An Analytical Framework for Further Research

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1 How can research inform negotiations?

1.1 The problematic negotiating timetable

If the Doha Round proceeds in the same way as its predecessor, informing the negotiating process with research results will not be easy. The Uruguay Round made erratic progress. A Draft Final Act had been produced by the end of 1991, but the agricultural proposals were rejected by the European Union (EU) (Croome 1995: 328). There followed two years in which most of the "action" took place in bilateral talks between the EU and the United States (USA) from which other states were largely excluded. Even when the formal negotiations were re-launched in July 1993, there were at least three tracks: the discussion in the formal General Agreement on Tariffs and Trade (GATT) groups; the personal "facilitating" of the new GATT Director General, Peter Sutherland, who 'kept up a punishing series of whirlwind visits to top-level political leaders in the major countries' (Croome 1995: 349), and bilateral negotiations between the EU and USA, with their respective chief negotiators, Sir Leon Brittan and Mickey Kantor, having from November 'a crucial series of meetings ... that were to continue with only short breaks over a period of more than three weeks' (Croome 1995: 364).

In other words, while some broad positions had been established by 1991, many of the critical details were not agreed until the final months, weeks (and even hours) of the 11-year marathon. Many of these details were hammered out in fora from which the majority of GATT members were excluded. Some of the non-actionable special and differential treatment (SDT) provisions that are causing the greatest developing country bitterness were hatched in this way.

The Doha dynamic will probably be similar because it appears to be inherent to the task of negotiating a wide range of complex provisions simultaneously. There can be no agreement until the major World Trade Organization (WTO) members have obtained compromises with which they can live, and then there is a strong imperative to finalise the deal as quickly as possible before this consensus is disturbed. John Croome, a close observer of the process, attributes a significant part of the final success in the Uruguay Round to Peter

Sutherland's refusal to countenance any further delay (Croome 1995). A consequence is that all other members have to scuttle around to establish their willingness to accept the compromises and to secure their own interests.

This would not be such a great problem if due provision for development concerns could be agreed at an earlier stage: any last-minute dotting of "i"s and crossing of "t"s would then be applicable only to the extent that it was in conformity with the agreed development principles. Unfortunately, this does not look a very likely outcome at the time of writing. The reasons for this pessimism become clear when one considers the following:

- To be effective, any development provisions must be enforceable within the WTO (in the sense of Section 3.1 of the first article in this *Bulletin*).

- In the absence of agreed details to any WTO rule changes, such a guarantee can be provided only in broad terms.

- In the absence of agreement on sub-groups of developing countries, these broad, enforceable provisions would apply either to all developing countries or just to the least developed countries.

- The industrialised countries are unwilling, currently, to agree general exemptions, and among the reasons identified by Claire Melamed (this volume) are that they want to link them to the negotiations of substance and they are unwilling to agree them for *all* developing countries.

- The developing countries are unwilling to discuss differentiation and graduation, at least until substantial offers are on the table, and are reluctant to link provisions which, to their mind, "restore the balance" to negotiations on further WTO rules.

From an analytical view, too, broad provisions are not necessarily desirable even if they were attainable. The "ideal" would be a set of precisely drafted modulations that respond to specific development interests. The crux of the problem is that it is not possible to craft such precise modulations until the scope of new rules is known in some detail, by which time it will probably be infeasible either to complete the research in time or to feed the results in to the, by then almost complete, negotiations.

1.2 What are the researchable issues?

Given the timetabling problem, research and negotiation will probably need to move on parallel tracks, as suggested in the first article, at least for the time being. And research will need to operate at three levels to:

1. establish the extent to which there do exist *development principles*, for which a reasonably strong consensus exists, that would provide an appropriate basis for WTO- or agreement-wide provisions for broad categories of states;

2. identify *the development shortcomings* of the current texts which are either already causing problems or could do so if the Doha Round were to continue on the same trajectory, and to frame *specific WTO rules* that would address these problems, including the countries and/or socio-economic groups that they would cover;

3. undertake *country-specific analysis* on the trade policy dimension of each member's development strategies and the appropriate multilateral framework that would provide a supportive environment.

This article is concerned primarily with the second of these three. The first is being widely addressed; the problem seems to be not one of a lack of interest, but of a lack of consensus. The third is of clear importance and is being followed up in a range of country-level exercises (see Prowse 2002).

The remainder of this article sets out an analytical framework within which specific elements of the WTO agreements and of the Doha agenda can be classified (and reclassified once more is known) to identify the types of treatment that might be important. The aim is to provide a two-way link between the research and the negotiation tracks: classification will clarify the types of research that need to be undertaken, and the form of presenting results most appropriate to influencing texts so that they are relevant to the problems identified.

2 The concept of differentiation

2.1 Why differentiate?

There is a wide range of circumstances in which some form of differentiation between WTO members is desirable; that is clear from the preceding six articles. In the case of agriculture, for example, a common development problem has been a gross under-investment and policy neglect of the sector. This situation is clearly very different from that which has underpinned the Agreement on Agriculture, which aims to discipline the substantial trade-distorting subsidies of the Organisation for Economic Cooperation and Development (OECD) states. In the cases of competition policy and government procurement, the issue is the plausibility of industrialised countries' willingness to accept rules that would address significant developing country concerns. Even if multilateral rules failed to address these key concerns they could still have merit, but there is no reason to presume that they will provide an appropriate balance of risks and rewards for all countries. In the case of intellectual property rights, the Commission on Intellectual Property Rights has demonstrated why rules that are appropriate to some WTO members might not be desirable for others (CIPR 2002).

In short, the presumption is that "one size doesn't fit all", with the corollary that there will be an underlying tension between two legitimately desirable outcomes of any WTO negotiations:

- to allow flexibility for the specific circumstances of members;
- to ensure precision so that the rules provide an effective discipline.

Differentiation is all about balancing these two goals. It was argued in the first article that there is an increased need for *ex ante* agreement on actionable differentiation because dispute settlement is now binding. Hence, far from the Uruguay Round sounding the death-knell of SDT, it gave the concept of differentiation a new lease of life. The Doha decision to move further into "behind the border" trade-related rules has merely made the task more necessary and complex.

The economic case

Historically, the case for SDT was couched largely in economic terms and is associated with the structuralist school. The desire to make Doha a "development" round places a similar emphasis on economics, but without the ability to translate this into a set of relatively simple rules of the game.

The background to the Uruguay Round was the rise of the Washington Consensus in place of policies that purported to reflect a structuralist analysis. Much attention was given to the shortcomings of the old policies in achieving the intended results. Now, it is the effectiveness of the Washington Consensus that is being questioned, at least in the sense that the design of these policies needs to be adapted to deal with the issues and problems that have emerged during implementation.

But while the pendulum has begun to swing, it has certainly not yet reached the stage at which there is a coherent, all-embracing, "alternative view" of economic development which would command sufficient support to underpin generalised differentiation within the WTO. Nor, possibly, will it ever do so. The world has moved on, and the inadequacies of simple, all-embracing paradigms are better understood.

Consequently, it is much harder to make an economic case for WTO-wide differentiation that applies equally to all non-OECD states. What is appropriate within the context of the Agreement on Agriculture may not be necessary, or even desirable, in relation to clothing and textiles. Even differentiation that would be common to both may not apply equally to Brazil, Thailand, India and Ghana. The case-by-case approach of the preceding functional articles is more appropriate. The principal reason why differentiation should not be done wholly on an *ad hoc* basis is institutional or political rather than economic.

The political case

The fundamental political argument for enhanced SDT is that closure in the Doha Round may be impossible to achieve without it. Or, rather, closure in the Doha Round on the basis of reasonably precise new rules and a continuation of binding dispute settlement may be unlikely. For there to be closure, there must be consensus, and for there to be consensus one of two conditions must be

satisfied. Either all members must acquiesce in the rules that have been proposed, or there must be let-out clauses for those that do not acquiesce.

Consequently, it is unlikely that by the end of the Doha Round countries will be willing to put their trust in vague phrases, which might subsequently be defined in unexpected ways by a Dispute Settlement Panel. And sufficient of them are likely to resist being "bought off" by non-actionable promises of extra-WTO support to prevent a consensus being reached.

2.2 What form of differentiation?

The different paths to differentiation

Differentiation can be applied through different mechanisms, in different senses, and in contingent ways. As explained in the first article, there are several mechanisms to differentiate between WTO members, not all of which have traditionally been covered by the term "SDT" (or are being discussed in the Committee on Trade and Development). One approach is to limit the scope of dispute settlement. This could be organised by rule: some parts of the WTO texts could be excluded from dispute settlement. Or it could be organised by country group (as implied by some current SDT): some WTO members could be protected from being pursued in dispute settlement. The positive-list approach adopted during the services negotiations represents another major avenue, whilst a wider use of plurilateral agreements would be a third. There seems to be no clear *analytical* reason to prefer one approach to another except in terms of their results. While the SDT approach may have the *potential* to achieve more substantial results than the other methods, if events prove otherwise then this assessment would need to be changed.

Research on the Doha issues should therefore keep all possible routes for differentiation in mind. The ideal output from research that identifies areas in which differentiation is desirable would be a list of all the possible ways in which it could be provided (with their relative merits). It will remain relevant as the negotiations progress and some routes begin to appear more feasible than others.

To take the example of the Agreement on Agriculture, Constantine Michalopoulos (this volume) has shown one clear objective to be the revision of Article 6.2 (at least for some activities in some countries), because it is subject to the wholly inappropriate budget limit of a country's 1992 subsidy level. This could be achieved in different ways. If there were to be a Development Box in the new agreement, that might be an appropriate place to deal with developing country subsidies to agriculture. Alternatively, the references to SDT could remain, as they are at present, scattered throughout the text of the Agreement on Agriculture, but appropriate changes would be made to Article 6.2 itself. Yet again, Article 13 (on due restraint) could be amended to provide strong guarantees to developing countries against the use of dispute settlement if they were to exceed their 1992 subsidy levels.

Not only are there multiple routes for differentiation, but there are also different senses in which the term should be applied. The type of differentiation that is needed will depend upon the provisions of the text being varied. In some cases, the only differentiation that is sufficiently robust will be a *de jure* right for specified countries to do something that other countries are not allowed to do, or to be exempt from having to do things that other countries have to do, or to demand action from other countries. In other cases, however, a *de facto* rather than a *de jure* approach may suffice. Effectively, the positive-list approach provides *de facto* justification for some countries to impose more restrictions on some areas of trade than do others.

Yet a third aspect of differentiation is whether it is "free-standing" or links an obligation and a right. The underlying strategy of the WTO approach of negotiating Rounds that represent a "single undertaking" is to establish such links. Each member accepts its obligations to change its own domestic laws in the knowledge of what other members for their part have agreed to do. But implementation is not always quite what had been expected: the phasing of liberalisation under the Agreement on Textiles and Clothing is a case in point.

One way to overcome developing country complaints that their "reasonable expectations" have not been fulfilled would be to make the same links more specific. The implementation of some rules by one member (or group of members) could be made contingent upon the actions of other members. An example would be to link the agricultural market

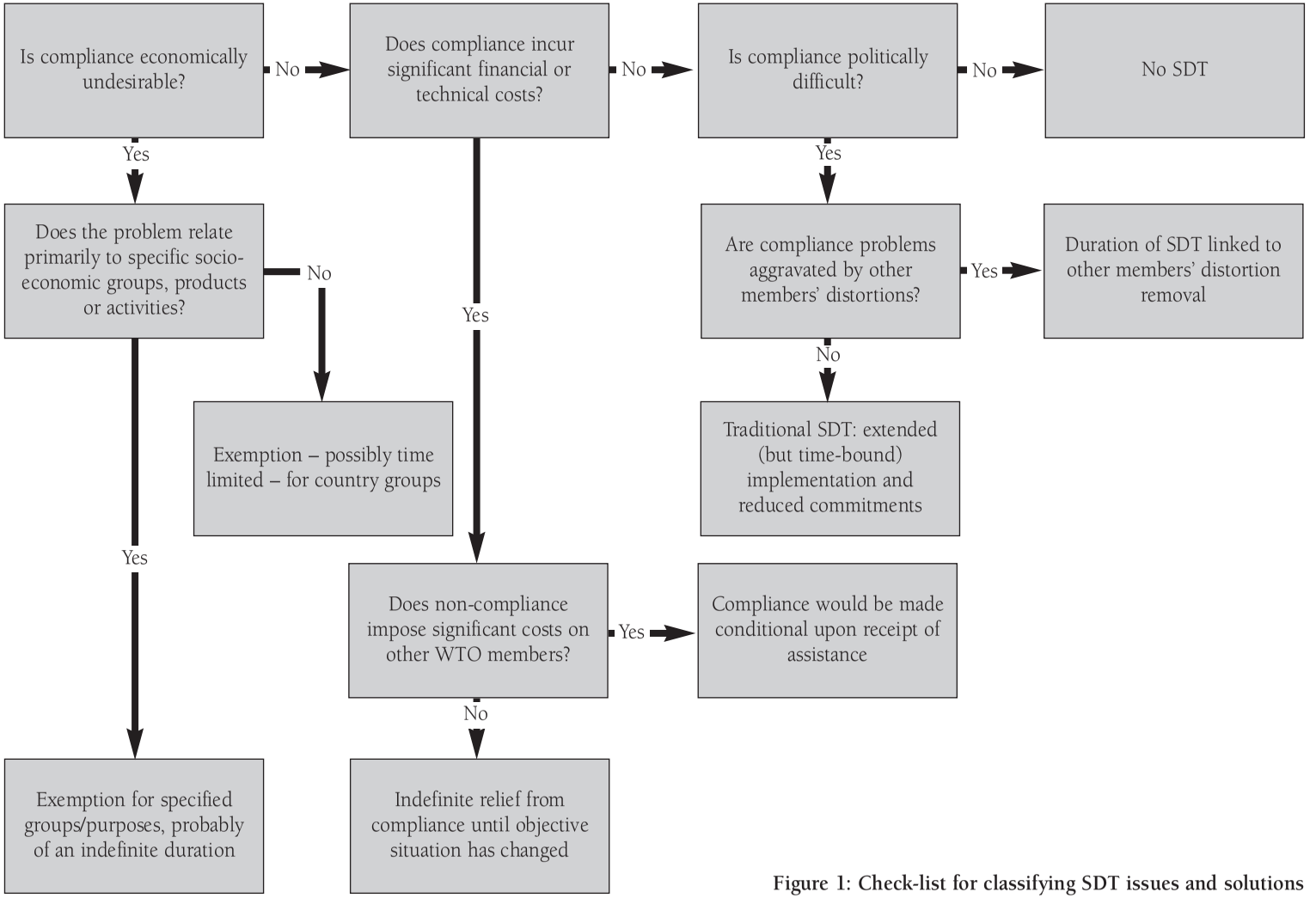

Figure 1: Check-list for classifying SDT issues and solutions

access barriers of developing countries and the subsidies of industrialised countries. A case can be made that developing countries should not necessarily offer unrestricted access to the heavily subsidised agricultural products of industrialised countries. It is unlikely that the Doha Round will substantially eliminate such subsidies (which include transfers from consumers forced to pay artificially high prices because of market access barriers as well as tax-payer transfers). Hence, the implementation of any reduction in developing country bound tariffs on agriculture could be linked explicitly to progress on OECD subsidy reduction.

Positive and negative differentiation

One further important distinction is between what might be termed "negative" and "positive" differentiation. Most of the actionable SDT in the WTO is of the negative variety. It relieves developing countries of certain obligations (or provides a permissive framework whereby the industrialised countries, if they choose to do so, can discriminate in their trade policy in favour of developing countries). The WTO provisions for positive SDT, specific pledges of support for technology transfer, priority food aid allocation or financial and technical assistance, are largely unenforceable.

Both forms of assistance are required to enable developing countries to benefit from trade opportunities; the question is how each can best be provided. Is differentiation within the WTO that is limited to negative SDT an adequate goal? How far is it feasible, or desirable, for the more positive agenda of support to trade development to be dealt with in the WTO context?

The answers are related to the role of the WTO in achieving a predictable, liberal world trade environment. Any country can unilaterally liberalise its trade policy, open its government procurement, or establish an effective competition policy. The key contributions of the WTO to such processes are that:

- it links changes in one country's trade policy to those in another;
- it consequently helps governments to build a domestic consensus in favour of change;
- it increases the credibility of change by "locking in";
- and it achieves all three of these partly by having penalties for countries that break the agreed rules.

Developing countries *ceteris paribus* stand to gain as much as any other member from these contributions, or arguably more (since they would tend to fare worse in bilateral negotiations with a stronger partner). But, apart from providing a negotiating and conciliation forum, the WTO's role is essentially negative: members agree to take positive actions, and the WTO provides sanctions to deter recidivism.

An important part of differentiation must be to provide a defence against this negative sanction in cases where it is not warranted on developmental grounds. By the same token, it should provide a clear message that it is developmentally desirable for country X *not to comply* with agreed rules, otherwise the credibility-enhancing feature of "locking in" will be reversed.

Hence, negative SDT is a legitimate and, arguably, the central part of developmental differentiation within the WTO. The issue of positive SDT is more problematic. Unless the WTO is to be made a development institution, with a vastly enhanced budget, and larger and differently skilled staff, the implementation of any positive financial or technological trade support will be the responsibility of other organisations. And the world's trade ministers cannot bind the actions of their finance and aid ministers in setting the policies of the International Monetary Fund, World Bank, World Food Programme, etc. Still less can they influence the behaviour of private firms. There is, however, one sense in which the WTO could agree actionable, positive SDT. This emerges from the analytical framework described in the next section.

3 Analytical criteria for new special and differential treatment

Effective SDT must link differentiation to a specific rule and development problem. This means it is likely to vary between country groups and issues. How can it be designed in a coherent way? Figure 1 presents a decision-making tree to assess the ways in which different types of problem might lead to various solutions.

3.1 Developmentally undesirable rules

The first step is to identify the development effects of a proposed rule and differentiate accordingly. This is the question that has traditionally been asked of SDT: should developing countries apply the same rules as industrialised ones?

Figure 1 identifies two broad reasons why the answer might be "no". One relates to types of country. For example, a case has been made that because small economies are more vulnerable to global volatility they have a legitimate need to provide themselves with a wider range of government interventions (Commonwealth Secretariat/World Bank 1999). Alternatively, the issue could be on the effects of rules for a particular economic group (resource-poor farmers) or products (staple foods).

The solution might differ between these. Clearly, in the case of country-wide problems the basic selection criterion would be the characteristics of each WTO member. It is for this reason that the small-island developing countries have pioneered the construction of the vulnerability index (Commonwealth Secretariat/World Bank 1999). In some cases, exemption from or modulation of the rule would be justifiable for an indefinite period since the fundamental characteristics of the economy would not change. But in other cases the fundamental problem might be that implementation would take longer (because of the need to create new, WTO-legal ways to achieve the same objectives).

In the case of vulnerable groups or commodities, differentiation could be available, in principle, to all countries that contain significant groups of this kind. Article 6.2 of the Agreement on Agriculture provides an example of possible phraseology where it talks about the exemption from reduction of 'agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members'. The presumption would be that this sort of differentiation would be permanent.

The assumption has tended to be that rules that are not developmentally undesirable should be applied uniformly by WTO members, but the analysis in this *Bulletin* and elsewhere suggests that this is no longer appropriate. Transparency in government procurement, for example, is not undesirable in its own right; the question raised by Giovanna Fenster (this volume) is whether or not the opportunity cost of ensuring transparency exceeds the gains.

3.2 High opportunity costs

Hence, in the case of rules that are not developmentally undesirable in themselves, the next step is to distinguish between two different types of "cost of compliance":

- the more traditional "cost" that the proposed new rule is politically unacceptable to a country; and
- the newer problem that implementation may incur financial, technical or human resource costs that are either beyond the scope of government or have a high opportunity cost.

In cases where implementation is costly, it is unreasonable to expect it to occur unless these costs are met in some way or another. The degree to which the WTO could tolerate non-compliance will be affected by the disruption to world trade that is likely to result. In the case of poor countries accounting for a small share of trade, non-compliance is unlikely to impose any significant costs on third parties. For example, while it may be the case that Malawi would benefit from having in place customs valuation procedures compatible with the WTO code, if the opportunity cost of compliance is considered to be too high will the world trading system be adversely affected in any substantial way by non-compliance?

In cases where non-compliance would not impose significant costs it could be permitted indefinitely. Depending upon the specificities of the case, compliance could either be left to subsequent negotiations or some objective criterion could be identified, which would have to be achieved before compliance were required. The latter would obviously be preferable, but it might be difficult to implement. What, for example, would be the appropriate criterion for requiring implementation of a customs valuation code? Would it be income per head, volume of trade, level of government expenditure?

The example cited by Peter Holmes (this volume) provides a further option. He argues that only those countries with a basic domestic competition policy

would be able to benefit, in practice, from multilateral cooperation to attack anti-competitive behaviour. In this case, therefore, compliance could be voluntary: when a country decides that the benefits of compliance exceed the costs, it complies.

In other cases, where the circumstances of the country are such that other WTO members are not willing to acquiesce in indefinite SDT, there could be a case for linking compliance to the provision of appropriate financial and technical support. What is being proposed here is that:

- in cases where WTO members believe that, say, Kenya is too important a trader to be excluded from an agreement, but also accept that
- Kenya cannot currently afford to comply, it makes sense to argue that
- the international community has an interest in facilitating compliance by the provision of appropriate support.

Formulations such as these would overcome the structural problem that the WTO cannot commit those bodies that would be involved in providing support. Formally, the decision by trade ministers of EU, USA and Japan in the WTO that Kenya needs technical and financial assistance would not bind the finance ministers of EU, USA and Japan to agree to this when meeting in the World Bank. But it would establish a link, and would guarantee to Kenya that it would not be forced to comply if the resources did not materialise. The result might still be sub-optimal from a broad development perspective (in which the best outcome might be considered the provision of sufficient resources that Kenya can comply). But, at least within the narrow parameters of the WTO, Kenya's situation would not have been worsened by making it choose between inappropriate "implementation" or vulnerability to a trade dispute.

3.3 Politically difficult compliance

What if implementation does not impose costs and there is no consensus that it is developmentally undesirable? This is the pragmatic case for SDT. It relates to cases where, say, the Indian government considers a rule likely to have developmentally undesirable effects, even though this is not a line supported by large sections of "the wider development community". Or the proposed rule may not be considered to be developmentally undesirable, but for other reasons it is simply unacceptable to the government of India. The principal reason for agreeing SDT in such cases is the pragmatic one that, negotiations having failed, there will not be a consensus for new rules without it.

The purpose of Figure 1 is to identify what type of SDT might be most appropriate in such cases. A distinction is made over whether or not a country is simply not yet ready to move in the direction suggested or whether it has objective reasons, linked to the current state of world rules, for not moving. The appropriate SDT measures will differ.

The example given above on food security provisions within the Agreement on Agriculture while OECD agricultural distortions remain in force is relevant. A strong case can be made that it would be foolhardy, and politically very controversial, for food-insecure countries to open up their markets to imports that are made artificially cheap by the distortions of OECD countries. According to estimates by the OECD Secretariat, the OECD's total agricultural producer support estimate (PSE) in 2001 was equivalent to 31 per cent of total farm receipts (OECD 2002: Annex Table 2). This compares with a figure of 38 per cent in 1986–1988 (the base period for the Uruguay Round subsidy cuts). The reduction from 38 per cent to 31 per cent is smaller than the 20 per cent cut in aggregate producer subsidies to which the industrialised WTO members committed themselves in the Uruguay Round.

Such subsidies have depressed the world price of various temperate agricultural goods, of which cereals are probably the most important. In 2001 the OECD PSE stood at 36 per cent for wheat and as much as 81 per cent for rice (OECD 2002: Annex Table 3). It would be appropriate to allow food-insecure countries relief from market access and subsidy reduction commitments for as long as world market prices fail to reflect real costs of production. Given that PSEs are calculated regularly by the OECD, they could provide an appropriate benchmark. For example, implementation might be required once the OECD's average PSE had been reduced to the

current levels of Australia (4 per cent) or New Zealand (1 per cent).

Traditional measures should be sufficient in other cases, where a country is not willing to move as far or as fast as others; it can draw on objective criteria to justify this, and other WTO members are willing to agree SDT in order to achieve a consensus. These "traditional measures" include extended transition periods and commitments that are proportional to those adopted by other countries. The expectation is that this modulation would be eroded over time.

4 Applying the research findings

The implication of this analysis is that there are many competing indicators around which SDT groups could coalesce. It is evident that most developing countries will be keenly interested in ensuring that the one selected is the "right" combination (which includes them as members!), as will many industrialised countries (but with the opposite goal). The debates that have already occurred in relation to the Development Box proposal for the Agreement on Agriculture illustrate the practical realities of attempting to achieve agreed, meaningful differentiation within the WTO. No sooner has a coherent formulation been proposed, than states that might be excluded lobby to have the criteria altered in such a way as to cover their specific circumstances.

These problems are not fundamentally different in kind from those applying to any effective SDT. We have already seen in the non-progress of the Committee on Trade and Development that the much simpler approach of wide-ranging SDT for all developing countries faces formidable problems. Hence, "political feasibility" is not a criterion that favours one analytical approach over another.

While the complexity and divisiveness of the approach sketched in Figure 1 brings its own problems, it also provides the seed of a solution. While "tailored" groups will exclude states that may wish to be members, the resulting friction may be dissipated if there are multiple new groups with states excluded from some being members of others. Since none of the pre-existing WTO-recognised groups is likely to overlap very closely with all of the sub-groups requiring differential treatment, and since no process exists within the WTO to forge new, restricted-membership groupings, the whole process is likely to be fraught with political difficulty. But the same reasoning can be applied to SDT group formation as to GATT/WTO negotiations. The principal reason for favouring broad rounds of negotiations, despite their horrendous complexity, is that they maximise the likelihood of cross-cutting gains for all parties. By the same token, new-style SDT in several different areas is more likely to result in many developing countries being "winners" in one area or another and, to this extent, to reduce the political difficulty of introducing the innovation of restricted-group formation.

So, "more complexity" could turn out to be more workable than "less complexity"! In any case, from a research perspective the complexity derives from the subject matter, not from an attempt to influence the negotiations. The concept of SDT actually provides a port of entry to examining the development implications of new trade rules, especially those that apply behind the border and not to goods. And if Doha lasts for the rest of the decade, that will not be too long for the research that is required!

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