



Briefing Paper

Special and Differential Treatment in E-Commerce

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Summary

This Briefing Paper outlines various possible models and options that can be considered for special and differential treatment (SDT) provisions in a potential agreement on e-commerce in the WTO. This is based on an analysis of the evolution of SDT in the multilateral trading system while being cognisant of the current debates on this important issue. The Briefing Paper is derived from a study on “Special and Differential Treatment in the Context of the Digital Era” by Y Colette van der Ven available at http://www.cuts-geneva.org/pdf/KP2018-Paper-SDT_in_Digital_Era.pdf. However, the selection, organisation and editing of the material in the Briefing Paper is the sole responsibility of the present author.

Introduction

One concrete way to reflect development concerns in the multilateral trading system (MTS) has been through the use of special and differential treatment (SDT), i.e., provisions that give developing countries special rights and allow members to treat them more favourably than other members. While countries are increasingly polarized about the nature and role of SDT within the World Trade Organisation (WTO), the notion that flexibility should exist to account for different levels of development remains central in the ongoing discussions and negotiations.

The digitalisation is reshaping production processes and business models, which has a profound effect on development. On the one hand, the benefits of the digital economy for developing countries can be particularly large. Specifically, it can significantly boost competitiveness and productivity, optimize production processes, reduce transaction costs, and enhance participation in international supply chains.¹ On the other hand, the digital economy also presents serious challenges. Many developing countries, and most least-developed countries (LDCs) are lagging behind in developing the requisite infrastructural frameworks to enable e-commerce.² The so-called digital divide is not only in levels of internet penetration and digital connectivity: it also manifests itself in the differential ability of developed and developing countries in using digital technology in e-commerce and to become ever-more competitive.

A key issue therefore is the role that SDT can play to bridge the digital divide in the area of e-commerce. To examine this issue, it is important

to look at the evolution of SDT in the MTS, particularly the multiple forms it has taken over time and in various agreements.

Evolution of SDT in the Multilateral Trading System: Multiple Models

The idea that developing and least-developed countries should have special rights has been part of the MTS since the establishment of the GATT (General Agreement on Tariffs and Trade) in 1947. However, the types of SDT provisions have evolved, responding to changing patterns of growth, but also to changing views regarding the trade strategy best suited to meeting development objectives.

Differentiated Commitments: “Traditional” SDT Model

The dominant view in the early period of GATT was that to create sustainable economic growth, developing and least-developed countries must foster industrial capacity in non-traditional manufacturers.³ Accordingly, the recommended policy prescription was one of import-substitution industrialization, reflected in SDT provisions under the GATT that provide leeway for developing countries to retain, through the use of tariffs and quotas, so-called protectionist policies.⁴ Another dominant view revolved around the importance of exports as a source of foreign exchange. This resulted in an SDT agenda around preferential market access through a generalized system of trade preferences.⁵

¹ Arbache, J. (2018). “Seizing the Benefits of the Digital Economy for Development”.

² See, e.g., World Bank (2016). “Digital Dividends”.

³ Hoekman, B. (2005). “Trade preferences and Differential Treatment of Developing Countries: A Selective Survey”. p. 1

⁴ This resulted in Article XVIII (C), enabling the imposition of trade restrictions to support infant industries; as well as Article

XVIII (B), which was amended to include a specific provision to allow countries “at an early stage of their development” to adopt quantitative restrictions on imports whenever monetary reserves were deemed to be inadequate in terms of the country’s long term development strategy.

⁵ Hoekman, B. (2005). “Trade preferences and Differential Treatment of Developing Countries: A Selective Survey”, pp. 1-

The concept of non-reciprocity in trade relations between developed and developing countries remained enshrined in the GATT 1994 and other WTO agreements that came into force in mid 1990s. In many areas, flexibilities for developing countries were maintained, and additional SDT elements, such as transitional time periods and technical assistance, were introduced.

This “traditional” SDT takes the form of substantive flexibilities – either in the form of commitments, actions or the use of policy instruments. The fundamental premise underlying these flexibilities is that developing countries are intrinsically disadvantaged in their participation in international trade and therefore, must be subject to a different set of substantive obligations.⁶ For instance, they can refrain in market access negotiations from making matching offers to those of developed countries. The traditional SDT also enables developing and least-developed countries to trigger exemptions from certain substantive disciplines. For example, under the Subsidies and Countervailing Measures (SCM) Agreement, countries listed in Annex 7 are not subject to the prohibition on export-contingent subsidies. Other traditional SDT provisions provide developing and least-developed countries with transitional – but fixed – implementation periods, and technical assistance – although the latter is often hortatory.

Traditional SDT in the form of exemptions and derogations from core disciplines therefore would be an appropriate model in situations involving issues related to policy space and infant industry.⁷ Other forms of traditional SDT, such as technical assistance and longer implementation periods, would be relevant for situations

addressing capacity constraints.

Built-in Flexibilities: GATS SDT Model

While a part of the WTO corpus since its inception, the General Agreement on Trade in Services (GATS) deviates from the other WTO Agreements by adopting a positive list approach, i.e., Members can decide which sectors to open to foreign competition.⁸ The degree of flexibility afforded to all Members under GATS shapes its approach to SDT.⁹ While the GATS does not explicitly mention SDT, it is provided through the freedom to determine the number and type of commitments developing countries and LDCs are expected to make.^{10 11}

The GATS built-in flexibility would be an ideal framework where countries have different levels of development and where beggar-thy-neighbour implications of failing to liberalize are limited.

“New Deal”: TFA SDT Model

The more recent Trade Facilitation Agreement (TFA)¹² adopts a rather novel SDT approach. The underlying rationale of the TFA’s SDT provisions is that while the benefits of trade facilitation are shared by all, the costs of doing so will be greater for developing and least-developed countries with less-developed border administration systems.¹³ Specifically, developing and least-developed Members are allowed to categorize their commitments into one of three categories, reflecting their domestic capabilities. Instead of establishing fixed limit transitional periods that apply equally to each specified category of members, implementation periods under the TFA

⁶ Michalopolous, C. (2000). “The Role of Special and Differential Treatment for Developing Countries in GATT and the WTO”, p. 15.

⁷ However, for this to be an SDT model for any future agreement that is acceptable to all WTO Members would require that not all self-designated developing countries are automatically eligible to all SDT in that agreement.

⁸ OECD (2006). “Special and Differential Treatment under the GATS”, p. 8

⁹ Ibid., p. 4.

¹⁰ Ibid., p. 9.

¹¹ It should be noted that SDT in the context of the GATS goes beyond providing a high degree of flexibility in scheduling commitments: it also requires developed countries to grant market access in favour of developing and least-developed countries; establishes transitional implementation periods, and provides for technical assistance, etc.

¹² TFA negotiations were concluded at Bali Ministerial Conference of the WTO in 2013 and it came into force on 22 February 2017 when two-thirds of the WTO Members ratified it.

¹³ McDougall, R. (2017). “A Platform to Accommodate Levels of Development in International Trade Rule-Making”

are largely self-designated. This allows SDT to be customized to developing and least-developed countries' specific circumstances, as opposed to treating all self-designated developing countries as a uniform block. Another important innovation is the link between technical assistance/capacity building and the implementation of commitments. Under category C, developing and least-developed countries' implementation is conditional on receiving technical assistance. This transforms the nature of technical assistance from "optional" under the WTO Agreements, to "mandatory" under TFA.

The TFA SDT model is most appropriate for provisions that are considered to be largely beneficial for development, and for which concerns regarding policy space are limited or non-existent.

Recent Debates: Variable Geometry SDT Model

Finally, it is important to point out that SDT is also being revisited more recently in the context of the broader discussion on WTO reform. The proposals by developed countries in that context emphasise to varying degrees that there should be some form of differentiation among developing countries to be eligible for SDT. For example, Canada highlights the need to balance reciprocity and flexibility, calling for "a new approach [to SDT] ..., one that recognizes the need for flexibility for development purposes, while acknowledging that not all countries need or should benefit from the same level of flexibility."¹⁴

It will be constructive to recognise the very sensitive nature of the differentiation debate while noting that a variable geometry approach to SDT may be the possible way forward. This would entail breaking up issues and obligations, and might involve a core set of disciplines applying to

a set of countries, with a stronger or additional set of disciplines applying to other countries.¹⁵ Over time, countries transition from the core set of disciplines to also encompass the additional set of disciplines either voluntarily or because they have met a number of key criteria. The most straightforward way to expand variable geometry in the WTO is through plurilateral annexes. Indeed, if plurilateral agreements allow countries to opt out from specific agreements, their effect is similar to SDT.¹⁶

Variable geometry SDT model could potentially be used to respond to different categories of development needs: policy space concerns, resource constraints, and situations that require reflecting different levels of development.

SDT in E-Commerce: Multiple Options

Based on the analysis above, it can be argued that there are several possible SDT models that can be considered for e-commerce. These include: "traditional" SDT as featured in the GATT and other WTO Agreements; the built-in flexibilities of the GATS, the "new deal" approach introduced by the TFA, and the variable geometry approach. An important caveat is in order here. Without knowing the overall architecture and specific provisions of a potential e-commerce agreement, any analysis of SDT would, at best, be an imperfect exercise. Indeed, SDT is meaningful only where coupled to a specific obligation.

There is, however, also value in analysing SDT prior to knowing some of the variables. Indeed, a bottom-up analysis that puts development concerns first could be used to inform the overall architecture and obligations of the agreement. This is the objective of what follows. While the below analysis is in the theoretical context of a stand-alone e-commerce agreement, it can also

¹⁴ Government of Canada (2018). "Strengthening and modernizing the WTO: discussion paper communication from Canada".

¹⁵ Hoekman (2004). "Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment", p. 14.

¹⁶ Ibid., p. 15.

be applied if that is not the case, i.e. by identifying and including appropriate SDT linked to the nature of the obligations.

A stand-alone e-commerce agreement would likely feature core provisions applicable to all signatories, and address development concerns through a combination of different SDT models applied to separately – as opposed to cumulatively – to different provisions. For those provisions that would present implementation difficulties – and that have full implementation as the goal – certain developing, and all least-developed countries could be entitled to transitional implementation, or implementation contingent upon receiving technical assistance in accordance with the TFA model. For those provisions that would raise policy space concerns, a traditional/GATT-style derogation/exemption model might be more appropriate.¹⁷ For market access commitments, flexibility may be provided through a non-reciprocal approach (for goods) and/or a GATS-style opt-in approach for services.

Provisions on Some Regulatory Frameworks and Digital Trade Facilitation – TFA SDT Model

Many provisions in an e-commerce agreement are likely to require countries to introduce regulatory frameworks for consumer protection, for privacy, for cyber security, and for unsolicited communications. These provisions aim to create a more secure environment for e-commerce activities, build trust, and thereby increase e-transactions. Thus, designing, adopting, and implementing the relevant regulatory frameworks will require capacity and resources that most developing countries do not have. For consumer confidence enhancing measures, the TFA would be the most appropriate SDT model, given that (i) the development benefit of these provisions is clear and (ii) members will benefit irrespective of what others will do. Concretely, this would mean

inviting developing and least-developed countries to identify the types of provisions they can implement immediately, the types of provisions they would implement after a transition time, and those provisions for which implementation would be contingent upon receiving technical assistance.

An e-commerce agreement would also likely include rules on digital trade facilitation. This could cover a wide range of provisions, including rules on electronic payments, rules on the recognition of e-signatures/authentication, rules on paperless trading, and preserving market-driven standardisation and interoperability. Those developing and least-developed countries without such infrastructure or regulation in place would require both time and support to implement these types of provisions. Similar to the consumer confidence regulatory framework analysis in the above paragraph, the most appropriate model to respond to the lack of capacity and resources to implement trade facilitation provisions would be the TFA model. Indeed, the characteristics and functioning of trade facilitation in the context of e-commerce would be identical to the provisions in the TFA.

Market Access – Hybrid Traditional/GATS/TFA SDT Model

A potential e-commerce agreement would likely include provisions that would further liberalize the market for services related to the digital economy (telecom, computer, Mode 1 delivery, business services, professional services, etc.) and would involve classification. This approach is similar to that of the 1996 Information Technology Agreement (ITA) and ITA II. This would involve revisiting existing GATS commitments in areas relevant to e-commerce (e.g., telecommunication services, computer services, delivery services) and creating commitments in new sectors. Such flexibilities should take the form of a hybrid

¹⁷ However, this would require that not all self-designated developing countries are automatically eligible to avail all exemptions.

GATS/TFA model, which would allow developing and least-developed countries to schedule less commitments (GATS model); while providing traditional timeframes for the implementation of some commitments and allowing them to make commitments contingent upon receiving technical assistance (TFA model).

Any development concerns regarding additional market access commitments on digital goods or goods related to the digital economy could be addressed through providing developing and least-developed countries flexibility in market openings in the form of transitional timeframes (TFA model) or through the principle of non-reciprocity (traditional SDT model).

Policy Space – Traditional SDT Model

From a development perspective, the most controversial are proposals regarding rules on cross-border data flows and the prohibition on data localization requirements in an e-commerce agreement. These have raised concerns, *inter alia*, with respect to a country's policy space: i.e., they could restrict a country's ability to force foreign companies to set up local data centres and processing operations.¹⁸ Any potential rules prohibiting the transfer of, or access to, software source code could similarly restrict opportunities to build up domestic software products or industries. Developing and least-developed countries are concerned that these types of provisions would cement and enhance the existing market concentration, and prevent domestic industries from catching-up. In other words, they are concerned that these provisions would limit their policy space to engage in digital industrial policies. The flipside of this argument is that the related costs may make certain markets unattractive, while the benefits gained in employment may be minimal.¹⁹ Another issue raised that would limit the benefits for developing

countries from these types of measures is that local firms often lack the expertise to analyse and use data in industrial application.

Given this staunch disagreement between countries, any disciplines in this area would be met with strong opposition. A transitional framework for developing and least-developed countries as embodied in the TFA would not suffice to alleviate these development concerns. Rather, exemptions for developing and least-developed countries would be more appropriate in addressing the development concerns raised.

Possible Way Forward for SDT in E-Commerce: Constructive Engagement and Capacity Building

It is clear that there is no one-size-fits all: different e-commerce disciplines are most appropriately addressed by different types of SDT models. TFA, hybrid TFA/GATS, hybrid TFA/traditional and hybrid TFA/GATS/traditional SDT approaches would be the appropriate models to address different development concerns that have been raised in the context of the e-commerce debate.

While these various layers of flexibilities are sensible from a technical perspective, politically, there will likely be pressure to minimize substantively differentiated commitments for different groups of countries. Many developed countries would press for universal implementation of a set of commitments. This means that the discussion on identifying relevant SDT provisions is more complicated than simply matching development concerns raised to SDT provisions that could address the concerns.

The first step to begin untangling this problem both from the technical as well as political angles would be to separate provisions in different

¹⁸ Macleod, J. (2017). "E-Commerce and the WTO: A development agenda?", p. 9.

¹⁹ Ibid., p. 21.

categories, according to the perceived impact on a country's development – on a scale from positive to negative. With respect to those provisions that are deemed problematic (i.e. perceived to have a negative impact on development), the second step would be for developing and least-developed countries concerned to carry out studies on the anticipated impact of these disciplines on their economy. As part of a third step, a country must also look at various trade-offs in the context of its overall development strategy and priorities. Concrete studies that back up developing and least-developed countries' concern with data would, at a minimum, enable the discussion to shift from positions to interests.

This brings us to countries' negotiating capacity: many developing and least-developed countries are ill-equipped to move from position to interest and formulate provisions that reflect their policy priorities. This may call for pre-agreement regarding the provision of adequate technical assistance to countries in need during the negotiations phase itself.

In sum, consideration of a development dimension within the context of e-commerce is, both economically and politically, a *sine qua non* for any WTO-based framework to succeed. The challenge, then, consists of designing a framework supportive of sustainable development that will lead to a fairer distribution of the benefits created by the Fourth Industrial Revolution. Meeting this challenge should be a priority for all.



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