

Special and Differential Treatment in the Context of the Digital Era

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Abstract

Discussions regarding the design of an effective e-commerce framework at the World Trade Organization (WTO) are stuck at political and ideological levels. As long as talks remain at high levels of abstraction, it is difficult, if not impossible, to reach consensus. Rather, for progress to be made, the discussion must become more concrete. Distinctions must be made between the development implication of different types of provisions. And countries must go beyond ideology and translate their positions into interests.

In this context, this paper explores how different development concerns raised in response to the e-commerce discussions could be addressed through special and differential treatment (SDT). After developing a framework with the key features of existing SDT models under the WTO Agreements, this paper applies the framework to different e-commerce topics that are under discussion, and suggests which SDT model(s) would be best suited to address different development concerns. It finds that there is no one-size-fits all, and that a future e-commerce agreement would likely feature a combination of different approaches.

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Abbreviations

AI	Artificial intelligence
DDA	Doha Development Agenda
ECIPE	European Centre for International Political Economy
EU	European Union
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
ICT	Information and Communication Technology
ITA	Information Technology Agreement
LDCs	Least developed Countries
MTS	Multilateral Trading System
RPA	Robotic Process Automation
SDT	Special and Differential Treatment
SCM	Subsidies and Countervailing Measures
SMEs	Small and Medium Enterprises
SPS	Sanitary and Phytosanitary
TFA	Trade Facilitation Agreement
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
WCO	World Customs Organization
WTO	World Trade Organization

Introduction

The Fourth Industrial Revolution, characterized by rapid digitization and the densification of services-enabled global value chains, is radically changing societies. It is forcing us to rethink approaches to economic growth and development. On the one hand, it has brought about great promise: it has lowered the barriers for Small and Medium Enterprises (SMEs) in developing and least-developed countries to access an international consumer market. On the other hand, it has presented new challenges, especially for developing and least-developed countries (LDCs) with poor infrastructure, and SMEs: with most digital growth happening in the industrial world, e-commerce risks widening the digital divide.

Disagreement about the impact of the digital economy on development is reflected in the ongoing discussions regarding the design of an effective e-commerce framework at the World Trade Organizations (WTO), which would build on the Joint Statement on Electronic Commerce signed in December 2017: while most industrialized countries – supported by a number of developing and least developed countries – are pushing for a framework with strong provisions to liberalize digital transactions, other developing and least-developed countries would prefer softer discipline. Yet another group of developing and least-developed countries is calling the discussions premature. They fear that disciplines to facilitate e-commerce would hurt their ability to build competitive domestic industries in areas related to the digital economy.

The ongoing WTO e-commerce discussions are stuck at a political and ideological level, with different groups supporting different theories of

development. As long as talks remain at high levels of abstraction, it is difficult, if not impossible, to reach consensus. Rather, for progress to be made, the discussion must become more concrete. Distinctions must be made between the development implication of different types of provisions. And countries must go beyond ideology and translate their positions into interests. For instance, developing and least-developed countries must start distinguishing the types of disciplines that would have positive development effects from those that would cause concerns. With regards to the latter, they must get concrete about how these concerns can be addressed.

One concrete way to reflect development concerns in international frameworks is 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 favorably than other members.¹ While countries are increasingly polarized about the nature and role of SDT within the multilateral framework, the notion that flexibility should exist to account for different levels of development remains central in the ongoing trade talks.

In this context, this paper explores different types of SDT provisions that could be considered to address the development dimension of e-commerce. Specifically, it will do so in four steps: first, in terms of background, this paper provides a quick overview of the development implications of the digital economy, focusing on both the benefits and challenges. Second, it will trace the origins and evolution of SDT. Third, it will create a framework of the features of different types of

¹ WTO, "Special and Differential Treatment". [online].

existing SDT models under the WTO; and fourth, it will apply this framework to the different e-commerce disciplines that are under discussion, and suggest which types of SDT provisions would be best suited to address development concerns.

The paper concludes by providing a number of recommendations.

SECTION 1

Development Considerations in the Context of the Digital Economy

The digital economy 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.²

Through reduced transaction costs and information asymmetries, the digital economy is profoundly changing ways in which countries and businesses are connected to the global market, SMEs hitherto excluded from the international market now can have an international customers' reach. E-commerce platforms further facilitate SMEs' international reach, offering sellers a wide range of services, including payment processing, shipping and delivery.

Other benefits include cheaper and wider access to goods and services at competitive prices. This benefits consumers, but also producers who can now source inputs cheaper and faster. Moreover, opportunities present themselves in the context of entrepreneurship and job creation. For governments, the digital economy promotes efficiency and lowers costs: it enables the delivery of more and better public services, improved

governance, and enhanced monitoring and evaluation.³

Yet the digital economy also presents serious challenges, including to the inclusiveness of development. Compared to developed countries, many developing countries, and most least-developed countries are lagging behind in developing the requisite broadband and infrastructural frameworks to enable digital trade.⁴

A digital divide remains, and not just in levels of internet penetration and digital connectivity. The digital divide today manifests itself as advanced economies are using digital technology to become ever-more competitive, while many developing and least-developed countries are trailing behind.

For instance, most research on new technologies, such as artificial intelligence (AI), robotic process automation (RPA) and 3D printing, is conducted in a handful of advanced countries.⁵ With some exceptions, these are also the countries where new digital technologies are concentrated.⁶ The strong concentration of intellectual property rights of digital products creates inequality between digital haves and have-nots.

Moreover, the use of new technologies in the advanced economies is risking jobs in some developing and least-developed countries.⁷ While previously, cheap labor in many developing

² Arbache, J. (2018). "Seizing the Benefits of the Digital Economy for Development". [online].

³ Ibid.

⁴ See, e.g., World Bank (2016). "Digital Dividends".

⁵ Gehl Sampath, P. (2017). "E-commerce and digital industrial policies: Why we may still need a collective solution", [online].

⁶ Ibid.

⁷ Ibid.

countries resulted in the outsourcing of manufacturing jobs, new technologies are reducing the dependency on cheap labor and could lead to the relocation of production sites closer to headquarters.⁸ This would require rethinking the manufacturing-dependent export-industrialization approach that, historically, stood at the center of many countries' development strategy.⁹

The digital economy is also increasing competition for industries in certain developing countries. For instance, as the digital economy tends to facilitate the cross-border sale of services, it opens up services sectors that countries have not liberalized. This has raised the concern that it becomes increasingly difficult for domestically-oriented service providers – and not only those directly related to the digital economy – to be competitive.

Finally, digitalization has resulted in the establishment of large e-commerce platforms,

such as Amazon and Alibaba. These platforms not only benefit from cost-reductions through scaling effects; they also collect vast amounts of data on their consumers, which, through an exponential feedback loop, can be used to further cement their position as market leader. While these platforms have enabled SMEs to reach international markets, it is also creating high market concentration in a handful of countries.¹⁰

Any multilateral framework must be sufficiently flexible in areas where it would risk to further widen the digital divide. Before looking into the types of flexibilities that could be considered in the context of a possible e-commerce agreement, the next sections turns to SDT and the way it has evolved under GATT and the WTO.

⁸ Ameh, S. (2018). "Why Strengthening the global economy means closing the digital divide". [online].

⁹ MacLeod, J. (2018). "Using Digital Trade for Development in Africa", in Bridges Africa, Volume 7, Issue 2, p. 8.

¹⁰ Ibid.

SECTION 2

The Evolution of Special and Differential Treatment

The idea that developing and least-developed countries should have special rights has been part of the multilateral trading systems since the establishment of the GATT in 1947. Yet while SDT provisions have, and continue to be, an important element of the multilateral trading systems, the types of provisions have evolved, responding to changing patterns of growth, but also to changing views regarding the trade strategy best suited to meeting development objectives.

During the early years of the General Agreement on Tariffs and Trade (GATT), a central element of the SDT provisions was the idea that, in specific circumstances, the multilateral trading system (MTS) process of gradual, negotiated liberalization would not lead to sustained economic growth.¹¹ Rather, the dominant view at the time was that to create sustainable economic growth, developing and least-developed countries must foster industrial capacity in non-traditional manufacturers.¹² Accordingly, the recommended policy prescription was one of import-substitution industrialization, reflected in SDT provisions under the GATT that provides leeway for developing countries to retain, through the use of tariffs and quotas, so-called protectionist

policies.¹³ Another dominant view during the late 1950s and 1960s revolved around the importance of exports as a source of foreign exchange. This resulted in an SDT agenda revolving around preferential market access through a generalized system of trade preferences.¹⁴

During the Uruguay Round – which expanded trade into areas beyond trade in goods – developing countries began to more actively participate in the exchange of reciprocal liberalization in goods and services, increasing the share of bound tariffs from 14% to 59% of all tariff lines.¹⁵ This reflected developing countries' disappointing experiences with import-substitution industrialization in the 1960s and 1970s, suggesting that fewer trade restrictions would be more conducive to the attainment of development objectives.¹⁶ Yet the concept of non-reciprocity in trade negotiations between developed and developing countries remained enshrined in the GATT 1994.

In other areas, flexibilities for developing countries were also maintained, and additional SDT elements, such as transitional time periods and technical assistance, were introduced. Politics,

¹¹ Hoekman, B. (2005). "Trade preferences and Differential Treatment of Developing Countries: A Selective Survey". p. 1.

¹² Ibid.

¹³ 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.

¹⁴ Hoekman, B. (2005). "Trade preferences and Differential Treatment of Developing Countries: A Selective Survey", pp. 1-2.

¹⁵ Michalopolous, C. (2000). "The Role of Special and Differential Treatment for Developing Countries in GATT and the WTO", p. 14.

¹⁶ Ibid., pp. 11-13.

and not economics, was the main driver for many of these provisions: absent these flexibilities, some countries would not have signed the Uruguay Round Agreements.¹⁷

Despite the SDT provisions throughout the WTO Agreement, many developing and least developed remained critical of the Uruguay Round, considering it an asymmetrical bargain that failed to promote economic development in most developing and least developed countries.¹⁸ As a response to such criticism, the Doha Ministerial Declaration, adopted in 2001, called for a review of the WTO SDT provisions with the objective of “strengthening them and making them more precise, effective and operational.”¹⁹ Yet as some developing countries began exporting far more than they were importing, industrialized countries were increasingly reluctant to provide and expand SDT provisions, instead requesting that they cut subsidies and lower import barriers.²⁰ Since neither developed countries nor developing countries were willing to make concessions, the Doha Development Agenda (DDA) has not been completed.

The 11th WTO Ministerial held in December 2017 in Buenos Aires cemented the deadlock in the WTO negotiations, with SDT being a key stumbling block. While the G90 group – comprised of developing and least-developed countries – sought to increase the scope of derogations from existing WTO disciplines, developed countries considered existing SDT provisions to be broad enough to respond to development needs, noting that increased

flexibility would not bolster development and would be counterproductive.²¹ These arguments were not only political; they also contained remnants of the old debate regarding the role of trade in development: i.e., are there circumstances that would call for protectionist measures, making the global trade rules an impediment to development?

Recently, SDT is being revisited in the context of the broader discussion on WTO reform, which has culminated in a series of proposals – mostly from developed countries – seeking to address, *inter alia*, SDT. Specifically, the European Union (EU)’s WTO reform proposal highlights issues related to the categorization of countries, expressing concern that “the developing country group now includes some of the world’s top trading nations, who have significant economic differences from other members of this group and who in some cases even present a level of development which surpasses that of certain Members who are designated as developed in the organization.”²² 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.”²³ Likewise, in a January 2019 paper, the United States spared no ink demonstrating why the self-designation of developing country status under

¹⁷ Ibid., p. 15.

¹⁸ Wolfe, R. (2009). “The WTO single undertaking as negotiating technique and constitutive metaphor”, p. 836; Chang, S.W. (2007). “WTO for trade and development post-Doha”, p. 553; Hoekman, B. (2005). “Operationalizing the concept of policy space in the WTO: Beyond Special and Differential Treatment”, p. 411; Tortora, M. (2003). “Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: the skeleton in the closet”, p. 2.

¹⁹ Doha WTO Ministerial 2001, Ministerial Declaration, adopted 14 November 2001, Paragraph 14.

²⁰ New York Times (2016). “Global Trade After the Failure of the Doha Round”.

²¹ See, e.g., WTO (2017). “Note on the Meeting of 19 July 2017, reconvened on 14 and 21 September 2017”. TN/CTD/M/52.

²² European Union (2018). “Concept paper on WTO modernisation”, p. 6.

²³ Government of Canada (2018). “Strengthening and modernizing the WTO: discussion paper communication from Canada” [online].

the WTO is an outdated concept in today's world.²⁴

More generally, advanced countries like the EU and Canada are moving away from SDT as it was originally featured under the WTO, towards the novel approach that was pioneered under the

Trade Facilitation Agreement (TFA), which focuses on transitional implementation and obligations linked to technical assistance. One of the objectives underlying this novel approach is to strive for universal implementation of commitments by all Members once transitional periods have expired.

²⁴ WTO, Communication from the United States (2019). "An undifferentiated WTO: self-declared Development status risks institutional irrelevance under the WTO".

SECTION 3

Different Models of Special and Differential Treatment

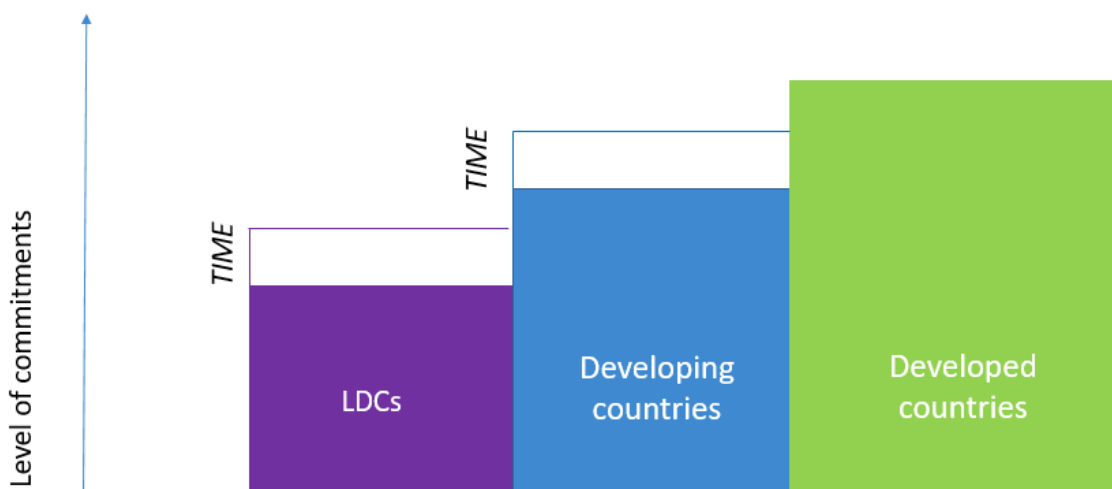
This section provides an overview of the different SDT models that currently exist under the WTO, with a special focus on their applicability. The models analyzed are: “traditional” SDT as featured in the GATT and other WTO Agreements; the built-in flexibilities of the General Agreement on Trade in Services (GATS), the “new deal” approach introduced by the TFA, and the variable geometry approach. It then distills key features of each of these models, to facilitate their application to the e-commerce discussions. While Members look to the approach pioneered in the TFA Agreement as a new blueprint on how to address differences in levels of development in multilateral rule-making,²⁵ this is certainly not the only SDT model that may be relevant to address development needs in the context of e-commerce.

3.1 Traditional SDT in WTO Agreements

Overview

Under the WTO Agreements, SDT provisions apply equally to each specified category of members: LDCs, which follows the United Nation’s designations; and developing countries, which is entirely self-designated. As illustrated in Figure A below, traditional SDT under the WTO Agreements allows for various degrees of substantive differentiation, as long as countries are categorized as LDCs, or have developing country status.

Figure A: “Traditional” SDT



²⁵ See, e.g., European Union (2018). “Concept paper on WTO modernisation”; Government of Canada, (2018). “Strengthening

and modernizing the WTO: discussion paper communication from Canada”.

The WTO Agreements provide for different types of SDT, depending on the development objective the provision aims to address. Traditional SDT comes in the form of substantive flexibilities – either in the form of commitments, actions or the use of policy instruments. For instance, the concept of non-reciprocity allows developing and least-developed countries in market access negotiations to refrain from making matching offers in return to concessions made by developed countries.²⁶ Moreover, traditional SDT enables developing and least-developed countries to trigger exemptions from certain substantive disciplines. For instance, under the Subsidies and Countervailing Measures (SCM) Agreement, countries listed in Annex 7 are not subject to the prohibition on export-contingent subsidies. Likewise, Article XVIII of the GATT enables developing and least developed countries – at least in theory – to deviate from their tariff commitments in situations in which this is necessary to protect infant industry, or to address balance of payment concerns.²⁷

SDT provisions through which developing and least-developed countries can obtain substantive exemptions are considered the most controversial, as they are linked to a theory of economic development that runs directly counter to the neoliberal premises on which the WTO is built. Indeed, 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.²⁸

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. These SDT provisions are rooted in the notion that developing countries do not have the institutional capacity to implement these commitments. The WTO Agreements also feature SDT provisions that aim at increasing trade opportunities for developing countries²⁹; or require WTO members to safeguard developing country interests.

Applicability

Traditional SDT in the form of exemptions and derogations from core disciplines would be an appropriate model in situations involving issues related to policy space and infant industry.

Other forms of traditional SDT, such as technical assistance and best endeavor provisions, would be relevant for situations addressing capacity constraints. However, as they are unenforceable, the TFA model, which is discussed below, would be more appropriate to address capacity constraints.

A key structural challenge inherent to traditional SDT is its dependence on outdated country differentiation.³⁰ Indeed, as noted above, the category “developing countries”, which is self-designated, currently includes countries with levels of development equal to, or exceeding, countries designated as developed countries. This means that for traditional SDT to be an eligible SDT model for any future agreement would

²⁶ WTO, “Understanding the WTO: Developing Countries” [online].

²⁷ It must be noted, however, that to properly invoke Article XVIII exceptions, developing and least-developed countries must comply with stringent procedural requirement. Article XVIII(b), which could be triggered for balance of payment purposes, has been disinvoked by a number of countries.

²⁸ Michalopolous, C. (2000). “The Role of Special and Differential Treatment for Developing Countries in GATT and the WTO”, p. 15.

²⁹ See, e.g., GATT Article XXXVI, which speak to the need of developing countries.

³⁰ See, e.g., WTO (2019). “An undifferentiated WTO: self-declared Development status risks institutional irrelevance under the WTO”. Communication from the United States. 16 January 2019. WT/GC/W/757.

require the introduction of new country differentiation benchmarks.

One option would be to keep the self-designation mechanism, but to target SDT provisions to *ex ante*, agreement-specific criteria, such as indicators of administrative capacity, country size and level of development that themselves can be monitored.³¹ As a result, the designation “developing country” would become less important.³² Another idea involves a simple “rule of thumb” approach through which all countries satisfying broad threshold criteria, such as minimum level per income capita, could opt out from resource-intensive agreements.³³ An example of this is the SCM Agreement per capita income threshold of USD 1,000 for the use of export subsidies. A disadvantage of this is that it will result in country differentiation, which will continue to create political tension. Indeed, while the criteria are clean, they will be inherently arbitrary.³⁴

3.2 SDT in GATS

Overview

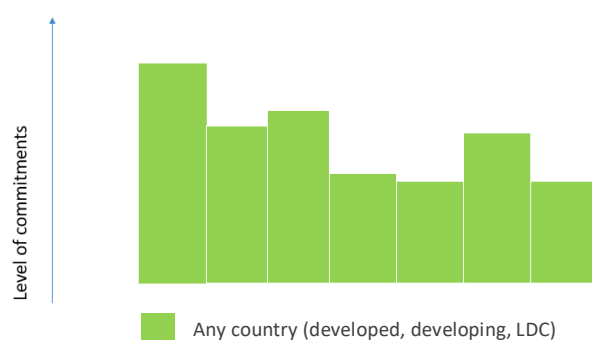
The GATS Agreement deviates from the other WTO Agreements by adopting a positive list approach, i.e., Members can decide which sectors to open to foreign competition.³⁵ The degree of flexibility afforded to all Members under GATS shapes its approach to SDT.³⁶ While the GATS does not explicitly mention SDT, it is provided through the freedom to determine the

number and type of commitments developing countries and LDCs are expected to make.³⁷

Yet SDT in the context of the GATS goes beyond providing a high degree of flexibility in scheduling commitments: Article IV requires developed countries to grant market access in favor of developing and least-developed countries. It also establishes transitional implementation periods, provides for technical assistance, and enables pre-commitments.

As illustrated in Figure B below, the GATS’ built-in flexibility has rendered the categorization of countries in different categories – LDC, developing, developed – mostly unimportant.³⁸ Instead, any flexibilities on Members’ substantive obligations related to market access are determined by each country individually. Not only does this provide significant leeway for countries whose services sector is underdeveloped not to liberalize; it also results in a patchwork of commitments that are tailor-made to each country’s situation.

Figure B: SDT under GATS



³¹ Hoekman, B. (2004). “Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment”, p. 8.

³² Josling, T. (2006). “Special and Differential Treatment for Developing Countries”, p. 8.

³³ Hoekman, B. (2004). “Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment”, p. 9.

³⁴ Ibid.

³⁵ OECD (2006). “Special and Differential Treatment under the GATS”, p. 8.

³⁶ Ibid., p. 4.

³⁷ Ibid., p. 9. GATS Article XIX explicitly notes that “there shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV”.

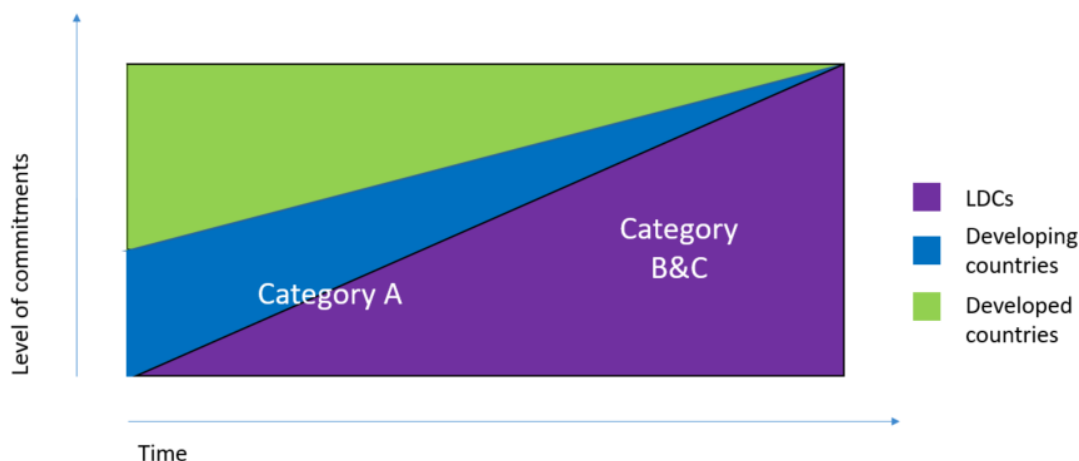
³⁸ OECD (2006). “Special and Differential Treatment under the GATS”, p. 4.

Applicability

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

Customization can also have disadvantages: as the agreement does not strive for universal implementation, progress can be limited. Indeed, the GATS agreement to date has delivered relatively limited market opening commitments, especially amongst many developing and least-developed countries.³⁹ Given the contribution of services liberalization to economic growth and development, SDT in the form of flexibilities may not suffice to address development needs.⁴⁰

Figure C: SDT in the TFA



The TFA addresses development concerns through allowing for transitional implementation periods by developing and least-developed countries.⁴³ 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

3.3 SDT in the TFA

Overview

The TFA Agreement, which entered into force on 22 February 2017, has introduced novel and unprecedented SDT provisions.⁴¹ In contrast to the earlier WTO Agreements and as illustrated in Figure C below, it allows for little differentiation in its substantive obligation. Rather, with only few exceptions, once the TFA is fully implemented and grace periods have expired, all members will be subject to the same substantive obligations.⁴²

countries with less-developed border administration systems.⁴⁴

Specifically, developing and least-developed Members are allowed to categorize their commitments into one of three categories, reflecting their domestic capabilities. Category A

³⁹ Ibid., p. 5.

⁴⁰ Ibid.

⁴¹ McDougall, R. (2017). Evaluating the Implementation Obligations of the Trade Facilitation Agreement in the Context of Existing Multilateral Trade Rules., p. 4.

⁴² McDougall, R. (2017). "A Platform to Accommodate Levels of Development in International Trade Rule-Making" [online].

⁴³ Ibid.

⁴⁴ Ibid.

refers to the provisions that must be implemented by the time the Agreement enters into force; category B to provisions that Members will implement after a transitional period following the entry into force of the agreement; and category C to provisions that members will implement after a transitional period and which requires the acquisition of assistance and support for capacity building.⁴⁵ Least-developed countries can determine their own implementation schedule of the provisions contained from Articles 1 to 12.

The TFA transitional periods differ from transitional periods provided under the earlier WTO Agreements. Instead of establishing fixed limit transitional periods that apply equally to each specified category of members, implementation periods under the TFA 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. That said, developing country status remains self-designated.

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".

Applicability

The TFA 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. Robert McDougall aptly captures when the TFA model would be appropriate, noting:

[t]his kind of differentiation works in the TFA context because the nature of its obligations is such that all countries benefit from their own implementation regardless of what others do. The incentive for free-riding is limited. The marginal benefit that inefficient borders might offer through reduced import competition is more than offset by the costs to consumers, export competitiveness and the public coffers. Reducing these inefficiencies facilitates trade without affecting policy space.⁴⁶

Thus, the TFA model is appropriate especially when dealing with provisions whose impact on development is straightforward and relatively uncontroversial.

A limitation of the TFA model is that it inverts entry into force and implementation. As a result, implementation is delayed, and may be delayed longer than would otherwise have been the case.⁴⁷

3.4 SDT through Variable Geometry

Overview

Differentiation can also take place on the basis of a variable geometry approach. 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.⁴⁸ Over

⁴⁵ Countries can shift provisions between categories B and C and can request an extension from the WTO Trade Facilitation Committee if they experience difficulties in implementing a provision in categories B or C.

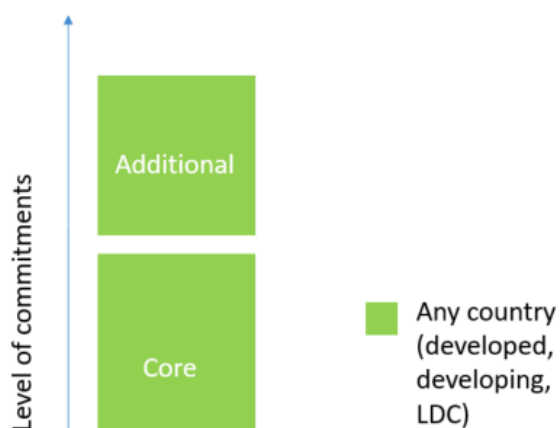
⁴⁶ McDougall, R. (2017). "A Platform to Accommodate Levels of Development in International Trade Rule-Making".

⁴⁷ McDougall, R. (2017). Evaluating the Implementation Obligations of the Trade Facilitation Agreement in the Context of Existing Multilateral Trade Rules, p. 16.

⁴⁸ Hoekman (2004). "Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment", p. 14.

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.

Figure D: SDT through Variable Geometry



The most straightforward way to expand variable geometry in the WTO is through plurilateral annexes. Indeed, as plurilateral agreements allow countries to opt out from specific agreements, their effect is similar to SDT.⁴⁹

A key advantage of applying the variable geometry model through a plurilateral is that it minimizes the importance of country differentiation on the basis of self-designation. Rather, the differentiation takes place voluntarily, reflecting the depth of commitments countries are willing to make.

Applicability

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

different levels of development. Indeed, by packaging new rules into a plurilateral, as opposed to a multilateral, agreement, Members, including developing and least-developed, would be able to decide whether or not to sign on to additional levels of commitment. To the extent they have development-related concerns, they could simply opt-out.

A limitation, however, is that especially in the case where the variable geometry takes the shape of a plurilateral agreement, there is no presumption that countries that have not signed will eventually join and be subject to the rules. It could also raise issues related to securing a critical mass.

3.5 Summary

There exists no one-size-fits all for SDT. Indeed, as summarized in Table 1 below, not each SDT model addresses all development needs.

Table 1: Characteristics of different SDT models

Development Concern	Traditional SDT	GATS	TFA	Variable Geometry
Lack of capacity/resources	✓/✗	✓/✗	✓	✓
Flexibility in market access commitments to reflect different levels of development	✓	✓	✗	✓
Infant industry /policy space concerns	✓	✓/✗	✗	✓

✓ = SDT model would be appropriate to address the stated development concern

✗ = SDT model would not be appropriate to address the stated development concern

✓/✗ = SDT model could address the stated development concern, but is limited – either because of scope, lack of specificity, or lack of enforceability – and would not be the most appropriate model to use

⁴⁹ Ibid., p. 15.

Moreover, each SDT model has different sets of characteristics: some lead to full implementation, whereas others result in immediate implementation but allow for substantive differences in levels of implementation.

This suggests that analyzing the type of SDT provisions that would be appropriate in the context of e-commerce requires, at a minimum, an understanding of the type of development concerns different potential e-commerce disciplines have raised. This is what we will do in the next section.

SECTION 4

SDT in the Context of a Multilateral Framework for E-Commerce

4.1 E-commerce discussions at the WTO

At the 11th Ministerial Conference of the WTO in December 2017, Members agreed by consensus to the continuation of the Work Programme on Electronic Commerce, established in 1998. In addition, 71 countries issued a Joint Statement on Electronic Commerce, aiming to “initiate exploratory work toward future WTO negotiations on trade-related aspects of electronic commerce”.⁵⁰ This set in motion several rounds of consultations and meetings discussing what a possible agreement on e-commerce would look like. In January 2019, 76 countries confirmed their intention to commence WTO negotiations on trade-related aspects of e-commerce. It thus seems plausible that any future agreement on e-commerce would be plurilateral in nature.

The plurilateral nature of a possible e-commerce agreement – a variable geometry approach – will inform the rest of the SDT provisions. As noted above, a variable geometry approach provides different levels of obligations to different countries, and thereby, has the same effect as SDT. Depending on the main objective of the negotiations, the plurilateral nature of a possible

e-commerce agreement could either lead to less flexible SDT provisions – to avoid creating yet an additional level of flexibility – or serve as impetus to adopt strong and broad SDT provisions to incentivize more developing and least developed countries to adopt the agreement.

While the agreement will likely take the form of a plurilateral, the architecture of the agreement remains an open question, i.e., will it take the form of a stand-alone agreement, or rather, will it be a reference framework to be implemented through additional commitments in GATT and GATS?

Other elements that are yet to be decided concern the exact scope of the agreement. The discussions have touched on a broad range of themes, from regulatory frameworks and open markets, to initiatives facilitating the development of e-commerce to transparency.⁵¹ Yet the exact scope of a potential e-commerce agreement, including the type of transactions that would fall within the scope, remains heavily debated.

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

⁵⁰ WTO (2017). “Joint Statement on Electronic Commerce”. Eleventh Ministerial Conference. 12 December 2017. WT/MN(17)/60.

⁵¹ WTO (2017). “Work Programme on Electronic Commerce: Trade Policy, the WTO and the Digital Economy”. Communication from Canada, Chile, Colombia, Cote d’Ivoire, the EU, the Republic of Korea, Mexico, the Republic of

Moldova, Montenegro, Paraguay, Singapore, Turkey and Ukraine. 15 June 2017. JOB/GC/116/Rev.2; WTO (2018). “Exploratory work on Electronic Commerce. Non-paper from Brazil”. 12 April 2018. JOB/GC/176.

obligation. The numerous uncertainties regarding the scope, architecture and substance of an e-commerce agreement requires working on the basis of certain assumptions, which inevitably limits this analysis.

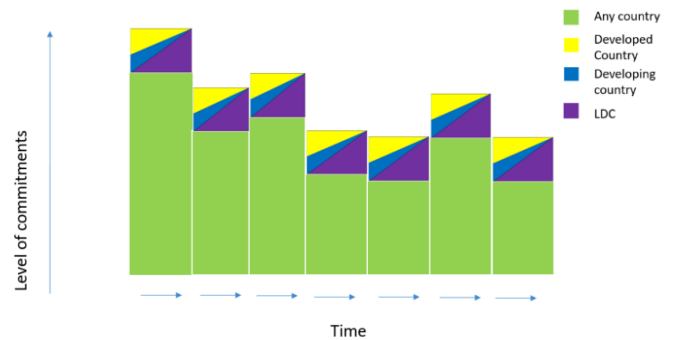
There is, however, also value in analyzing SDT prior to knowing some of the variables. Indeed, a bottom-up analysis that puts development concerns first could be used to inform the overall architecture and obligations of the agreement. It is with this in mind that this section will analyze the type of SDT provisions that could be considered to address the development needs in the context of e-commerce.

4.2 Linking SDT to the overall architecture

As noted above, the overall architecture of a potential e-commerce agreement is unclear. It could either take the form of a stand-alone agreement or a reference framework to be implemented through individual commitments annexed to GATT and GATS. The overall architecture would have important implications for the types of SDT provisions that could be relevant to address the development dimension of e-commerce.

If the overall structure were to be a reference framework with corresponding GATT/GATS commitments, there would be a core set of commitments, with additional flexibilities provided through the parameters in the reference framework. These flexibilities could take the form of fewer commitments, transitional times, or flexible implementation. SDT in a reference framework could combine the in-built flexibilities of GATS with the individualized TFA framework, as illustrated in Figure E below.

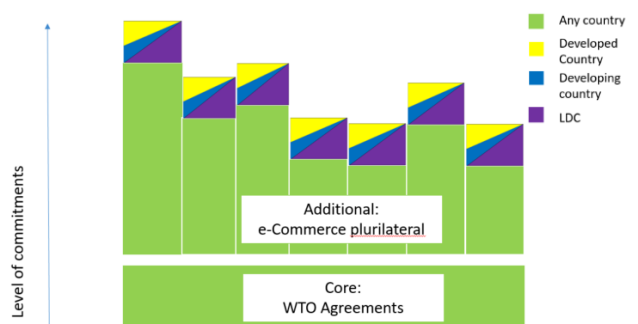
Figure E: Integrated GATS and TFA approach



The benefits of this approach with respect to SDT would be that it minimizes the importance of country categorization: all countries would benefit from flexibilities in scheduling additional market access commitments in services, and any transitional time frames would reflect the situation of individual countries. Moreover, should it take the form of a reference paper that would be annexed through schedules, the existing GATT and GATS SDT provisions would additionally apply.

With the overall architecture being a plurilateral agreement, this would create an additional level of flexibility.

Figure F: Integrated GATS and TFA approach in a plurilateral structure



A stand-alone 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 provision. For those provisions that would present implementation difficulties – and that have full implementation as the goal – certain developing and 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 GATT-style derogation/exemption model might be more appropriate. This would require proposing a novel way to allow for country differentiation. For additional market access commitments, flexibility may be provided through a non-reciprocal approach (for goods) and/or a GATS-style opt-in approach for services.

4.3 Linking SDT to e-commerce provisions

It is unclear what an e-commerce agreement would cover. Many different issues have been raised and discussed during the past year, ranging from market access and digital trust to transparency and intellectual property. This section will not cover all topics that have been proposed; rather, it will look into specific topics that fall under two umbrella headings⁵²: (i) regulatory frameworks, which includes enhanced transparency, consumer confidence enhancing measures, and trade facilitating measures; and

(ii) open markets, which covers liberalization commitments and measures ensuring openness.

For each these different topics, this section will analyze the development concerns that have been raised – irrespective of their legitimacy⁵³ – and on that basis, link the provision to the most appropriate SDT model – or, where relevant, a hybrid approach.

SDT Options for Disciplines on Regulatory Frameworks

Consumer confidence enhancing measures

Adopting consumer confidence enhancing measures is a key focus of the regulatory dimension of the e-commerce discussions. Specifically, provisions in this area could include requiring countries to introduce regulatory frameworks for consumer protection, regulatory frameworks for privacy, regulatory frameworks for cyber security, and regulatory frameworks for unsolicited communications. These provisions aim to create a more secure environment for e-commerce activities, build trust, and thereby increase e-transactions.

Adopting these types of regulatory reforms are little controversial. They are, by and large, considered to contribute to building a digital enabling environment and to foster development. Indeed, having these regulations in place would make the country more attractive for business transactions, and would facilitate SMEs to export.

⁵² This classification is loosely based on: WTO (2017). Work Programme on Electronic Commerce: Trade Policy, the WTO, and the Digital Economy". Communication from Canada, Chile, Colombia, Cote d'Ivoire, the European Union, the Republic of Korea, Mexico, Montenegro, Paraguay, Singapore, and Turkey. 13 January 2017.

⁵³ Any potential negative development implications raised in this paper should not be considered as an endorsement of the

legitimacy of these concerns. Indeed, whether certain fears or concerns ultimately must be addressed through the provision of flexibilities will, in part, depend on the extent to which Members consider the concerns legitimate, and to outweigh any benefits from the proposed provision.

However, in many developing and least-developed countries, the gap between the status quo and implementing these regulatory frameworks is large. According to UNCTAD, 10% of all countries has no consumer protection legislation in place, and for 32% of all countries no data are available.⁵⁴ Similarly, 21% of all countries have no legislation on data protection and privacy, while for 12% countries no data were available.⁵⁵ For countries without consumer protection or data protection laws in place, they must draft, and then adopt, new regulations from scratch. This often involves more than adopting new laws. For instance, protecting consumers requires the ability to take action against fraudulent and deceptive commercial practices, which in turn is contingent upon the rule of law and functioning consumer protection institutions.⁵⁶ Moreover, an e-commerce agreement cannot dictate the content of regulatory frameworks, or ensure it is actually functional. Thus, designing, adopting, and implementing the relevant regulatory frameworks will require capacity and resources that some developed countries, and 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.

Should the overall architecture of an e-commerce agreement take the form of a reference paper, it could incorporate TFA-type flexibilities, thereby giving developing and least-developed countries flexibilities with their scheduling.

Trade facilitating measures

An e-commerce agreement would 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.

Most of these provisions are relatively uncontroversial as their development benefits are widely recognized. By lowering the overall cost of trading and reducing transaction time, the ease of doing online business increases, which, in turn, lowers entry barriers for MSMEs. Indeed, Brazil specifically notes in its non-paper on e-commerce that digital trade facilitation provisions are “technical, specific and rather uncontroversial.”⁵⁷

However, while trade facilitating measures are not generally considered to encroach upon policy space, they present implementation difficulties for some developing and most least-developed countries as many of them do not have the capacity to implement such provisions. For example, implementing paperless trading would require that all trade administration documents are available electronically, and are accepted and processed electronically.⁵⁸ Facilitating electronic

⁵⁴ UNCTAD, “Online Consumer Protection Legislation Worldwide.” [online].

⁵⁵ UNCTAD, “Data Protection and Privacy Legislation Worldwide.” [online].

⁵⁶ UNCTAD (2017). “Consumer Protection in Electronic Commerce”. Note by the UNCTAD secretariat.

⁵⁷ WTO (2018). Exploratory Work on Electronic Commerce: non-paper from Brazil.

⁵⁸ UNECE (2017). “Trade Facilitation and Paperless Trade Implementation”, p. 4.

transactions would require not only agreement to accept electronic signatures and electronic contracts, but also simplified e-customs procedures for express shipments and release of goods and the creation of single window system that supports electronic customs transactions.⁵⁹ 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, 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 TFA in the context of e-commerce would be identical to the provisions in the TFA.

Enhanced transparency

An agreement on e-commerce will likely feature provisions on transparency. Ongoing e-commerce discussions on transparency mostly focus on disciplines that would require countries to publish measures and draft measures related to e-commerce, and that would provide countries for an opportunity to comment on these measures – disciplines similar to existing transparency provisions in other WTO Agreements, such as the Sanitary and Phytosanitary (SPS) Agreement. These types of provisions are generally little controversial and pose little implementation challenges. Where necessary, the provisions themselves could provide developing countries and/or LDCs with additional time to comment on any measure that is published – through traditional SDT.

SDT Options for Disciplines on Open Markets

Liberalization Commitments in Services

A potential e-commerce agreement would likely include provisions that would 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.

Opening up the services sectors is considered to be, generally speaking, beneficial for developing and least-developing countries: it would enable them to access high-quality services, which would increase productivity in all sectors. Any concerns that liberalization commitments in the services sector would create a barrier for businesses in developing countries to compete are largely mute: for many sectors, many developing, and especially, least developing countries do not have the infrastructure or capacity to realistically develop competitive digital services industries. Moreover, any liberalization provisions would apply to both national and foreign businesses.

In the scheduling of digital services commitments, flexibilities must be provided to address developing and least-developed countries' different realities in their level of digital development. Indeed, it would be meaningless for a least-developed country to open up sectors that do not exist, or are underdeveloped, or poorly

⁵⁹ WCO (2015). "Facilitating E-commerce", p. 2.

regulated. Such flexibilities should take the form of a hybrid 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.

Moreover, there are also online services industries in which developing and least-developed countries have secured a competitive edge for which they could also have identifiable offensive interests during the e-commerce negotiations. For these and other sectors with importance to developing countries, developed countries should be encouraged to make market liberalization commitments.

The reference framework adopted through GATS commitments would be an apt structure. It would be less clear how additional e-commerce market access commitments would be scheduled under a stand-alone agreement.

Liberalization Commitments in Goods

The e-commerce discussions also focus on identifying tariff elimination for goods that could enable and promote infrastructure development. The anticipated benefit of such additional market access commitments would be that it would lower costs of goods, which in turn could enable and promote infrastructure development, and thus, e-commerce. However, concerns related to infant industry have been raised in this regard, reminiscent of earlier ideological periods: i.e., the influx of cheap products from abroad may prevent a less-developed local industry from developing to competitive levels. Moreover, there could presumably be policy space concerns related to

the generation of revenue on Information and Communication Technology (ICT) products.

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) or through the principle of non-reciprocity (traditional SDT).

Permanent moratorium

Discussions on liberalizing duties on goods related to digital transactions center on making permanent the moratorium on the imposition of customs duties and possibly quantity restrictions on digital products, in addition to a moratorium on customs duties on electronic transmissions.

On the one hand, this would provide certainty for business that countries would not impose additional layers of duties in the future. It would also enable consumers to access more and cheaper digital goods. On the other hand, concerns have been raised related to revenue implications. As more and more products would be traded digitally, a permanent moratorium would result in revenue loss for developing and least-developed countries.⁶⁰

Theoretically, these concerns could be addressed through providing developing and least-developed countries transitional implementation timeframes along the lines of the TFA model – and on the basis of countries' implementation capacities including those related to public revenue generation. However, since a provisional moratorium has been adopted and implemented

⁶⁰ See, e.g., WTO (2018). "Work Programme on Electronic Commerce. Moratorium on Customs Duties on Electronic

Transmissions: Need for a Re-think". Communication from India and South Africa.

by the WTO Members since 1998, introducing flexibilities now would likely be unrealistic.

Measures ensuring openness

Another category of topics that could feature into a potential e-commerce agreement are measures that would ensure openness. Discussions have focused on disciplines that would ensure cross-border data flows; disciplines with respect to data localization; and disciplines related to the transfer and/or access to software source code. These rules would aim to ensure that companies can access and process data of citizens in other countries without any obstacles, and use foreign companies to provide services for data processing.⁶¹

From a development perspective, these proposals are the most controversial. Rules regarding cross-border data flows and the prohibition on data localization requirements 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 data local centers and processing operations.⁶² 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.⁶³ For instance, the European Centre for International Political Economy (ECIPE) estimates that data localization has a negative effect on the economies of Brazil, India, Indonesia, and South Korea.⁶⁴ Other issue raised that would limit the benefits for developing countries from these types of measures is that local firms often lack the expertise to analyze 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.

If the agreement were to take the form of a reference framework, this could be accomplished by giving developing and least-developed countries the flexibility not to make certain commitments in their GATS schedules. In the context of a stand-alone agreement, however, it would require traditional GATT-era exemptions/derogations.

As noted above, this latter approach would trigger issues related to self-designation, and would enable countries like China, at which many of these disciplines are targeted, to benefit from such flexibilities. Thus, derogations must be linked to different criteria: either objective benchmarks, or rule of thumb-type criteria like minimum levels of GDP.

⁶¹ Macleod, J. (2017). "E-Commerce and the WTO: A development agenda?", p. 9.

⁶² *Ibid.*

⁶³ *Ibid.*, p. 21.

⁶⁴ Kaplan, J.M, and Rowshankish, K. (2015). "Addressing the Impact of Data Localization Regulation in Financial Services", [cited in Macleod, J. (2017). "E-Commerce and the WTO: A Development Agenda?"].

4.4 Summary

Table 2 below sets out the different types of development concerns that have been raised in response to discussions on different types of

potential e-commerce disciplines. What is clear is that there is no one-size-fits all: different e-commerce disciplines are most appropriately addressed by different types of SDT models.

Table 2: SDT recommendations for different e-commerce disciplines

	Topics	Development Needs	Architecture	SDT	Comments
Regulatory Frameworks	Regulation	Resources/capacity constraint to implement	Reference paper/stand-alone agreement	TFA	Little controversial; would be easy to implement
	Trade Facilitation				
	Transparency	Resources/capacity constraints to meaningfully engage	Reference paper/stand-alone agreement	Traditional SDT	Relatively uncontroversial as this would likely be a weak, hortatory provision requiring to “take into account” needs of developing countries/LDCs
Open Markets	Services	Different realities in levels of digital development	Reference paper	GATS/TFA	A hybrid GATS/TFA would provide the right level of flexibilities. Challenge lies in implementation of this approach (types of sectors/types of flexibilities etc.)
			Stand-alone agreement	Unclear	
	Goods	Infant industry/policy space concerns	Reference paper	Traditional SDT/TFA	Longer transition times (TFA) to liberalize certain goods could be negotiated; non-reciprocity would be more difficult to achieve as it will require new ways of country differentiation.
			Stand-alone agreement	Unclear	
	Moratorium	Policy space concerns	Reference paper	GATS	As provisional moratorium is already in place, very unlikely that flexibilities will be provided for certain countries
			Stand-alone agreement	TFA	
	Openness	Infant industry/policy space	Reference paper	GATS	Challenge lies in implementation of this approach (types of sectors/types of flexibilities etc.)
			Stand-alone agreement	Traditional SDT	Most controversial; would be difficult to get political by-in as it is contingent on country differentiation. Would require novel ways of thinking about differentiation.

A hybrid TFA/GATS and TFA/traditional SDT approach would be the most appropriate model to address different development concerns that have been raised in the context of the e-commerce debate. Indeed, this approach would be to respond to issues related to resource/capacity constraints, reflect countries' different digital realities, and assuage policy space/infant industry triggered mostly by proposed disciplines on openness. The reference paper, to be implemented through different GATS/GATT commitments, would be the most appropriate architecture to support these flexibilities.

A hybrid GATS/TFA model would minimize any concerns related to country classification. Indeed, as seen in the earlier analysis on different SDT

models, both the GATS and TFA models allow for tailor-made commitments to each country, thereby minimizing the importance of a country's development status – LDC, developing or developed. Country classification, would, however, need to be addressed in the context of liberalization of digital goods through GATT commitments.

In addition to flexibilities provided through TFA/GATS, the plurilateral structure of a potential e-commerce agreement would add one more layer of flexibility: indeed, countries may decide whether or not to sign-on to the agreement in the first place. Its uniqueness would stem from its combination of various different models.

SECTION 5

Final Observations and Conclusions

This paper has identified different types of SDT models that could address development concerns raised by certain developing and least-developed countries in the context of a potential agreement on e-commerce. Given the many unanswered questions about (i) whether there will be an agreement on e-commerce; and (ii) the architecture of such an agreement; (iii) the provisions; and (iv) the actual signatories, this analysis may be premature. However, by making development concerns the *point de depart* and working backwards, this analysis has also shed light on the architecture that would be best suited to accommodate different layers of flexibilities to address developing countries' concerns.

Different topics have raised different development concerns – ranging from the little controversial to the very controversial – and therefore, would be best addressed through different types of SDT provisions. While the TFA model would be appropriate to address development concerns related to digital facilitation and building an enabling environment, it is not the new SDT blueprint certain countries consider it to be. Indeed, its characteristics do not easily lend themselves to address development concerns that raise issues related to infant industry and policy space, or flexibilities in scheduling of market access commitments.

Rather, a hybrid TFA/GATS and TFA/traditional SDT approach – within a plurilateral context – would be the most appropriate model to address different development concerns that have been raised in the context of the e-commerce debate.

The reference paper, to be implemented through different GATS/GATT commitments, would be the most appropriate architecture to support these flexibilities. This suggests that SDT remains more complex than is suggested in some proposals on WTO reform, and that introducing novel ways to engage in country-differentiation may be an inevitability.

While these various layers of flexibilities are sensible from a technical perspective, politically, there will likely be pressure to minimize substantive differentiation, with countries focusing increasingly on universal implementation of a set of commitments. This means that the discussion on identifying relevant SDT provisions is more complicated than matching development concerns raised to SDT provisions that could address the concerns. This must be taken into account.

Part of what makes the e-commerce discussions so controversial – other than the politics – is underlying ideological disagreement about the development implications of certain disciplines.⁶⁵ Will rendering the moratorium permanent, on balance, be harmful to developing and least-developed countries? Will prohibitions on data localization requirements forever exclude developing and least-developed countries from building up a digital industry? But what would be the consequences of not lowering duties on digital products? These questions are difficult to answer for a number of reasons.

⁶⁵ The other element that is proving contentious is disagreement on procedure, i.e., whether new topics should be

allowed to be discussed and/or negotiated prior to finishing the Doha Development Agenda (DDA).

Often, the answers will be situation-specific. Indeed, for some countries these provisions may have a net negative impact, and for others, the impact will be net positive. The answer is also time-specific. There may be a short-term revenue loss, but a long-term gain in digital trade. The answer also depends on different actors: consumers may be gaining, while producers, or a sub-set of producers, may be losing, or vice versa. Decisions on which group should benefit – in situations where there is a trade-off – is not only a political question, but also an ideological one. As noted above, they echo the unresolved question that has been at the heart of the trade and development discussions in the WTO: when is liberalization an impediment for development?

The first step to begin untangling this problem would be to separate provisions in different 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, the second step would be for developing and least-developed countries to carry out studies on the anticipated impact of these disciplines on their economy. As part of a third step, a country must decide what its development priorities are, given the inevitable trade-offs. 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.

Given the technicalities and politics of the ongoing discussions, it is key that developing and least developed countries participate in the discussions. Indeed, failure to do so would risk that the rules of digital trade will be written without them as provisions negotiated in plurilateral settings could become the new multilateral norms. Moreover, while certain countries may not be interested in joining a plurilateral on e-commerce now, they could develop an interest in doing so in the future. Thus,

irrespective of developing and least-developed countries' political and ideological approaches to the ongoing discussions, failure to participate will not be in their best interest.

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, as noted above. This may call for pre-agreement regarding the provision of technical assistance to countries in need.

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.

References

Ameh, S. (2018). Why Strengthening the Global Economy means Closing the Digital Divide. [online]. Available at: <https://www.weforum.org/agenda/2018/03/closing-the-global-economy-s-new-digital-divide>.

Arbache, J. (2018). Seizing the Benefits of the Digital Economy for Development. ICTSD opinion and analysis. [online]. Available at: <https://www.ictsd.org/opinion/seizing-the-benefits-of-the-digital-economy-for-development>.

Chang, S.W. (2007). WTO for Trade and Development post-Doha. *Journal of International Economic Law* 10, no. 3. pp. 553-570.

European Union (2018). Concept Paper on WTO Modernization. September 2018. [online]. Available at: http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf.

Gehl Sampath, P. (2017). E-Commerce and Digital Industrial Policies: Why we may still need a collective solution. ICTSD opinion and analysis. [online]. Available at: <https://www.ictsd.org/opinion/e-commerce-and-digital-industrial-policies-why-we-may-still-need-a-collective>.

Government of Canada, (2018). Strengthening and modernizing the WTO: discussion paper communication from Canada. [online]. Available at: https://international.gc.ca/gac-amc/campaign-campagne/wto-omc/discussion_paper-document_travail.aspx?lang=eng.

Hoekman, B. (2004). Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment. [online]. Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.535.9967&rep=rep1&type=pdf>.

Hoekman, B. (2005). Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment.” *Journal of International Economic Law* 8, no. 2. pp. 405-424.

Hoekman, B., Ozden, Caglar (2005). Trade Preferences and Differential Treatment of Developing Countries: A Selective Survey. Policy, Research working paper; no. WPS 3566. Washington DC: World Bank.

Josling, T (2006). “Special and Differential Treatment for Developing Countries” in Kym Anderson and Will Martin (eds.) *Agricultural Trade Reform and the Doha Development Agenda*, Palgrave Macmillan and the World Bank.

Kaplan J.M. and Rowshankish (2015). Addressing the Impact of Data Localization Regulation in Financial Services. Global Commission on Internet Governance Paper. [online]. Available at: <https://www.cigionline.org/publications/addressing-impact-data-location-regulationfinancial-services>.

Macleod, J. (2017). E-Commerce and the WTO: A Development Agenda? Global Economic Governance Africa. Discussion Paper. [online]. Available at: <http://www.gegafrica.org/publications/e-commerce-and-the-wto-a-developmental-agenda>.

MacLeod, J. (2018). Using Digital Trade for Development in Africa”, in Bridges Africa, Volume 7, Issue 2, p. 8. March 2018.

McDougall, R. (2017). A Platform to Accommodate Levels of Development in International Trade Rule-Making. ICTSD opinion and analysis. [online]. Available at: <https://www.ictsd.org/opinion/a-platform-to-accommodate-levels-of-development-in-international-trade-rule-making>.

McDougall, R. (2017). Evaluating the Implementation Obligations of the Trade Facilitation Agreement in the Context of Existing Multilateral Trade Rules. Geneva, ICTSD. [online]. Available at: https://www.ictsd.org/sites/default/files/research/evaluating_the_implemenation_of_the_tfa.pdf.

Michalopolous, C. (2000). The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization. Policy Research Working Paper; no. 2388. World Bank, Washington, DC. [online]. Available at: <https://openknowledge.worldbank.org/handle/10986/19819>.

New York Times (2016). Global Trade After the Failure of the Doha Round. Available at: <https://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html>.

OECD (2006). Special and Differential Treatment under the GATS. OECD Trade Policy Papers 26, OECD Publishing. [online]. Available at: <https://www.oecd-ilibrary.org/docserver/786764616255.pdf?expires=1550328279&id=id&accname=guest&checksum=7BFAF52FDF169B00FF08AA8E7B7B2A1D>.

Tortora, M. (2003). Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: the skeleton in the closet.” *UNCTAD Background Paper WEB/CDP/BKGD/16, Geneva: UNCTAD*.

UNCTAD (2018). Adapting industrial policies to a digital world for economic diversification and structural transformation. [online]. Available at: https://unctad.org/meetings/en/SessionalDocuments/cimem8d5_en.pdf.

UNCTAD, Data Protection and Privacy Legislation Worldwide. [online]. Available at: https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx.

UNCTAD (2017). *Consumer Protection in Electronic Commerce*. [online]. Available at: https://unctad.org/meetings/en/SessionalDocuments/cicplpd7_en.pdf.

UNCTAD, Online Consumer Protection Legislation Worldwide. [online]. Available at: https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Consumer-Protection-Laws.aspx.

UNECE (2017). Trade Facilitation and Paperless Trade Implementation”. UNECE Regional Report 2017. United Nations, New York and Geneva. [online]. Available at: https://www.unece.org/fileadmin/DAM/trade/Publications/ECE_TRADE_438E_UNECERegionalReport2017.pdf.

WCO (2015). Facilitating e-Commerce. WCO News No. 78, October, 2015. [online]. Available at: <http://www.wcoomd.org/~media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/ecommerce/wco-news/facilitating-ecommerce-wco-news-78-october-2106.pdf?db=web>.

Wolfe, R. (2009). The WTO single undertaking as negotiating technique and constitutive metaphor. *Journal of International Economic Law* 12, no. 4, pp. 835-858.

World Bank (2016). Digital Dividends. World Development Report 2016. [online]. Available at: <http://documents.worldbank.org/curated/en/896971468194972881/pdf/102725-PUB-Replacement-PUBLIC.pdf>.

WTO (2017). Note on the Meeting of 19 July 2017, reconvened on 14 and 21 September 2017. TN/CTD/M/52.

WTO (2019). An undifferentiated WTO: self-declared Development status risks institutional irrelevance under the WTO. Communication from the United States. 16 January 2019. WT/GC/W/757.

WTO, Doha WTO Ministerial 2001, Ministerial Declaration. WT/MIN(01)/DEC/1. Adopted 14 November 2001. [online]. Available at: https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

WTO (2018). Exploratory Work on Electronic Commerce. Non-paper from Brazil. 12 April 2018. JOB/GC/176.

WTO (2017). Joint Statement on Electronic Commerce. Eleventh Ministerial Conference. 13 December 2017. WT/MN(17)/60.

WTO, Understanding the WTO: Developing Countries. Available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm

WTO (2018). Work Programme on Electronic Commerce. Moratorium on Customs Duties on Electronic Transmissions: Need for a Re-think. Communication from India and South Africa. 13 July 2018. WT/GC/W/747.

WTO (2017). Work Programme on Electronic Commerce: Trade Policy, the WTO, and the Digital Economy". Communication from Canada, Chile, Colombia, Cote d'Ivoire, the European Union, the Republic of Korea, Mexico, Montenegro, Paraguay, Singapore, and Turkey. 13 January 2017. JOB/GC/116, JOB/CTG/4, JOB/SERV/248, JOB/IP/21, JOB/DEV/42.

WTO (2017). Work Programme on Electronic Commerce. Trade Policy, the WTO and the Digital Economy. Communication from Canada, Chile, Colombia, Cote d'Ivoire, the European Union, the Republic of Korea, Mexico, the Republic of Moldova, Montenegro, Paraguay, Singapore, Turkey and Ukraine. 15 June 2017. JOB/GC/116/Rev.2.

