Special and Differential Treatment
Introduction

- What is Special & Differential treatment?
- What are the different types of S&D provisions in the UR Agreements?
- What are the concerns that developing countries have expressed with these provisions?
- What did Ministers mandate at Doha?
- What has been the progress so far since the HKMC?
- What is the likely course of future work?
Special & Differential Treatment

The following kinds of S&D provisions can be found in the Uruguay Round Agreements

- provisions aimed at increasing trade opportunities (12)
- provisions which urge WTO Members to safeguard the interest of dc’s, esp. while using trade remedies (49)
- provisions offering flexibility of commitments (30)
- transitional time periods (18)
- provisions related to technical assistance (14)
- provisions in favour of least developed countries (22)
Special & Differential treatment

Provisions aimed at increasing trade opportunities of developing countries.

These provisions basically encourage the developed countries to adopt positive measures which would result in increased trade opportunities for developing countries.

Article XXXVII of the GATT 1994, provides that: “…the developed …[Members] shall to the fullest extent possible … accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to …[developing countries].”

Legally enforceable?
Special & Differential treatment

- Measures safeguarding the interests of developing countries

These require developed country Members of the WTO to take into account the special situation of developing countries before imposing any measures which might affect their trade interests.

- Article 10(1) of the SPS Agreement states that "In the preparation and application of SPS measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members."
Special & Differential treatment

Is this provision legally enforceable?

Probably not. There is an obligation on developed country Members to consider the effects that their intended sanitary or phytosanitary measures may have on developing countries, but the provision does not compel them to change those measures even if they are likely to impact negatively on the export interests of developing countries.

Developing countries recognised that language did not create any enforceable rights, and made a proposal on this provisions as part of the implementation proposals.
Special & Differential treatment

Similarly, Article 15 of the Anti-Dumping Agreement states:

“It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping duties.

Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members."
Special & Differential treatment

- Is the provision legally enforceable?

- What is the meaning of ‘special regard’, ‘special situation’, and ‘essential interests’; what obligations do these impose?

- Developed country Members appear to have an

  - obligation to consider taking price undertakings, instead of imposing antidumping duties;

  - however, there does not appear to be any obligation to necessarily accept such alternative remedies.

  - interestingly, both sentences have mandatory verbs, namely ‘must’ and ‘shall’
Special & Differential treatment

Provisions permitting the assumption of lesser obligations by developing countries

In Agriculture, for example, developing countries were asked to assume lesser obligations than their developed counterparts.

- Developed countries to reduce their tariffs by 36 per cent over a six-year period, while developing countries by 24 per cent over a ten-year period.

- Minimum tariff reduction on each tariff line: Developed countries -15 per cent, while developing countries 10 per cent.
Special & Differential treatment

Provisions relating to transitional periods

- With the exception of Anti-Dumping Agreement and Pre-Shipment Inspection Agreement, almost all the agreements contain longer transitional periods for developing countries.

- Agriculture: Developed countries were given six years to implement their obligations, while developing countries were given ten years.

- TRIPS: developing countries were given 5 years to comply with their obligations.
Special & Differential treatment

Provisions relating to transitional periods (cont)

- TRIMS: developing countries were given five years time to comply with their obligations.

- Customs Valuation: developing countries which were not parties to the Tokyo Round Code on Customs valuation were given 5 years to comply with their obligations.

- Provisions relating to transitional periods are legally enforceable.
Special & Differential treatment

Provisions relating to technical assistance

Art. 9 of the SPS Agreement, for example:

- “Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations”

- “Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance”
Special & Differential treatment

The ambiguous areas in Article 9 of the SPS Agreement are:

- “Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations”

- “Where substantial investments are required in order for an exporting developing country Member to fulfill the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance”
Some concerns with S&D

Many developing countries accordingly said that most of the S&D provisions are:

- non-binding

- in the form of ‘best endeavour clauses’

- apparently mandatory, yet de-facto non-binding

and only a few provisions are

- mandatory and binding provisions
Ministers at Doha, recognising that problems existed with respect to S&D treatment set out a work programme in para 44 of the declaration, which

- reaffirmed that SDT is an integral part of the WTO
- noted that there are concerns about the implementation of S&D provisions
- directed that all S&D provisions should be reviewed to strengthen them and to make them more precise, effective and operational, and
- Asked members to identify the S&D provisions which should be made mandatory and the implications of doing so
Procedural and Submissions Phase

The TNC in its first meeting after Doha mandated the CTD in special Sessions to carry out the work programme on SDT. Some of the procedural issues:
- negotiating body?
- symbols of documents?
- reporting requirement

A very large number (finally 88) Agreement specific proposals were submitted by dc’s, primarily by the African group and the LDC’s.
Responses and Discussions phase

- Developed countries took time to provide (oral) responses, saying the number of proposals was too large.

- They also raised a number of systemic issues including those related to principles and objectives of SDT, utilisation, graduation, universal vs. differentiated treatment.

- In its report to the General Council, initially in July’02, and then in December’02, the CTD detailed the above status and sought more time to complete the work.
Negotiating phase

- Actual negotiations and drafting of possible language for recommendation to the GC only started in Dec’02
- Members could agree in principle to 4 proposals in December’02 and a further 8 by February’03
- This number increased to 28 by the time of the Cancun Ministerial Conference, but to date have not been adopted
- Most developing countries felt that the agreed language did not make the provisions more precise, effective and operational
What happened at Hong Kong?

- A package for the LDCs emerged as the most important and concrete outcome for HK.

- And even from amongst the LDC proposals being considered the one relating to providing all LDCs bound duty-free and quota-free market access for all their products, was by far the most important.

- The proposal to provide DFQF access to all LDCs was first considered at Doha in 2001 when Ministers agreed to work towards fulfilling this objective;
What happened at Hong Kong?

- After some very difficult and arduous negotiations at HK Members agreed that DFQF access shall be provided to all LDCs for all their products by 2008 or start of the implementation period.

- It was agreed that this would be done on a lasting basis that ensures stability, security and predictability; it was also agreed that Members who find this difficult to do will in the first stage provide DFQF access for at least 97 per cent of their tariff lines;

- These countries will take progressive steps to achieve compliance with the obligation to provide DFQF to all products;
What next?

- Issues about implementation of the DFQF decision remain.
- Impasse remains over whether the 28 Agreement-specific proposals agreed in Hong Kong should be harvested or revisited to make them more enforceable.
- African Group not in a hurry to adopt the decisions on the grounds that they lack economic value.
- Pressure on the Group to agree to their adoption.
- Negotiating tactic? Nothing much has happened on the remaining implementation issues.
Special and Differential Treatment

Category II proposals – not much progress in the relevant WTO bodies

The African Group wants the CTD Special Session to examine these proposals. Opposed by developed-country Members

16 remaining category I and III proposals – focus on 7 proposals. New language needed on the remaining 9 proposals as Members’ positions are widely divergent

Cross-cutting issues – not much progress
Special and Differential Treatment

While focus is on Ag and NAMA modalities, developing-country Members would insist on substantial progress on development-related issues before agreeing to any package.

Without substantial progress, question likely to be asked whether the negotiations really took into account the interests of developing countries.

What would be the optimal results on SDT?