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TRADE AND COMPETITION IN THE WTO:

PONDERING THE APPLICABILITY OF SPECIAL AND DIFFERENTIAL TREATMENT

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ABSTRACT

This article critically evaluates the potential applicability of special and differential treatment ('S&D') as a mechanism for addressing development concerns often associated with a possible WTO agreement on trade and competition policy. It begins by examining the origins, evolution, and current S&D provisions in the GATT and WTO. It then addresses S&D in a trade and competition context, by first evaluating its broad relevance and then exploring a number of options to formulate the concept in order to most effectively advance development objectives in this nascent area. While the article advocates that S&D *could* play a valuable role in addressing the special challenges faced by developing countries at this policy interface, it highlights where opinions differ, or empirical evidence is lacking, on the true developmental value of the various options explored. This is particularly the case concerning exceptions and exemptions, to competition regimes, the role of transitional time periods, and the optimal phasing in of competition policy. Thus the article argues that in a trade and competition policy context S&D is not a panacea, and cautions against S&D being used to delay or exempt the introduction of competition disciplines, where such disciplines would be of benefit to developing countries.

INTRODUCTION

The 4th World Trade Organization ('WTO') Ministerial Conference held in Doha, Qatar, paved the way for possible negotiations on a trade and competition agreement following the next Ministerial Conference, scheduled for

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Mexico in late 2003.[1] At the same time, Ministers emphasized the paramount importance of addressing the development dimension of this policy interface, mandating that 'full account shall be taken of the needs of developing and least-developed country participants' and 'appropriate flexibility provided to address them'.[2]

A number of developing countries have questioned whether a WTO agreement on trade and competition will promote their development objectives. Addressing these concerns could prove decisive for the launch of WTO negotiations in this area, which remains subject to an 'explicit consensus . . . on the modalities of negotiations'.[3]

Historically, the concept of 'special and differential treatment' ('S&D') has been at the forefront of efforts of the GATT and the WTO to facilitate the integration of developing countries into the multilateral trading system. The concept has assumed renewed pertinence following the Doha conference, with Ministers mandating that the WTO's future work 'shall take fully into account the principle of special and differential treatment'[4] including consideration of 'how special and differential treatment may be incorporated into the architecture of WTO rules'.[5]

This paper critically evaluates the applicability of S&D as a mechanism for addressing development concerns at the interface of trade and competition policy. To that end, Part I examines the origins, evolution, and current S&D provisions in the GATT and WTO. Part II then addresses S&D in a trade and competition context. It does so by first examining its broad relevance and then exploring a number of options to formulate and implement the concept in order to most effectively advance the development dimension in this nascent area of trade policy. The paper concludes with a number of cautionary remarks.

I. THE ORIGINS, EVOLUTION, AND CURRENT SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS IN THE GATT AND WTO

A. Special and differential treatment under the GATT

The manner in which the international community sought to accommodate the specific concerns of developing countries in the period between the early

[1] WTO Ministerial Declaration, Ministerial Conference, 4th Session, 14 November 2001, WT/MIN(01)/DEC/1, at para 23.

[2] Ibid, at para 25.

[3] Ibid, at para 23. The exact meaning of this phrase has been a source of contention from the outset, resulting in a statement of clarification by the Chairman of the 4th Session of the Ministerial Conference, Youssef Kamal, setting out that 'this would give each Member the right to take a position on modalities that would prevent negotiations from proceeding after the 5th Session of the Ministerial Conference'.

[4] Ibid, at para 50.

[5] WTO Implementation-Related Issues and Concerns, Ministerial Conference, 4th Session, 14 November 2001, WT/MIN(01)/17, at para 12.

1950s and the 1980s was heavily influenced by the consensus prevailing at the time regarding the type of trade strategy best suited to meeting development objectives. Throughout this period, developing countries sought to emphasize the uniqueness of their development challenges and the need to be treated differently and more favourably in the GATT, in part by being permitted non-reciprocity when liberalizing their own trade and in part by being extended preferential access to others' markets.

When the GATT was established in 1947, eleven of the original twenty-three signatories were developing countries.[6] Nonetheless, there was no formal recognition of such a group nor any special provisions or exceptions that covered their rights and obligations. Indeed, the fundamental principle of non-discrimination underlying the original agreement stressed the importance of universal and reciprocal application of its commitments.[7] Consequently, between 1948 and 1955, developing countries participated in tariff negotiations and other aspects of GATT activities as equal partners. They were subject to the same rules as their developed counterparts. At its inception, the GATT therefore operated on the basis of what we have come to call a 'single undertaking'.

While the original GATT agreement contained no explicit provisions on development issues, soon thereafter developing countries started to raise concerns and identify the special challenges that they faced in international trade. They argued that it was not realistic to expect developing countries with fragile economies to compete on a level playing field with established industrialized countries. Developing countries initially pressed for measures that would enable them to protect their domestic industries. These demands culminated in the redrafting of Article XVIII ('Government Assistance to Economic Development') at the 1954–55 GATT Review Session. It was the first occasion that provisions were adopted to address the needs of developing countries as a group and permitted them exclusively, under certain conditions, to derogate from their scheduled tariff commitments in order to promote the establishment of a particular industry (Article XVIII, Section A), use quantitative restrictions for balance-of-payments purposes (Article XVIII, Section B) and a spectrum of other measures to promote certain industries (Article XVIII, Section C). At the same time, special treatment was extended to developing countries by two other provisions: Article XVI:4, which allowed the use of export subsidies for manufactured goods, and Article XXVIII*bis*, which permitted more flexible tariff protection.

At this stage, developing countries were described as those 'economies . . .

[6] Brazil, Burma (Myanmar), Ceylon (Sri Lanka), Chile, Cuba, China, India, Lebanon, Pakistan, Southern Rhodesia (Zimbabwe), and Syria.

[7] The preamble of the original GATT agreement stressed the importance of 'the elimination of discriminatory treatment' and emphasized 'reciprocal and mutually advantageous arrangements'. See General Agreement on Tariffs and Trade, 30 October 1947, 55 U.N.T.S. 194.

which can only support low standards of living and are in the early stages of development' (Article XVIII:1). Despite this being the first of extensive references in the GATT to special rights and obligations accorded to developing countries, it is noteworthy that there is still no official definition in either the GATT or the WTO Agreements of what constitutes a 'developing country'. Rather WTO Members may select their designation.[8] In the remainder of this paper, reference to developing countries follows WTO practice.

Developing countries continued to push for their concerns to be addressed during the period from 1957–64. Numerous initiatives culminated in the adoption of Part IV of the GATT specifically addressing 'Trade and Development' at the end of the Kennedy Round in 1964.[9] Part IV contained three new articles setting out various obligations, including Article XXXVI ('Principles and Objectives') recognizing the need for positive efforts to improve market access for primary, processed, and manufactured products of interest to developing countries, Article XXXVII ('Commitments') requiring developed Contracting Parties to accord high priority to the reduction of barriers to products of export interest to less-developed countries, and Article XXXVIII ('Joint Action') encouraging joint action such as international agreements to improve market access of primary products of interest for developing countries.

Part IV was perhaps most significant, however, for formalizing the acceptance by developed countries of the principle of 'non-reciprocity'. Notably, Article XXXVI:8 exempted reciprocal tariff concessions stating that '(t)he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of less-developed contracting parties'. An interpretative note, drafted during the Round, clarified the phrase 'do not expect reciprocity' to mean that:

> (t)here will, therefore, be no balancing of concessions granted on products of interest to developing countries by developed participants on the one hand and the contribution which developing participants would make to the objective of trade liberalisation on the other and which it is agreed should be considered in light of the development, financial and trade needs of developing countries themselves. It is, therefore, recognised that the developing countries themselves must decide what contributions they can make.[10]

Non-reciprocity formed one of the core pillars of S&D prior to the Uruguay Round. The other pillar, discussed below, conferred enhanced and preferential market access to developed country markets.

[8] Other Members may however challenge the proclamation as a developing country, which can then lead to negotiations to clarify the position. For countries which have acceded to the WTO after 1995, their status has been a matter taken up during accession negotiations.

[9] Part IV was drafted by the Committee on the Legal and Institutional Framework of GATT in Relation to Less-Developed Countries, and went into legal effect on 27 June 1966.

[10] See GATT document, COM.TD/W/37, at 9.

Preferential market access was formally secured via the 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' framework agreement, introduced during the Tokyo Round of Trade Negotiations in 1979. Commonly known as the 'Enabling Clause', it placed S&D at the heart of the GATT legal system by creating a permanent legal basis for the preferential tariff treatment accorded under the Generalized System of Preferences ('GSP')[11] as well as greater flexibility in the formation of preferential trade regimes between developing countries. Thus, with the Enabling Clause, the second broad justification for S&D, of enhanced and preferential market access, was formally introduced and made permanent. The Enabling Clause also included, for the first time, mention of special treatment for least-developed countries,[12] and thus introduced a two-tier developing country concept.

B. Shifting perceptions on special and differential treatment

Despite the introduction of these various S&D provisions, by the 1980s it was becoming apparent that they had not reversed developing countries' marginalization from the international trading system. Consequently a number of observers, as well as developing countries, began to query the overall effectiveness and value of S&D. Such questioning was linked to a critical reassessment of development policy and how trade should be aligned to support the developmental process.

Notably, the protection of domestic industry via import substitution policies and infant industry protection was increasingly challenged as evidence mounted suggesting that rather than increasing their integration into the trading system, the industries that developed behind punitive tariffs were not internationally competitive.[13]

At the same time, a number of market access concerns were revived. In particular, increasing use of contingency protection measures by developed countries, such as anti-dumping duties, countervailing measures and 'grey-area measures' (i.e. 'voluntary' export restraints and orderly marketing arrangements), appeared to be negatively affecting developing countries'

[11] The Generalized System of Preferences was proposed under the auspices of UNCTAD in 1964 and implemented in 1971 to recognize 'agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to developing countries'. See Resolution 21(II) of the Second UNCTAD Conference, in UNCTAD, Proceedings of the Conference of 1968, Report and Annexes (United Nations, TD/97).

[12] Unlike developing countries, the WTO designates least-developed countries in accordance with the United Nations' official list of least-developed countries, which currently totals 49 countries of which 29 are WTO Members.

[13] See M. Pangetsu, 'Special and Differential Treatment in the Millennium: Special for Whom and How Different?', 23(9) The World Economy (2000), at 1289.

export interests.[14] Furthermore, GSP market access preferences became less effective as the margins of preference were eroded with periodic reductions of most-favoured-nation tariffs, under the successive rounds, and the proliferation of regional trade arrangements. Perhaps most significantly, products from key sectors of interest for developing countries were either essentially excluded from the GATT, such as agriculture, or subject to GATT sanctioned derogations allowing for discriminatory restrictions, as has been the case for textiles and clothing since 1961 and continues to be under the Agreement on Textiles and Clothing.[15]

As a consequence, by the 1980s a significant shift in developing countries' attitudes towards S&D was taking shape. Developing countries entered the Uruguay Round negotiations advocating less emphasis on non-reciprocity with the negotiating objective of accepting a dilution of S&D in exchange for better market access and strengthened rules.[16] Notably, they did not seek exemption from the multilateral trade agreements accepting the 'single undertaking' approach of the Round.[17]

This change in attitude still holds currency, with commentators continuing to argue that protectionism often remains the cause of dismal export and economic performance whether because protection creates an anti-export bias, as selling in home markets becomes more lucrative than exporting; or because of the simple reality that as long as developing nations are treated on a non-reciprocal basis developed countries will only proceed to make significant concessions in sectors that serve their own interests. As two respected observers put it, '(i)f you want a free lunch, you can hardly expect a banquet'.[18]

C. Special and differential treatment under the WTO Agreements

Despite the 'single undertaking' approach, the Uruguay Round did not put an end to S&D. In fact, the WTO Agreements feature no fewer than 145 S&D provisions. The WTO has classified them under five main headings, with

[14] WTO (1999), 'Developing Countries and the Multilateral Trading System: Past and Present', Background Note by the Secretariat, 1999, World Trade Organization, Geneva, at 17.

[15] Ibid, at 17.

[16] Although this is not to say that they were critical of all aspects of S&D and certainly continued to advocate for preferential access to developed country markets, see E. Kessie, 'Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements', 3(6) Journal of World Intellectual Property (2000), at 962.

[17] Developing countries accepted as a single undertaking the major agreements constituting the WTO Agreement. Only four agreements in the area of goods remained plurilateral, of which only the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement are still in effect.

[18] See Bhagwati and Panagariya 'The Truth About Protectionism', *Financial Times* (30 March 2001) where they call for poor countries to not shy from reducing trade barriers on the basis that historically and '(u)nsurprisingly, giving few concessions of their own, poor countries got little in return'.

a sixth heading referring to additional provisions relating specifically to the least-developed countries. These headings establish the following categories:

(1) provisions aimed at increasing trade opportunities through market access;

(2) provisions requiring WTO Members to safeguard the interests of developing countries;

(3) provisions providing greater flexibility of commitments;

(4) provisions allowing for longer transitional time periods;

(5) provisions providing for technical assistance; and

(6) provisions relating to least-developed countries.[19]

While a number of these provisions were carried forward from earlier instruments, it is important to note the fundamental shift in focus of S&D that occurred under the WTO Agreements. In particular new provisions on transitional time periods and technical assistance were adopted to allow developing WTO Members to accept the same commitments as their developed counterparts, but under more flexible terms, in recognition of their unique implementation and adjustment difficulties.[20] Each of these categories is briefly outlined below.

1. Provisions aimed at increasing trade opportunities through market access

The earlier GATT provisions that exhorted contracting parties to increase trade opportunities in products of export interest to developing countries or permitted them to grant trade preferences to those countries were carried forward into the General Agreement on Tariffs and Trade 1994 ('GATT 1994').[21] Notably, Part IV of GATT 1994 ('Trade and Development') which requires developed Members to accord high priority to the reduction of barriers to products of export interest to less-developed countries, and the preferential treatment permitted under the 'Enabling Clause', remain in force.

These are now complemented, however, by a number of provisions in the

[19] WTO (2000a), 'Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions', Note by the Secretariat, 2000, WT/COMTD/W77, World Trade Organization, Geneva, at 3; and WTO (1999), above n 14, at 18.

[20] As John Whalley summarized, '(s)pecial and differential treatment changed from a focus on preferential [market] access and special rights to protect, to one of responding to special adjustment difficulties in developing countries stemming from the implementation of WTO decisions'. See J. Whalley, 'Special and Differential Treatment in the Millennium Round', 22(8) The World Economy (1999), at 1073.

[21] 'GATT 1994' came into force at the same time as the WTO Agreements, and consists of the original GATT agreement (hereinafter referred to as 'GATT 1947') as amended, the legal instruments entered into force under GATT 1947 and six 'Understandings' on the GATT provisions. See the General Agreement on Tariffs and Trade 1994, Annex 1A, Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

various WTO Agreements designed to also ensure market access for developing countries' exports. An innovative example being Article IV of the General Agreement on Trade in Services ('GATS') which provides a new S&D-like provision stipulating that increased participation of developing countries in world trade shall be facilitated through the negotiation of specific commitments on, amongst others, the liberalization of market access in sectors and modes of supply of export interest to them.

2. Provisions requiring WTO Members to safeguard the interests of developing countries

The WTO Agreements contain many preambular, as well as general, provisions calling on Members to implement the agreements in ways that recognize and safeguard the interests of developing and least-developed countries. They are mostly of a general nature or expressed in broad hortatory ('best endeavours') terminology, such as the preamble to the Marrakesh Agreement Establishing the World Trade Organization, which recognizes the 'need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade'. Other agreements such as the Agreement on Agriculture, Agreement on Technical Barriers to Trade, and the Agreement on the Implementation of Article VI of the GATT 1994 ('Anti-dumping') call on Members 'to take fully into account',[22] 'give particular attention to',[23] and take 'special regard'[24] of the particular needs of developing countries when implementing their texts.

3. Provisions providing greater flexibility of commitments

Non-reciprocity still holds an important place in the WTO, with GATT 1994 incorporating all the provisions granting freedom to limit market access or provide support to domestic producers and exporters existing in GATT 1947 (as amended).[25] These GATT disciplines regarding market access are now buttressed, however, by various other provisions in the WTO Agreements including an ability under GATS to attach conditions to the establishment of certain foreign suppliers,[26] as well as GATS Article XIX.2 which mandates

[22] Preamble, Agreement on Agriculture.

[23] Article 12.2, Agreement on Technical Barriers to Trade.

[24] Article 15, Agreement on the Implementation of Article VI of the GATT 1994 ('Anti-dumping').

[25] These have been described earlier. They include Article XXXVI GATT 1947 and the 'Enabling Clause', which both allowed for non-reciprocity with respect to the removal or reduction of tariffs and other barriers to trade, as well as Article XVIII GATT 1947.

[26] For instance, the GATS Annex on Telecommunications offers a new dimension to S&D by setting out reasonable conditions of access to public telecommunications transport networks and services consonant with the need to strengthen domestic telecommunications infrastructure and increase participation (of the developing country Member) in international trade, see GATS, Annex 2, para 5(g).

that 'there shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, [and] progressively extending market access in line with their development situation . . .'. Furthermore, support to domestic producers now includes exemptions or more modest reductions in government support or subsidies under both the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures.[27] Of course, in addition to such S&D provisions, poorer Members may still use the generally available flexibility of binding tariffs at ceiling levels often significantly higher than autonomously applied rates. When taken together with provisions for longer transitional time periods, flexibility accounts for 48 of the 145 S&D provisions and has thus emerged as one of the most widespread instruments of S&D under the WTO.[28]

4. Provisions allowing for longer transitional time periods

Longer implementation periods are provided for in all WTO Agreements, with the exception of the Agreement on the Implementation of Article VI of GATT 1994 ('Anti-dumping') and the Agreement on Preshipment Inspection. According to the WTO, transitional time flexibility was 'intended to respond to shortfalls in institutional capacity within developing Members in the implementation of agreements and related commitments'.[29] In most cases flexibility takes the form of an agreed delay, on the part of developing countries, of certain or all provisions of the agreement concerned. For instance, the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS') generally granted developing countries a delay of up to five years (except for the national treatment and MFN commitments) and least-developed countries up to eleven years, after entry into force of the agreement, to bring their legislation into conformity with WTO disciplines. Furthermore, developing countries which were not providing product patents under their legislation were given an additional five years to comply with that obligation. The Agreement on Trade-Related Investment Measures ('TRIMS') gave least-developed countries, developing countries, and

[27] Under the Agreement on Agriculture, lower subsidy and domestic support reductions apply for developing country Members. Furthermore, investment subsidies for agriculture and agricultural inputs are exempt from domestic support reduction commitments (Article 6.2) and agricultural export subsidies are allowed for marketing costs as well as internal transport and freight charges during the implementation period (Article 9.4). The Agreement on Subsidies and Countervailing Measures, in recognition that subsidies may play an important role in economic developmental programmes, exempts developing countries with a per capita income of less than US$1,000 (and listed in Annex VII) from the prohibition on export subsidies (Article 27.2) while other developing countries have been given an eight-year transitional period to phase out such subsidies (Article 27.2(b)).

[28] WTO (2000a), above n 19, at 5. Exceeded only by provisions to safeguard the interests of developing country Members (category (2) above), which total 49.

[29] WTO (1999), above n 14, at 21.

developed countries seven, five, and two years, respectively, to phase out their inconsistent trade-related investment measures.

5. Provisions providing for technical assistance

In a similar vein, provisions calling for technical assistance support were a response to the emerging analytical consensus that institutional constraints are of major significance in inhibiting the integration of poorer and least-developed countries in the multilateral trading system.[30] Article 67 ('Technical Co-operation') of the Agreement on TRIPS is illustrative of how such a provision was drafted to address implementation in countries that often lacked a legal framework, the institutions, or the cultural background for intellectual property protection:

> In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial co-operation in favour of developing and least-developed country Members. Such co-operation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

Other areas in which technical assistance is envisaged include the Agreement on Technical Barriers to Trade (Articles 11 and 12.7), the Agreement on the Application of Sanitary and Phytosanitary Measures (Article 9), the Agreement on Preshipment Inspection (Article 1.2) and the Understanding on the Rules and Procedures Governing the Settlement of Disputes (Article 27.2).

6. Provisions relating to least-developed countries

All the S&D provisions of the WTO Agreements are also applicable to least-developed country Members ('LDCs'). As mentioned earlier, however, additional provisions within these five groups relate specifically to the LDCs. This tiering of benefits commenced with the 'Enabling Clause', which provided for special treatment of LDCs 'in the context of any general or specific measures in favour of developing countries', and has since manifested itself under, amongst others, the Agreement on Agriculture, which exempts LDCs from reduction commitments on domestic support, market access, and export subsidies and the Agreement on Subsidies and Countervailing Measures, which exempts LDCs from reduction commitments for export subsidies. Furthermore the TRIPS Agreement, TRIMS Agreement, and Agreement on the

[30] See C. Michalopoulos, 'The Role of Special and Differential Treatment for Developing Countries in the GATT and the World Trade Organization', 2000, Policy Research Working Paper No 2388, World Bank.

Application of Sanitary and Phytosanitary Measures all include extended transitional periods compared to developing countries.

II. SPECIAL AND DIFFERENTIAL TREATMENT IN A TRADE AND COMPETITION CONTEXT

A. The relevance of special and differential treatment to trade and competition

This review of the last fifty years shows that developing countries' participation in the international trading system has traditionally been guided by the concept of special and differential treatment ('S&D'), which in turn has been amplified with provisions on technical assistance and additional transition periods.

When examining the possible application of S&D in promoting development objectives in a trade and competition context a certain number of objective realities should be borne in mind at the outset. Firstly, only 90 or so of the WTO's 144 Members have competition regimes, of which more than half are less than 10 years old. Secondly, regardless of whether competition regimes have been put in place, developing countries face special challenges in establishing *effective* competition laws and policies. This is often attributable to problems of developing a 'competition culture', weak enforcement capabilities and court systems, as well as markets that may be characterized by high degrees of concentration and histories of state intervention which tend to facilitate lobbying by vested interests against the introduction of new competition.[31] More generally, there is the special challenge of developing the political will to see competition law enforced by individual governments against powerful interests.

The United Nations Conference on Trade and Development ('UNCTAD'), in a discussion focusing specifically on trade and competition, emphasized the importance from a development perspective of ensuring that such special conditions are not ignored. In this regard, it advocated adopting some form of S&D holding that the concept 'should be defended by the developing countries in any negotiation of a multilateral framework on competition in order to ensure that developing countries, and LDCs in particular, maintain the necessary flexibility in their competition regimes in accordance with their development objectives'.[32] Certainly, the S&D concept is incorporated in *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control*

[31] OECD (1999), *Trade and Competition Policies, Exploring Ways Forward*, 1999, Paris, at 13–24.

[32] UNCTAD (1999a), 'Preparing for Future Multilateral Trade Negotiations: Issues and Research Needs from a Development Perspective', UNCTAD/ITCD/TSB/6, September 1999, United Nations Conference on Trade and Development, Geneva.

of Restrictive Business Practices, which was negotiated internationally under the auspices of UNCTAD and adopted by the United Nations General Assembly in 1980.[33]

Developing countries have openly affirmed UNCTAD's calls for S&D in a trade and competition context.[34] As one developing country WTO Member put it, any agreement on trade and competition would have to integrate the development dimension in all its component parts, which 'included the application of special and differential treatment in a more effective and consistent way than hitherto'.[35] The need for innovative approaches to S&D at the trade and competition interface has also been voiced by other developing countries, who have suggested that this is an area where 'new proposals and solutions were needed'.[36] Such views reflect a broader consensus amongst participants of the WTO Working Group on the Interaction between Trade and Competition Policy of the need for 'a more focused discussion, in concrete terms, on ... special and differential treatment for developing countries'.[37]

In light of these calls, and S&D's renewed prominence in the Doha Ministerial Declaration, the time appears ripe to explore how S&D might apply in promoting developing countries' objectives at the trade and competition interface. That said, care should be taken to avoid S&D being used to delay or exempt the introduction of competition disciplines, where such disciplines would be of benefit to developing countries.

[33] In particular, Article 7 of Section C(iii) is titled 'Preferential or differential treatment for developing countries' and sets out that:

> In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:
>
> (a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and
>
> (b) Encouraging their economic development through regional or global arrangements among developing countries.

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, United Nations General Assembly, (35th Session), Resolution 35/63 of 5 December 1980.

[34] See for example, Communication from Uruguay, WTO Working Group on the Interaction between Trade and Competition Policy, 4 July 2001, WT/WGTCP/W/169, at 3–5.

[35] See intervention of Morocco at the WTO Working Group on the Interaction between Trade and Competition Policy, referred to in the Report of the Meeting of 5–6 July 2001, Note by the Secretariat, 14 August 2001, WT/WGTCP/M/15, para 13.

[36] See intervention of Venezuela at the WTO Working Group on the Interaction between Trade and Competition Policy, referred to in the Report of the Meeting of 15–16 June 2000, Note by the Secretariat, 15 September 2000, WT/WGTCP/M/11, para 41.

[37] WTO (2000b), 'Report (2000) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council', 30 November 2000, WT/WGTCP/4, para 76.

B. How could special and differential treatment be adopted?

Participants of the WTO Working Group on the Interaction between Trade and Competition Policy have pointed out that any future work programme on competition would need to pay heed to the diversity of, and asymmetries in, Members' economic situations, competition regimes, legal traditions, and cultural contexts to be effective.[38] Perhaps most significantly, the Working Group summarized that 'it was common ground that competition policy was not a field in which 'one size fits all''.[39]

For these reasons there is broad support for the view that any rule-making in the area be sufficiently flexible and progressive to accommodate the divergence of policies, institutions, and economic circumstances amongst WTO Members.[40] At Doha, this view crystallized into the future mandate for the WTO Working Group on the Interaction between Trade and Competition Policy, which sets out that '(f)ull account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them'.[41] The key question is then how best to incorporate such flexibility into potential rule-making initiatives? A number of options could be explored, including adopting the GATS formulation of S&D as a future model; utilizing a broad framework agreement allowing for exceptions and exemptions; exploring alternative modalities beyond the multilateral paradigm and the possibility of drawing greater distinctions amongst developing countries eligible for S&D. While these four options fall broadly under the third category of S&D set out in Part I, namely provisions ensuring flexibility of commitments, the final two categories of S&D described in Part I, of transitional time periods and technical assistance, may also prove relevant in a trade and competition policy context. The rest of this paper will therefore direct attention to, and evaluate the potential roles of, each of these six options. It concludes with a reminder that, while S&D could certainly play a role in promoting development in future rule-making initiatives, it has experienced increasing scrutiny in light of developing countries' continued marginalization in the multilateral trading system.

1. Potential relevance of the GATS formulation of S&D

The General Agreement on Trade in Services ('GATS') codifies an approach to liberalization that differs from that found in other WTO Agreements. The very structure of the agreement – its progressive approach to liberalization – allows scope and flexibility for the incorporation of development objectives

[38] Ibid, at para 76.

[39] Ibid, at para 28.

[40] Ibid, at paras 40 and 76. See also OECD (1999), above n 31, at 14–16.

[41] WTO Ministerial Declaration, above n 1, at para 25.

throughout its text. For example, market access and national treatment are negotiated concessions relating to a particular service sector or subsector on the basis of positive voluntary undertakings, allowing for more gradual trade liberalization and providing for policy flexibility in sectors where countries do not feel able or willing to contemplate such liberalization. That is, WTO Members can choose the sectors in which they liberalize trade ('positive listing') and can place conditions and limits upon that liberalization, provided those limits are scheduled ('negative listing'). Some developing countries have noted that the structure of the GATS contributes to it being a more 'development friendly' agreement.

Moreover in terms of specific S&D treatment, under Article XIX.2 ('Negotiation of Specific Commitments'), developing countries are explicitly given the flexibility to open fewer sectors, liberalize fewer types of transactions and progressively extend market access in line with their development situation. Furthermore, when making access to their markets available to foreign service suppliers, they are entitled to attach to such access certain conditions aimed at achieving the objectives referred to in Article IV ('Increasing Participation of Developing Countries'). This latter article foresees the participation of developing countries in the liberalization of services sectors to be gradual and to proceed according to the development requirements of each Member.[42]

While the GATS provides a potentially useful model, perhaps one of its weaknesses is the lack of a specific mechanism to operationalize the provisions of Article IV, and thus enforce them.[43] The enforceability of S&D provisions has been a key concern of developing countries, who claim that they are either too broad and general in nature or merely hortatory clauses that do not create legally enforceable obligations.[44] Thus, one initial suggestion could be for any S&D provisions adopted in a trade and competition context to be drafted in sufficiently precise language, or to include monitoring or follow-up procedures, so as to better hold Members accountable for implementing them.

The GATS framework also begs the question of the scope that may exist for addressing core elements of the trade and competition interface in the

[42] Increased participation is intended to be achieved through the negotiation of specific commitments, relating to: (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia,* through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and information networks; and (c) the liberalization of market access in sectors and modes of supply of priority export interest to them.

[43] See developing country concerns as set out in WTO (1999), above n 14, at 26.

[44] See statement by Ambassador Narayanan of India at the 4th Session of the WTO Seminar on Special and Differential Treatment for Developing Countries, 7 March 2000, World Trade Organization, Geneva, available at http://www.wto.org/english/tratop>e/devel>e/sem01>e/sdtind>e.htm (visited 13 November 2002). Edwini Kessie, following an extensive examination of the legal enforceability of S&D provisions, has opined that 'at the moment, much of the WTO provisions dealing with special and differential treatment could be said to be unenforceable, as they are expressed in imprecise and hortatory language', see Kessie, above n 16, at 975.

context of sectoral negotiations. The 1997 Agreement on Basic Telecommunications ('ABT') broke important ground in this regard by incorporating a number of competition-like disciplines in a Reference Paper appended to it (for example abuse of dominance). Certainly the ABT has prompted several observers to argue that the GATS offered a useful way to achieve incipient multilateralization of competition disciplines in a trade context.[45]

2. A broad framework agreement with exceptions and exemptions

Another option for achieving flexibility and progressivity might be the possibility of a broad framework agreement on competition policy focusing on certain core principles such as transparency, non-discrimination, and a common commitment to treat hard-core cartels.[46] Proponents of such an approach have also suggested progressive commitments to have a competition law and an independent authority to administer it buttressed by capacity building, technical assistance, and various co-operation modalities.[47]

Significantly, the proposals currently on the table are not calling for harmonization of substantive competition law regimes leaving large areas of policy open to domestic interpretation. This has been argued to provide the flexibility and progressivity necessary for countries to respond to their developmental challenges, in particular by allowing for exceptions, exemptions, and exclusions to national regimes.[48] Such exceptions and exemptions could be sectoral or non-sectoral in nature. Sectoral exceptions and exemptions may entirely or partially exclude sectors from competition policy; while non-sectoral exceptions and exemptions would tend to be more horizontal in nature, referring to specific categories of conduct, business arrangements, or

[45] See P. Sauvé, 'Developing Countries and GATS 2000 Round', 34(2) Journal of World Trade (2000), at 85–92; and A. Mattoo, 'Developing Countries in the New Round of GATS Negotiations: From a Defensive to a Pro-Active Role', paper prepared for a WTO/World Bank Conference on *Developing Countries in a Millennium Round*, 20–21 September 1999, Geneva. Further attention to competition disciplines will likely be required when various other service sectors are addressed in future GATS negotiations (e.g. energy and both air and maritime transport services).

[46] The European Community and its Member States is one of the leading advocates of such an approach. Their ideas have been elucidated in the WTO Working Party on the Interaction between Trade and Competition Policy, notably its communication on 'A Multilateral Framework Agreement on Competition Policy', 25 September 2000, WT/WGTCP/W/152. This should be read in conjunction with communications on 'A WTO Competition Agreement and Development', 26 July 2001, WT/WGTCP/W/175; and 'The Development Dimension of Trade and Competition Policy', 8 June 2000, WT/WGTCP/W/140. Amongst others, Canada and the Czech Republic concur with such an approach as reflected in their communications to the WTO Working Party on the Interaction between Trade and Competition Policy set out in WT/WGTCP/W/174 of 28 June 2001; and WT/WGTCP/W/165 of 26 July 2001 respectively.

[47] These proposals are described in detail in the WTO communications cited above.

[48] While the terms 'exception', 'exemption', and 'exclusion' can have specific meanings in the context of particular national legal systems, at a general level the terms have been used somewhat interchangeably in trade and competition discussions to date. Hereinafter this paper refers to all three categories as 'exceptions and exemptions'.

practices.[49] The distinction between these two types of exceptions and exemptions is significant from the perspective of policy formulation, albeit that they are not necessarily mutually exclusive and are often considered together in discussions on this option at the trade and competition interface.

An approach allowing for exceptions and exemptions, accords with the preference of some developing countries. For instance, speaking from the perspective of a small developing economy, Trinidad and Tobago has suggested that 'flexibility in developing a competition regime refers to the substance of each country's national competition law'.[50] This it equated with the ability to choose from a menu of prohibitions which could be embodied in a competition law those aspects that are relevant for a particular economy given its market structure, level of development, prevalent types of anti-competitive conduct, and special characteristics. Critically, this was argued to mean 'that some aspects of competition law may not be relevant for that economy, or may have to be tempered to complement government's development (industrial) policy, through the use of exemptions or exclusions'.[51] For example, a small open economy might not need merger control regulation where effective competition was already provided by imports, might require concentrations for efficiency-related reasons, or may wish to exempt exclusionary distribution agreements where, for instance, the peculiarities of smallness could necessitate that a distributor not carry competing products.

Similarly the European Commission has acknowledged the potential of exceptions and exemptions as 'another avenue through which governments could ensure that competition law did not adversely affect . . . development related objectives'.[52] Canada appears to have adopted a similar rationale arguing that, by leaving open the possibility for a government to provide specific exceptions and exemptions, 'it is clear that a multilateral agreement on competition policies would not entail any necessary conflict with domestic policies with respect to economic development'.[53] In addition the UNCTAD Secret-

[49] This basic distinction between sectoral and non-sectoral exceptions and exemptions mirrors that adopted in WTO (2001), 'Exceptions, Exemptions and Exclusions Contained in Members' National Competition Legislation', Note by the Secretariat, 6 July 2001, WT/WGTCP/W/172. It lists non-sectoral exceptions and exemptions as practices and arrangements including, *inter alia,* statutory monopolies, small and medium enterprises, research and development agreements, efficiency enhancing measures, and other efficiency enhancing arrangements.

[50] See the intervention of Trinidad and Tobago at the WTO Working Group on the Interaction between Trade and Competition Policy, referred to in Report of the Meeting of 5–6 July 2001, Note by the Secretariat, 14 August 2001, WT/WGTCP/M/15, para 28.

[51] Ibid. Morocco has also called for ' . . . safeguards for national strategic objectives in the form of exemptions', see WTO Working Group on the Interaction between Trade and Competition Policy, Report of the Meeting of 5–6 July 2001, Note by the Secretariat, 14 August 2001, WT/WGTCP/M/15, para 13.

[52] WTO Working Group on the Interaction between Trade and Competition Policy, Report of the Meeting of 5–6 July 2001, Note by the Secretariat, 14 August 2001, WT/WGTCP/M/15, para 9.

[53] See Communication from Canada, WTO Working Group on the Interaction between Trade and Competition Policy, 28 June 2001, WT/WGTCP/W/174, p 3.

ariat, in the context of calls that S&D be considered in greater depth by the trade and competition community, has also advocated that '(f)rom a development perspective, exemptions were important to developing countries . . . [and that] (g)reater flexibility should be granted for least developed countries in the area of exemptions and exceptions'.[54]

Certainly many developed and developing country competition regimes already feature both sectoral and non-sectoral exceptions and exemptions. For example, sectoral exemptions to competition policy are well established in a number of OECD countries, as illustrated in an OECD study examining the coverage, limitations, and exclusions of sectors in 10 OECD countries and the European Community.[55] A subsequent WTO Secretariat Note, building upon the OECD study, suggests that in addition to sectoral exemptions there is also an abundance of non-sectoral exceptions and exemptions amongst the broader WTO Membership.[56]

One of the underlying questions that arises, however, is the extent to which such exceptions and exemptions truly support development efforts. This question has been flagged within the WTO Working Group on Interaction between Trade and Competition Policy where one Member has suggested that, when discussing exceptions and exemptions, it was 'important not to lose sight of the fact that competition law and policy were important to sound economic development and . . . [therefore] to ensure that the underlying objective of promoting effective competition laws and policies continued to be the top priority'.[57] Such concerns seem to be corroborated by a recent Japanese study summarizing, from a historical perspective, the effects of its competition policy and exemption systems for its post-war economic development.[58] The study highlights that much of Japan's economic dynamism at

[54] See intervention from UNCTAD, WTO Working Group on the Interaction between Trade and Competition Policy, Report of the Meeting of 22–23 March 2001, Note by the Secretariat, 2 July 2001,WT/WGTCP/M/14, para 19. The UNCTAD Secretariat has also specifically singled out the potential developmental benefits of *sectoral* exceptions and exemptions for developing countries and therefore that 'the special and differential treatment of developing countries . . . could encompass the right to exempt sectors from national competition rules for development reasons', see UNCTAD (1999b), *Trade and Development Report 1999*, UNCTAD/TDR/(1999), United Nations Conference on Trade and Development, Geneva, at 43.

[55] See OECD (1996), *Antitrust and Market Access: The Scope and Coverage of Competition Laws and Implications for Trade*, 1996, Paris. The jurisdictions reviewed were those of Canada, France, Germany, Hungary, Japan, Mexico, Portugal, Sweden, the United Kingdom, the United States, and the European Community.

[56] See WTO (2001), above n 49. Uruguay has also conducted a comparative study of exceptions and exemptions from national competition legislation which reveals their wide breadth and use in both developed and developing countries, see Communication from Uruguay, WTO Working Group on the Interaction between Trade and Competition Policy, 4 July 2001, WT/WGTCP/W/109, at 3–5.

[57] United States, WTO Working Group on the Interaction between Trade and Competition Policy, Report of the Meeting of 5–6 July 2001, Note by the Secretariat, 14 August 2001, WT/WGTCP/M/15, para 30.

[58] See Communication from Japan, 'Competition Policies and Exemption Systems', WTO Working Group on the Interaction between Trade and Competition Policy, 4 July 2001, WT/WGTCP/W/177.

that time was in fact rooted in robust competition, rather than industrial policy, which allowed many promising new industries (such as the automotive, semiconductor, and animation industries) to actually sharpen their competitive edge. Notably, while not rejecting exemptions *per se*, the study suggests that developing countries limit exemption systems as 'Japan's experience indicates that international competitiveness can eventually be further strengthened by increasing competition among domestic companies, rather than regulating competition through exemptions'.[59] Japan's conclusion is succinct, 'we believe that exemption systems themselves have nothing to do with industrial development'.[60]

Determining the true extent to which exceptions and exemptions may support development efforts is likely to require further analysis of both sectoral and non-sectoral approaches. The answers seem less than clear. Sectorally, for example, while a number of delegations to the WTO have alluded to the potential developmental benefits of a flexible and progressive approach,[61] OECD research of competition exceptions and exemptions in industrialized countries suggests a different conclusion, holding that 'such exceptions to the legal coverage of competition law should be constantly reviewed and tested . . . with a view to their progressive elimination'.[62] Supporting that end, OECD analysis has determined that 'exemptions have reduced economic performance by allowing anti-competitive practices – such as abuses of a dominant position, cartel conduct and anti-competitive mergers . . . [and therefore that] (a)n essential reform is to reverse such exemptions and apply the general competition law as widely as possible'.[63] While these OECD conclusions should be tempered by the fact that they relate to competition policy in industrialized countries, and do not specifically address the unique position of developing countries, the divergent messages should be closely considered. At the same time, this is not to imply that excluding a sector or subjecting it to special rules necessarily indicates 'weak' competition policy nor protectionist motives.[64] In fact, reflecting the rule-of-reason nature of competition policy, exclusions and special rules may be based on domestic judgements resting on considerations 'appropriate' to accepted competition policy principles. These various considerations highlight the complexities of

[59] Ibid, at 5.

[60] Ibid, at 5.

[61] See text at nn 50 to 54 above.

[62] See Communication from the OECD, WTO Working Group on the Interaction of Trade and Competition Policy, 29 July 1997, WT/WGTCP/W/21, para 17.

[63] OECD (1997), *The OECD Report on Regulatory Reform: Synthesis*, 1997, Paris, at 32. The synthesis report goes on to makes calls to 'eliminate sectoral gaps in the coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways'.

[64] For example, in OECD (1996), 'natural monopoly', economies of scale, and market failure considerations were invoked to support exclusions or special treatment of certain sectors, see above n 55, at 17.

drawing conclusions in this area. One inevitable conclusion, however, is that further analysis remains necessary prior to embarking on international rule-making in this area. Certainly one developing country WTO Member, in response to suggestions that conflicts between industrial and developmental policies could be dealt with using sectoral exemptions, highlighted that 'clarity was needed in relation to that possibility since it would reconcile sectoral policy objectives and competition policy interests'.[65]

3. Examining alternative modalities beyond the multilateral paradigm

The Doha Ministerial Declaration's chapter on trade and competition is perhaps one of the most convoluted to emerge from the conference. One particular instance is the Ministers' recognition of both the case for 'a multilateral framework' to enhance the contribution of competition policy to international trade and development, while at the same time agreeing that negotiations will be contingent upon a decision on 'modalities of negotiation'.[66]

Presumably this means that alternative modalities of negotiation, and ultimate agreement, beyond the multilateral paradigm could be explored. Certainly, the WTO Working Group on the Interaction between Trade and Competition Policy noted before the conference that 'the Group should not be hide bound to pursuing a particular modality'.[67] As noted earlier, only 90 or so of the WTO's 144 Members have competition regimes of which the majority are of recent vintage. This fact could lead one to question the likelihood of consensus on a multilateral agreement on competition policy. Notably, developing countries have expressed some reservations that such an approach might impede their ability to pursue pro-development industrial policies or other development policy options.[68] Accordingly, attention has been devoted to various alternatives including plurilateral, regional, and bilateral arrangements.[69] To date, discussions to determine which of these variable geometry mechanisms would best address the development dimension of the trade and competition interface have not reached consensus,[70] with a general feeling that it is too early to reach conclusions.[71] Nonetheless there appears to be agreement that the different approaches are not necessarily mutually exclusive and may be complementary.[72]

[65] Colombia, WTO Working Group on the Interaction between Trade and Competition Policy, 14 August 2001, WT/WGTCP/M/15, para 15.

[66] WTO Ministerial Declaration, above n 1, paras 23–25.

[67] WTO (2000b), above n 37, para 40.

[68] WTO (2000b), above n 37, paras 14, 26, and 30.

[69] See for example the elucidation in OECD (1999), above n 31, at 16–20.

[70] OECD (1999), above n 31, at 17.

[71] WTO (2000b), above n 37, paras 17 and 87, acknowledging that 'not all questions were resolved as to which elements could most usefully be addressed at the bilateral, regional and multilateral levels', and setting out demands for further study including cost-benefit analysis.

[72] OECD (1999), above n 31, at 17.

In light of the open-ended mandate to emerge from Doha, and the WTO Working Group's suggestion to consider various modality options, while not technically falling under the traditional categories of S&D, a European Commission proposal concerning the negotiation of a trade and competition agreement continues to warrant attention.[73] In summary, the proposal called for negotiation by all Members, but with a negotiating mandate allowing countries the freedom to opt-out of the agreement towards the end of negotiations. The advantage of such an approach is seen as alleviating developing country concerns of entering negotiations on rules beyond their capacity to handle or implement.[74] Provided the opt-out is used, the proposal would therefore ultimately result in a movement away from a multilateral framework to a plurilateral one in trade and competition policy-making. Significantly, the 'Like Minded Group' of developing countries[75] has also voiced support for giving developing countries leeway to delay or opt-out of some agreements negotiated in any new trade round on the basis 'that the application of the concept of the Single Undertaking for developing countries should not be automatic'.[76]

4. Should distinctions be drawn between different categories of developing countries?

There are two questions of relevance here. Firstly, whether the current distinctions and tiering of LDCs (as well as occasionally Annex VII and net food-importing developing countries) compared to developing countries, adopted in many of the existing WTO Agreements, would be desirable in future policy and rule-making relating to competition and trade. Secondly, whether further distinctions should be made within these categories such as distinguishing between small or micro and large developing economies.

Logic suggests that distinctions between developing countries are needed so as to target S&D where it is most needed. Certainly, it has been pointed out that, at the most basic level, no single system can pretend to address the interests and concerns of all developing countries nor produce the most effective remedies to address them (especially in light of vastly differing capacities to adopt them).[77] As one commentator put it 'defining *who* might be

[73] EU Commission Paper: *State of Play and Strategy for the New WTO Round*, Note for the Attention of the 133 Committee, Brussels, 13 December 2000.

[74] Perhaps one immediate concern is whether this model is likely to include developing countries at the final stage. The EU Commission Paper states that it believes that 'most Members' will join such an agreement clarifying that both the 'key countries', which the paper leaves undefined, and countries that already have a competition law will be attracted to joining this type of agreement, ibid.

[75] Consisting of Pakistan, India, Malaysia, Indonesia, Zimbabwe, Uganda, Tanzania, Sri Lanka, Kenya, Honduras, the Dominican Republic, and Cuba.

[76] See 'Developing Countries Propose New Negotiating Areas for Doha', 19(38) *Inside US Trade* (21 September 2001), at 6.

[77] OECD (2001), *The Development Dimensions of Trade*, 2001, Paris, at 80.

eligible for S&D is crucial to ensure those who genuinely need latitude get it'.[78] Furthermore, as trade and competition is an area where one size does not fit all, it would appear a likely candidate for at least some form of differentiated treatment amongst developing countries.

More contentious is how to achieve such differentiation. Targeting a select group may lead to the remaining, and more general, S&D provisions becoming less responsive to those developing countries outside the group. One solution might be for more advanced developing countries to abandon or graduate from the groups as their trade and economic situations improve.[79] Another option for differentiation in a trade and competition context may be the *size* of the developing country economy. As noted earlier, small or micro developing economies may have quite different competition requirements precisely due to the peculiarities of smallness. In addition to special flexibility requirements, one such economy has also emphasized that progressivity, in terms of the gradual and selective introduction of instruments to control anti-competitive behaviour, is also 'particularly important for small economies because of the lack of human and financial resources for the initial establishment of a competition regime'.[80] Another potential reason for differentiating the trade and competition obligations of small or micro economies from larger ones relates to the possibility that such countries may assume their commitments at a regional rather than national level. Certainly, as the potential merits of such an approach gain increased recognition so are demands made that any future agreements be sufficiently flexible to accommodate such an option.[81]

5. The role of technical assistance and capacity building

No matter what mix of variable geometry is adopted, there appears to be almost universal consensus amongst observers and WTO Members that both technical assistance and capacity building will be necessary to aid in implementing effective competition laws and policies. The Doha Ministerial Declaration's competition chapter lays heavy emphasis on 'the need for enhanced technical assistance and capacity building' for developing and least-developed countries in this area.[82] Within the WTO Working Group on the Interaction between Trade and Competition Policy it has been common

[78] See E. Drage, Presentation made at the OECD Global Forum for Trade, 'Trade Policy Issues: The Labour, Environmental and Competition Dimensions', Paris, 8–9 March 2001, available at: http://www1.oecd.org//ech/globalforum/programme.htm (visited 13 November 2002).

[79] OECD (2001), above n 77, at 80.

[80] Trinidad and Tobago, WTO Working Group on the Interaction between Trade and Competition Policy, 14 August 2001, WT/WGTCP/M/15, para 29.

[81] See WTO Working Group on the Interaction between Trade and Competition Policy, 14 August 2001, WT/WGTCP/M/15, para 61.

[82] WTO Ministerial Declaration, above n 1, at para 23.

ground that such assistance is essential for meaningful progress.[83] In other fora, technical assistance has also been requested prior to any negotiations to compensate for the relative lack of knowledge and resources on competition policy issues and thus allow developing countries to take part as full participants and rule-makers.[84]

When considering the mechanics of applying this arm of S&D in the trade and competition context, it should be noted that the effectiveness of the existing technical assistance provisions in the current WTO Agreements has come under considerable scrutiny. Certainly, the implementation of commitments has become a key area of the WTO's work programme since 2000, when it became obvious that many developing countries were encountering significant difficulties in putting in place the necessary administrative, institutional, and legal machinery to meet their obligations. One of the most common observations is that the technical assistance and capacity building commitments aimed at addressing developing countries' institutional constraints failed to adequately recognize the true costs to prepare, enact, and enforce new legislation, as well as failing to provide the flexibility to accommodate country-specific situations and capacities.[85] Furthermore, it has been suggested that the effectiveness of the technical assistance that has been provided in the past has often been mitigated due to it being supply driven, not effectively co-ordinated, and not 'owned' by the recipient countries.[86] Thus, in addition to increases in such assistance,[87] WTO Members have emphasized the importance of matching it more closely to the specific needs of the individual countries.[88] These concerns will need to be addressed if a WTO Agreement on trade and competition is to promote development objectives.

[83] WTO (2000b), above n 37, at paras 63 and 86.

[84] OECD (1999), above n 31, at 14. For a critical yet also forward-looking discussion of the role of technical assistance and capacity building in a trade and competition context, see I. Garcia Bercero and S. Amarasinha, 'Moving the Trade and Competition Debate Forward', 4(3) JIEL (2001), at 499.

[85] A second possible contributing factor to the implementation problems currently faced has less to do with the practical difficulties in dealing with new commitments and more to do with the view that some of the commitments entered into during the Uruguay Round may be unduly onerous, unsupportive of development, or simply not in the national interest.

[86] Jan Pronk, as Chairman of the WTO High Level Meeting on Integrated Initiatives for Least Developed Countries, commented that ' . . . foreign assistance can help, but often did not. Too often supply driven assistance and incoherent diagnoses from a wide range of development agencies, undercut the domestic will to reform: too much expatriate technical assistance and proliferation of donor schemes overtaxed the domestic capacity to reform and led to confusion and duplication', see WTO High Level Meeting on Integrated Initiatives for Least Developed Countries, 27 October 2000, World Trade Organization, Geneva.

[87] It has been pointed out that trade-related technical assistance accounted for less than 2% of ODA provided by OECD countries, which allegedly does not correspond with the promises made during the multilateral trade negotiations, UNCTAD (1999a), above n 32, at 141. This situation improved on 11 March 2002, however, when WTO Member Governments pledged CHF 30 million for trade-related technical assistance to the Doha Development Agenda Global Trust Fund.

[88] WTO (1999), above n 14, at 26.

6. The role of transition periods

The benefit of S&D in the form of transition periods is much less clear. Some developing countries have called for transition periods comparable to those that might be granted before they eliminate tariff protection for a sector, supposedly due to fears that dislocations caused by increased international competition risk unemployment and failure of domestic firms.[89] Outside the S&D context, this rationale has been largely discredited by World Bank and OECD competition policy experts, who have pointed out that permitting domestic firms to create cartels and abuse their monopoly positions is not an efficient means of preventing such dislocation.[90] The historical experience of Korea appears to support this theory, where failure to implement competition policy at a sufficiently early stage in the development process necessitated costly industrial restructuring later on, leading it to conclude that 'if competition policy had been introduced earlier, Korea's economic development would have been achieved in a more balanced and sound manner'.[91]

On the other hand, it is true that there are considerable hurdles to establishing the institutional capacity to implement and enforce competition laws or policies.[92] The extent to which this fact might warrant a transition period would depend upon the nature of the obligation to which S&D might apply. For example, it would take a developing country a very long time to implement a comprehensive law enforcement regime comparable to those of OECD Members, but a much shorter period to enact and begin implementing the laws themselves.[93] In this regard, however, lessons must be drawn from previous criticisms concerning the realism of the time extensions given in other WTO Agreements in light of the actual time frames required to build

[89] OECD (1999), above n 31, at 13.

[90] See for example, T. Winslow, 'OECD Competition Law Recommendations, Developing Countries, and Possible WTO Competition Rules', 3(1) OECD Journal of Competition Law and Policy (2001), Paris.

[91] Submission from the Republic of Korea, WTO Working Group on the Interaction between Trade and Competition Policy, 10 December 1997, WT/WGTCP/W/56, para 13. More recently, a communication from the Republic of Korea to the Working Group set out that 'Korea's experience illustrates that it is better to introduce a competition regime at the initial stage of economic growth, when monopolies have not yet gained political and economic power', see Communication from the Republic of Korea, 26 June 2001, WT/WGTCP/W/166, para 11.

[92] WTO (2000b), above n 37, at para 18.

[93] A commentator who has advocated a comprehensive set of international competition policies under the ambit of the WTO, contemplated at least seven years for full implementation of its provisions to give nations not only the opportunity to observe the process evolve before making a full commitment but also to reflect the gradual pace at which both individual nations and the European Community introduced and expanded their competition policies, see F. M. Scherer, *Competition Policies for an Integrated World Economy* (Washington D.C., The Brookings Institution, 1994), especially at 89–97. Notably, the seven-year transition period of that proposal was not specifically to address developing countries' implementation difficulties, for which longer phase-in periods might be appropriate. On the other hand, it appears that some developing countries have established competent competition law enforcement regimes in less than seven years.

the institutional capacity needed for full implementation of the obligations.[94] Certainly, in some cases, the time limits for the extensions have already passed and there is little evidence that countries have made sufficient progress towards full implementation. Consequently, the time frames have been called arbitrary, and it has been argued that they should be determined in a more systematic way by linking them with individual countries' specific capacities and needs.[95] Worth reiterating, however, is the broad consensus in a trade and competition context against transitional time periods delaying commitments to treat certain key anti-competitive practices such as hard-core cartels.

CONCLUDING REMARKS

Global trends regarding trade liberalization, while positive overall, have not benefited developing countries equally, raising a number of broad concerns regarding the effectiveness and future relevance of S&D in promoting development.[96] The challenges to S&D have been extensive, leading some to query whether it should remain an integral part of the multilateral trading system at all.[97] Certainly, there has been increasing questioning of one of the fundamental premises of S&D, namely that less liberal trade policies are optimal for developing countries.[98] This line of questioning points to a growing body of analytical and empirical work suggesting that developing country exemptions have had negative effects, culminating in the view that certain trade policies need not differ along development lines. In this regard S&D has at times been described as 'ideological baggage' and an infant industry 'crutch' which has actually hindered development and competitiveness.[99]

Any discussion on the possible application of S&D in a trade and competi-

[94] WTO (1999), above n 14, at 26.

[95] Certainly the WTO reports concerns raised by developing countries that the time periods do not always give sufficient time to deal with specific shortfalls in capacity that are faced by individual Members, or with their precise development needs, see WTO (1999), above n 14, at 26. See also Michalopolous who states that '(o)ne of the more urgent issues that should be the subject of a systematic review of the implementation of special and differential treatment of developing countries is the time limits set for full implementation of certain provisions of the agreements relative to the institutional capacity to do so', see Michalopolous, above n 30, at 22.

[96] See OECD (2001), above n 77, at 74; Michalopoulos, above n 30, at 24; and Pangetsu, above n 13, at 1293.

[97] A number of papers summarize developing countries' concerns with S&D. See in particular, OECD (2001), above n 77, at 74–85; and WTO (1999), above n 14, at 25–26. According to UNCTAD, S& D provisions were incorporated in an *ad hoc* manner without a guiding consensus on how developing countries' needs should be reflected in WTO principles and rules, see UNCTAD (1999a), above n 32, at 137.

[98] Michalopoulos, above n 30, at 24, 30; T. Srinivasan, 'Developing Countries in the World Trading System: From GATT 1947 to the Third Ministerial Meeting of the WTO, 1999', 22(8) The World Economy (1999), at 1047–1064; and generally J. Finger and L. Winters, 'What Can the WTO Do for Developing Countries?', in A. Krueger (ed), *The WTO as an International Organization,* (Chicago and London: University of Chicago Press 1998).

[99] Concerns referred to in UNCTAD (1999a), above n 32, at 137.

tion context will need to bear these fundamental concerns in mind. In particular, as emphasized at the outset, care should be taken to avoid S&D being used to delay or exempt the introduction of competition disciplines, where such disciplines would be of benefit to developing countries. In this regard, the paper has highlighted where opinions differ or empirical evidence is lacking on the developmental value of exceptions and exemptions to competition regimes. The analysis also draws attention to the fact that the role of transition periods and the optimal phasing in of competition policy remain contentious questions.

Nonetheless there is a growing consensus, reflected in the Doha Ministerial Declaration, on the need for flexibility and progressivity in order to promote development objectives in any future trade and competition rule-making initiatives. This paper argues that S&D provides a mechanism for achieving these goals and thus to address the special challenges faced by developing countries at this policy interface. At the same time, simply importing prior S&D models and assumptions will not do. Thinking beyond traditional paradigms is thus required. This paper, and the various S&D options it explores, hopes to engage this necessary debate.