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THE ROLE OF "SPECIAL AND DIFFERENTIAL TREATMENT" AT THE TRADE, COMPETITION AND DEVELOPMENT INTERFACE

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THE ROLE OF "SPECIAL AND DIFFERENTIAL TREATMENT" AT THE TRADE, COMPETITION AND DEVELOPMENT INTERFACE

1. In October 2000 the Secretariat prepared a scoping paper on Possible Future Work for the Joint Group on Trade and Competition addressing the "development dimension" of the trade and competition debate. That paper identified, in the form of broad questions, several substantive elements of the trade, competition and development interface worthy of further analytical attention.

2. The purpose of this note is to outline and critically evaluate one of the key topics identified for future work, being the relevance of the principle of "special and differential treatment", as applied in the various WTO Agreements, to the implementation of future international agreements on competition law.

Introduction

3. Historically, the concept of "Differential and More Favourable Treatment" has been at the forefront of efforts of the GATT and WTO to facilitate the integration of developing countries into the multilateral trading system. The term that has since developed is that of "special and differential treatment" (S&D) and the aim of this paper is to review its evolution and application to date in order to critically evaluate its potential applicability at the interface of trade and competition policy.

4. This note is structured in two parts, Part I examines the origins, evolution and current S&D provisions in the GATT and WTO. A number of recent papers have dealt with such a review and a summary of the salient points is presented.[1] Part II, then addresses S&D in a trade and competition context by first examining its broad relevance and then identifying a number of options to best formulate and implement the concept in order to most effectively advance development concerns in the trade and competition context.

5. The note does not intend to prejudge whether negotiations on the subject of trade and competition will be initiated in the future or whether, if so, these should be conducted within the WTO. These are questions on which there is a wide divergence of views, both amongst OECD Members and the broader WTO Membership. Rather, the note focuses on the specific issue of the *potential* role of S&D in future rule-making initiatives without engaging a broader policy debate. Consistent with this approach the discussion, at times, remains necessarily preliminary in scope.

1 Most recently see Chapter V of OECD (2001); and WTO (1999).

PART I

A. The origins and evolution of special and differential treatment provisions in the GATT

6. The manner in which the international community sought to accommodate the specific concerns of developing countries in the period between the early 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 emphasise 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 liberalising their own trade and in part by being extended preferential access to others' markets.

7. When the GATT was established in 1947, eleven of the original twenty-three signatories were developing countries.[2] 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.[3] 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".

8. While the original GATT (GATT 1947) 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 industrial countries. Developing countries initially pressed for measures which 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 export subsidies for manufactured goods, and Article XXVIII*bis* which permitted more flexible tariff protection.

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

3 The preamble of GATT 1947 stressed the importance of substantially reducing discriminatory treatment and emphasised reciprocal and mutually advantageous arrangements.

9. At this stage, developing countries were described as those "the economies of 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 WTO of what constitutes a "developing country". Rather GATT Contracting Parties have self selected their designation, most recently when the WTO was created.[4] In the remainder of this note, reference to developing countries follows WTO practice.

10. 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 GATT specifically addressing "Trade and Development" at the end of the Kennedy Round in 1964.[5] Part IV contained three new articles setting out various obligations including, Article XXXVI ("Principles and Objectives") recognising 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.

11. It was perhaps most significant, however, for formalising 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". [6]

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.

12. 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 Generalised System of Preferences (GSP)[7] as well as

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4 However other Members can challenge the proclamation as a developing country, which can then lead to negotiations to clarify the position. For countries that have negotiated to join the WTO after 1995, their status is a matter taken up during accession negotiations.

5 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.

6 See GATT, COM.TD/W/37, p9.

7 The Generalised System of Preferences was proposed under the auspices of UNCTAD in 1964 and implemented in 1971 to recognise "agreement in favour of the early establishment of a mutually acceptable system of generalised, non-reciprocal and non-discriminatory preferences which would be beneficial to developing countries" (UNCTAD Resn 21 (II)).

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 (LDCs),[8] and thus introduced a two-tier developing country concept.

B. Shifting perceptions on special and differential treatment

13. Despite the introduction of these various S&D provisions, by the 1980s it was becoming apparent that they had not reversed developing countries' marginalisation 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.

14. 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.[9]

15. Furthermore, 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' export interests.[10] Furthermore, market access preferences began to be questioned especially as GSP preferences became less effective as margins of preference were eroded with periodic reductions of MFN 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 Multifibre Arrangement.[11]

16. 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.[12] Notably, they did not seek exemption from the multilateral trade agreements accepting the "single undertaking" approach of the Round.[13]

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8 Unlike developing countries, the WTO designates LDCs in accordance with the United Nations' official list of LDCs, which currently totals forty-nine countries of which 29 are WTO Members.

9 See Pangetsu (2001), p. 1289.

10 WTO (1999), p. 17.

11 Now the ATC, WTO (1999), p. 17.

12 Although this is not to say that they were critical of all aspects of S&D and continued to advocate for preferential access to developed country markets, see Kessie (2000), p. 962.

13 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.

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 become 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.[14]

C. Special and differential treatment provisions under the WTO Agreements

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

(i) provisions aimed at increasing trade opportunities through market access;
(ii) provisions requiring WTO Members to safeguard the interests of developing countries;
(iii) provisions providing greater flexibility of commitments;
(iv) provisions allowing for longer transitional time periods; and
(v) provisions providing for technical assistance.

Additional provisions within these five groups relate specifically to the least-developed countries.[15]

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.[16] Each of these categories is briefly outlined below, while Annex 1 provides a more detailed listing of the S&D provisions contained in the Uruguay Round Agreements.[17]

(i) Provisions aimed at increasing trade opportunities through market access

20. The 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 GATT 1994. Notably, Part IV of GATT 1994 ("Trade and Development") 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" remains in force.

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14 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)nsuprisingly, giving few concessions of their own, poor countries got little in return. If you want a free lunch, you can hardly expect a banquet".

15 WTO (2000*a*), p. 3; and WTO (1999), p. 18.

16 As John Whalley summarised, "(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 Whalley (1999), p. 1073.

17 See Annex 1. [Which matches Annex II of WTO (1999)]

21. Article IV of the General Agreement on Trade in Services (GATS) 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 liberalisation of market access in sectors and modes of supply of export interest to them.

(ii) Provisions requiring WTO Members to safeguard the interests of developing countries

22. The WTO Agreements contain many preambular, as well as general provisions, calling on Members to implement the agreements in ways that recognise 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 Organisation which recognises 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 (TBT) and the Agreement on the Implementation of Article VI of the GATT 1994 (Anti-dumping) call on Members "to take fully into account",[18] "give particular attention to"[19] and take "special regard"[20] of the particular needs of developing countries when implementing their texts.

(iii) Provisions providing greater flexibility of commitments

23. 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).[21] WTO disciplines regarding market access are buttressed, however, by an ability to attach conditions to the establishment of certain foreign suppliers[22] while GATS Article XIX.2 states that "there shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation…".

24. Furthermore, poorer Members may use the generally available flexibility of binding tariffs at ceiling levels often significantly higher than autonomously applied rates. Support to domestic producers, beyond the measures under GATT 1947 (as amended), include exemptions or more modest reductions in government support or subsidies under both the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures.[23] When taken together with provisions for longer transitional time

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18 Preamble, Agreement on Agriculture.

19 Article 12.2, Agreement on Technical Barriers to Trade.

20 Article 15, Agreement on the Implementation of Article VI of the GATT 1994 (Anti-dumping).

21 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.

22 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 (GATS Annex 2 para 5(g)). See also GATS, Article XIX.2.

23 Under the Agreement on Agriculture, longer time frames and lower subsidy and domestic support reductions apply for developing 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

periods, flexibility accounts for 48 of the 145 S&D provisions and has thus emerged as one of the most widespread instrument of S&D under the WTO.[24]

(iv) Provisions allowing for longer transitional time periods

25. Longer implementation periods are provided for in all WTO Agreements, with the exception of the Agreement on the Implementation of Article VI (Anti-dumping) of GATT 1994 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".[25] 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 11 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 gave least-developed countries, developing countries and developed countries seven, five and two years, respectively, to phase out their inconsistent trade-related investment measures.

(v) Provisions providing for technical assistance

26. 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 poorer and least developed countries in the multilateral trading system.[26] Article 67 ("Technical Cooperation") 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 a 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."

(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 8 year transitional period to phase out such subsidies (Article 27.2(b)).

24 WTO (2000*a*), p. 5, exceeded only by provisions to safeguard the interests of developing country Members which total 49.

25 WTO (1999), p. 21

26 Michalopoulos (2000), p. 16.

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).

Provisions relating to least-developed countries

27. 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, TRIMs and SPS Agreements all include extended transitional periods compared to developing countries.

PART II

A. Special and differential treatment in a trade and competition context

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

29. 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 87 of the WTO's 142 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 characterised by high degrees of concentration and histories of state intervention which tend to facilitate lobbying by vested interests against the introduction of new competition.[27] More generally, there is the special challenge of developing the *political will* to see competition law enforced by individual governments against powerful interests. S&D does not address this issue.

30. The United Nations Conference on Trade and Development (UNCTAD), in a discussion focussing specifically on trade and competition, emphasised the importance from a development perspective to ensure that such special conditions are not ignored. In this regard, it advocated adopting some form of S&D holding that the principle "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".[28] Certainly, the S&D principle is incorporated in *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* which was negotiated internationally under the auspices of UNCTAD and adopted by the United Nations General Assembly in 1980.[29]

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27 OECD (1999), pp.13-24.

28 UNCTAD (1999*a*).

29 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:

31. Developing countries have openly affirmed UNCTAD's calls for S&D in a trade and competition context.[30] As one developing country WTO Member recently put it, any agreement on trade and competition would have to integrate the development dimension in all its component parts which "included application of special and differential treatment in a more effective and consistent way than hitherto".[31] 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".[32] Developed countries have also recognised the importance of S&D[33] culminating in a consensus amongst participants of the WTO Working Group on the Interaction between Trade and Competition Policy on the need for "a more focussed discussion, in concrete terms, on… special and differential treatment for developing countries".[34]

32. It therefore appears that S&D could have a valuable role to play in promoting developing countries' development 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.

B. How could special and differential treatment be adopted?

33. 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

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(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 was adopted under UNGA Resolution 35/63 of 5 December 1980. While a non-binding legal instrument, the fourth review Conference of the Set "*calls upon* all Member States to implement the provisions of the Set" (TD/RBP/CONF.5/15 of 4 October 2000).

30 This is clearly reflected in a recent contribution from Uruguay to the WTO Working Group on the Interaction between Trade and Competition Policy addressing the development dimension of competition policy, see Communication from Uruguay, 4 July 2001, WT/WGTCP/W/169, pp. 3-5.

31 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.

32 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.

33 For example, the European Community and its Member States have recognised that "for a WTO competition agreement to fulfil its development potential… Special and Differential Treatment should be reflected in specific provisions, including as regards progressivity, flexibility and support for capacity building", see Communication from the European Commmunity and its Member States, "A WTO Competition Agreement and Development", 26 July 2001, WT/WGTCP/W/175, pp. 2-3.

34 WTO (2000*b*), para. 76.

cultural contexts to be effective.[35] Perhaps most significantly, the Working Group summarised that "it was common ground that competition policy was not a field in which 'one size fits all'".[36]

34. 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.[37] 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; utilising a broad framework agreement allowing for exceptions and exemptions; the option of a plurilateral rather than a multilateral approach 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 used by the WTO and set out in Part I, namely provisions ensuring flexibility of commitments, this part of the note will also examine the potential role of the final two categories of transitional time periods and technical assistance which have both been called for in a trade and competition context. The rest of this note therefore directs some preliminary, and by essence tentative, attention to 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 marginalisation in the multilateral trading system.

(i) Potential relevance of the GATS formulation of S&D

35. The General Agreement on Trade in Services (GATS) codifies an approach to liberalisation which differs from that found in other WTO Agreements. The very structure of the agreement – its progressive approach to liberalisation – allows scope and flexibility for the incorporation of development objectives throughout its text. 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 liberalisation and providing for policy flexibility in sectors where countries do not feel able or willing to contemplate such liberalisation. That is, WTO Members can choose the sectors in which they liberalise trade ("positive listing") and can place conditions and limits upon that liberalisation, 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.

36. 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, liberalise fewer types of transactions and progressively extend market access in line with their development situation. 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 article foresees the participation of developing countries in the liberalisation of services sectors to be gradual and to proceed according to the development requirements of each Member. This increased participation was 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 liberalisation of market access in sectors and modes of supply of priority export interest to them.

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35 WTO (2000*b*), para. 76.

36 WTO (2000*b*), para. 28.

37 WTO (2000*b*), paras 40 and 76. See also OECD (1999), pp. 14, 16.

37. While the GATS provides a potentially useful model, perhaps one of its weaknesses is the lack of a specific mechanism to operationalise the provisions of Article IV, and thus enforce them.[38] 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.[39] Thus, one possible 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.

38. 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 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 (e.g. abuse of dominance). Certainly the ABT has prompted several observers to argue that the GATS offered a useful way to achieve incipient multilateralisation of competition disciplines in a trade context.[40]

(ii) A broad framework agreement with exceptions and exemptions

39. Another option for achieving flexibility and progressivity might be the possibility of a broad framework agreement on competition policy focussing on certain core principles such as transparency, non-discrimination, and a common commitment to treat hard-core cartels.[41] 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.[42]

40. Significantly, the proposals currently on the table are not calling for harmonisation 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

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38 See developing country concerns as set out in WTO (1999), p. 26.

39 See Statement by Ambassador Narayanan of India at the WTO Seminar on Special and Differential Treatment for Developing Countries, WTO, Geneva (7 March 2000). One observer, following a recent and extensive examination of the legal enforceability of these 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 (2000), p. 975.

40 See Sauvé (2000), pp. 85-92; and Mattoo (1999). 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).

41 The European Community and its Member States is one of the leading advocates of such an approach. Their ideas have been most clearly elucidated in the WTO Working Party on the Interaction of 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; responses to questions raised in WT/WGTCP/W/160 of 14 March 2001; and "The Development Dimension of Trade and Competition Policy", 8 June 2000, WT/GTCP/W/140. Amongst others, Canada and the Czech Republic concur with such an approach as reflected in their communications WT/WGTCP/W/174 of 28 June 2001; and WT/WGTCP/W/165 of 26 July 2001 respectively.

42 These proposals are described in detail in the WTO communications cited above.

regimes.[43] Such exceptions, exemptions or exclusions[44] 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 practices.[45] 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 exceptions and exemptions at the trade and competition interface.[46]

41. An approach along these lines, and 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 recently suggested that "flexibility in developing a competition regime refers to the substance of each country's national competition law".[47] 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 means 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".[48] 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 exclude exclusionary distribution agreements where, for instance, the peculiarities of smallness could necessitate that a distributor not carry competing products.[49]

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43 See, for example, Communication of Canada, 2 July 2001, WT/WGTCP/W/174, p. 3. See also Communication from the European Community and its Member States, 8 June 2000, WT/WGTCP/W/140, p. 7 which states that "(t)he need to take the special circumstances of developing countries duly into account is also reflected in… elements of a WTO framework agreement. No harmonisation of substantive competition law is envisaged… (r)ather we propose… focussing on core principles."

44 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 note refers to all three categories as "exceptions and exemptions".

45 This basic distinction between sectoral and non-sectoral exceptions and exemptions mirrors that adopted in a recent Note by the WTO Secretariat, titled "Exceptions, Exemptions and Exclusions Contained in Members' National Competition Legislation", 6 July 2001, WT/WGTCP/W/172 [WTO (2001)]. It lists non-sectoral exceptions and exemptions as practices and arrangements including *inter alia* statutory monopolies, SMEs, R&D agreements, efficiency enhancing measures and other efficiency enhancing arrangements.

46 A further distinction, which is not always emphasised, is that between an approach based on exceptions and exemptions and one paralleling the GATS model and based on a positive listing of sectors or issues subject to competition policy disciplines (noting that it is infact the "market access" obligations of the GATS, rather than the "rules", that tend to be à la carte positive listings). Here the distinction is somewhat more subtle, with the ultimate effects of both approaches likely to be similar. This note focuses on the former, while recognising that a bottom-up positive listing approach could also be considered both sectorally and non-sectorally.

47 See the intervention of Trinidad and Tobago at the WTO Working Group on the Interaction of Trade and Competition Policy of 5-6 July 2001, set out in WT/WGTCP/M/15, para. 28. The intervention was accompanied by a Room Document titled "Some initial views on the concepts of progressivity and flexibility in developing a competition regime: a small economy perspective".

48 See above.

49 Morocco has also voiced support for a framework agreement provided it includes *inter alia* "…safeguards for national strategic objectives in the form of exemptions", WT/WGTCP/M/15, para. 13.

42. 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 social or development related objectives".[50] 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".[51] In addition the UNCTAD Secretariat, 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".[52]

43. Certainly many developed and developing country competition regimes feature both sectoral and non-sectoral exceptions and exemptions. For example, sectoral exclusions to competition policy exists in many OECD countries as illustrated in a 1996 OECD study examining sectoral coverage, limitations and exclusions of 10 OECD countries and the European Community.[53] More recently, a WTO Secretariat Note synthesised the results of the 1996 OECD study with updates from WTO Members' oral and written contributions to the WTO Working Group on the Interaction of Trade and Competition Policy which identified exceptions, exemptions and exclusions of both a sectoral and non-sectoral nature in their domestic regimes.[54] The note suggests that in addition to sectoral exceptions and exemptions there also appears to be an abundance of non-sectoral exceptions and exemptions.[55]

44. One of the underlying questions which arises, however, is the extent to which such exceptions and exemptions actually support development efforts. This question was flagged by a delegation at the latest WTO Working Group on Interaction of Trade and Competition Policy which argued 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".[56] Such concerns seem to be corroborated by a recent Japanese submission to the WTO summarising, from a historical perspective, the effects of its competition policy and exemption systems in achieving post-war economic development. Notably, while not rejecting exemptions per se, the paper 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

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50 WT/WGTCP/M/15, para. 9.

51 WT/WGTCP/W/174, p. 3.

52 UNCTAD, 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 (1999*b*), p. 43.

53 The jurisdictions reviewed were those of Canada, France, Germany, Hungary, Japan, Mexico, Portugal, Sweden, the United Kigdom, the United States and the European Community. See OECD (1996).

54 WTO (2001).

55 See in particular Part III of WTO (2001) which presents, in tabular form, information on non-sectoral exceptions, exemptions and exclusions of 29 Members and the EC. Uruguay has also conducted a comparative study of exceptions or exemptions from national competition legislation which reveals their wide breadth and use in both developed and developing countries, see Communication from Uruguay of 4 July 2001, WT/WGTCP/W/109 pp 3-5.

56 United States, WT/WGTCP/M/15, para. 30.

regulating competition through exemptions".[57] Japan's conclusion is succinct: "we believe that exemption systems themselves have nothing to do with industrial development".[58]

45. Determining the extent to which exceptions and exemptions may support development efforts is likely to require separate consideration of sectoral or non-sectoral approaches. Sectorally, for example, while a number of delegations to the WTO have acknowledged the potential for a flexible and progressive approach,[59] the OECD has concluded in the past that "such exceptions to the legal coverage of competition law should be constantly reviewed and tested… with a view to their progressive elimination".[60] Furthermore, the 1997 OECD Synthesis Report on Regulatory Reform 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".[61] Although both these OECD conclusions could be tempered by the 1996 OECD study's proviso that the mere fact that a sector is excluded or subject to special rules does not necessarily indicate "weak" competition policy nor indicate protectionist motives. In fact, exclusions and special rules may be based on domestic judgements resting on considerations "appropriate" to accepted competition policy principles.[62] This appears to be an area where analysis could still be of value, with one developing country WTO Member, in response to suggestions that conflicts between industrial and developmental policies could be dealt with using sectoral exemptions, recently highlighting that "clarity was needed in relation to that possibility since it would reconcile sectoral policy objectives and competition policy interests".[63]

46. Questions have also been raised regarding if, and if so how, S&D might apply to the proposed broader core principles such as non-discrimination, transparency and a common commitment to treat hard-core cartels. While proponents of a framework approach have emphasised that such principles could be defined in a manner reflecting progressivity and flexibility[64] a number of delegations have expressed

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57 See Communication from Japan "Competition Policies and Exemption Systems" dated 4 July 2001, WT/WGTCP/W/177, p. 5. It was pointed out that rather than subordinating competition to industrial policy much of Japan's post-war economic dynamism was rooted in robust competition which allowed many promising new industries (such as the automotive, semiconductor and animation industries) to actually sharpen their competitive edge.

58 WT/WGTCP/W/177, p. 5.

59 For example, the European Community and its Member States expressly "favour a flexible and progressive approach to the issue of sectoral exclusions… [whereby agreement] could limit itself to ensuring the necessary level of transparency", see WT/WGTCP/W/140, p 8. This view point recognises that "(t)he issue of sectoral exclusions from the application of competition law is of great importance… sensitivity and complexity both among developing countries and OECD Members…", Communication of the European Community and its Member States, "A Multilateral Framework Agreement in Competition Policy", 25 September 2000, WT/WGTCP/W/152, p. 7. Japan, has also recognised the potential for flexibility in this area, see WT/WGTCP/M/15, para. 37.

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

61 OECD (1997), p. 32. The synthesis report continues that "exemptions have reduced economic performance by allowing anti-competitive practices – such as abuses of a dominant position, cartel conduct and anti-competitive mergers. An essential reform is to reverse such exemptions and apply the general competition law as widely as possible".

62 For example, in the 1996 OECD study, p. 17, "natural monopoly", economies of scale and market failure considerations have been invoked to support exclusions or special treatment of certain sectors.

63 Colombia, WT/WGTCP/M/15, para. 15.

64 See WT/WGTCP/W/152, p. 5; and WT/WGTCP/W/175, p. 3.

difficulty in reconciling the two.[65] The core principle of national treatment is illustrative, where even a requirement to avoid provisions allowing overt discrimination on the basis of corporate nationality, may conflict with the flexibility that certain developing countries are seeking.[66] On this question, guidance may be provided by South Africa's national Competition Act, which complies with the core principles of non-discrimination, treating foreign companies and South African companies equally, and yet is considered to not interfere with an ability to respond to specific national developmental needs.[67]

(iii) A plurilateral approach?

47. As noted earlier, only 87 of the WTO's 142 Members have competition regimes of which the majority are of recent vintage. These objective facts have led to some questioning of the likelihood of consensus on a multilateral agreement on competition policy. Notably, developing countries have expressed some reservations that such an approach might impede flexibility for pro-development industrial policies or other development policy options.[68]

48. 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] At any rate, the WTO Working Group on the Interaction between Trade and Competition Policy has noted that "the Group should not be hide bound to pursuing a particular modality".[73]

49. In light of the WTO Working Group's suggestion to consider various modality options, while not technically falling under the traditional categories of S&D, a recent and innovative European Commission proposal concerning the negotiation of a trade and competition agreement may warrant attention.[74] In

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65 See Zimbabwe, WT/WGTCP/M/15, para. 24; Malaysia, WT/WGTCP/M/15, para. 33.

66 India, for example, has commented that it might be perfectly legitimate for a developing competition authority to allow large domestic firms to merge so that they may compete on more equal terms with multinationals while prohibiting mergers involving multinationals within their territory on the basis that they are already large enough to achieve relevant economies of scale, WT/WGTCP/M/15, para 19.

67 As that country sets out, "(h)ence, in the experience of South Africa, it was possible to apply the same competition principles that would be applied anywhere else in the world and, at the same time, advance specific economic objectives which were embodied in the Act and were important to the country's development", see WT/WGTCP/M/15, para. 11.

68 WTO (2000*b*), paras. 14, 26, 30.

69 OECD (1999), p. 16-20.

70 OECD (1999), p. 17.

71 WTO (2000*b*), 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 demands for further study including cost-benefit analysis.

72 OECD (1999), p. 17.

73 WTO (2000*b*), para. 40.

74 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. Cited in Inside US Trade, Vol. 19:3, 19 January 2001.

summary, the proposal calls 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.[75] 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. In this regard, a proposal by the "Like Minded Group" of developing countries[76] regarding a framework WTO agreement on S&D is pertinent, as it specifically suggests 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".[77]

50. A separate potential benefit of a plurilateral approach includes the ability to negotiate without first attaining the approval of the WTO Ministerial Conference as is required for multilateral agreements.[78] This was the case with the WTO Information Technology Agreement which was negotiated on a plurilateral basis with an additional dimension that it would only come into effect when the parties to it reached a "critical mass" of total trade in IT products. This was seen as essential as the agreement's obligations were granted on an MFN basis to all WTO Members and therefore risked "free-riding" from non-signatories. Such a model might also be relevant to a trade and competition agreement as, in practice, it may allow for individual developing countries to strike deals with the existing parties in return for their accession. This proved to be the case with the ITA where special arrangements regarding the speed of implementing the agreement's tariff cuts were negotiated with various developing country participants.[79]

(iv) Should distinctions be drawn between different categories of developing countries?

51. 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 micro or small and large developing countries.

52. One perspective is 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 the most effective remedies to address them (especially in light of vastly differing capacities to adopt them).[80] As one commentator recently put it while addressing specifically trade and competition policy, "defining *who*

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75 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.

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

77 See "Developing Countries Propose New Negotiating Areas for Doha", *Inside US Trade*, Vol. 19:38, 21 September 2001, p. 6.

78 Article III.2 of the Marrakesh Agreement Establishing the World Trade Organisation.

79 See Fliess and Sauvé (1998).

80 OECD (2001), p. 80.

might be eligible for S&D is crucial to ensure those who genuinely need latitude get it".[81] 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.[82]

53. More concretely, as has been noted earlier, competition policy is an area where one size does not fit all due to the diversity of, and asymmetries in, Members' economic situations, competition regimes, legal traditions and cultural contexts.[83] It would therefore appear a likely candidate for at least some form of differentiated treatment amongst developing countries. In this regard, the *size* of the developing country economy may be crucial. 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 emphasised 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".[84] Another reason for differentiating the trade and competition obligations of small or micro economies from larger ones relates to the possibility that such countries 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 that any future agreements be sufficiently flexible to accommodate such an option.[85]

(v) The role of transition periods and technical assistance

54. No matter what mix of variable geometry is adopted, there appears to be almost universal consensus amongst observers and developing countries that technical assistance will be necessary to aid in implementing effective competition laws and policies. For example, within the WTO Working Group on the Interaction between Trade and Competition Policy it is common ground that technical assistance and capacity building is essential for meaningful progress.[86] In other fora, technical assistance has also been requested prior to any multilateral 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.[87]

55. The role 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.[88] 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

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81 See Dredge (2001).

82 OECD (2001), p. 80.

83 WTO (2000*b*), para. 76.

84 Trinidad and Tobago, WT/WGTCP/M/15, para. 29.

85 See WT/WGTCP/M/15, para. 61 referring to WT/WGTCP/W/177, p. 4.

86 WTO (2000*b*), paras. 63, 86.

87 OECD (1999), p. 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 Garcia Bercero and Amarasinha (2001), p. 499.

88 OECD (1999), p. 13.

domestic firms to create cartels and abuse their monopoly positions is not an efficient means of preventing such dislocation.[89] 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".[90] On the other hand, it is true that there are considerable hurdles in establishing the institutional capacity to complement competition laws or policies.[91] 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.[92] Worth reiterating, however, is the broad consensus against transitional time periods delaying commitments to treat certain key anti-competitive practices such as hard-core cartels.

56. When considering the potential application of these two areas of S&D in a trade and competition context, it should be noted that the effectiveness of the existing provisions in the current WTO Agreements dealing with similar areas of technical complexity has come under considerable scrutiny. Certainly, 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.

57. In this regard, one of the most common observations is that the commitments aimed at addressing developing countries' institutional constraints, namely transition periods and technical assistance, failed to adequately recognise the actual time needed to prepare, enact and enforce new legislation, the true costs of implementation as well as the flexibility to accommodate countries' different implementation capacities.[93]

58. Regarding *transition periods*, questions have been raised concerning the realism of the time extensions given in light of the actual time and costs required to build the institutional capacity needed for full implementation of the obligations under the WTO Agreements.[94] Certainly, in some cases, the time

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89 See for example, Winslow (2001).

90 Submission from Korea, 10 December 1997, WT/WGTCP/W/56, para 13. More recently, a Communication from the Republic of Korea set out that "Korea's experience illustrates that it is better to introduce a competition regime at the initial stage of economic growth, when monopoloies have not yet gained political and economic power", see Communication from the Republic of Korea, 26 June 2001, WT/WGTCP/W/166, para. 11.

91 WTO (2000*b*), para. 18.

92 A commentator who has advocated a comprehensive set of international competition policies under the ambit of the WTO, contemplated at least 7 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 to also reflect the gradual pace at which both individual nations and the European Community introduced and expanded their competition policies, see Scherer (1994), especially pp. 89-97. Notably, the seven-year phase in time 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.

93 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.

94 WTO (1999), p. 26.

limits for the extensions have already passed and there is little evidence that countries have made sufficient progress towards full implementation. The time limits 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 capacity needs.[95]

59. With respect to *technical assistance*, developing country Members have stressed the critical and continuing need for assistance to strengthen their technical capacity to implement the WTO Agreements. In addition to increases in such assistance,[96] WTO Members have emphasised the importance of matching it more closely to the specific needs of the individual countries.[97] Furthermore, it appears, in areas other than competition policy, that the effectiveness of the technical assistance that is provided has often been mitigated due to it being supply driven, not effectively co-ordinated and not "owned" by the recipient countries.[98]

60. The area of competition policy technical assistance was recently reviewed by the OECD Committee on Competition Law and Policy (Working Party No. 3 on International Co-operation). A survey of Member countries examined issues relating to the need for assistance, the most effective means of providing assistance, the extent of co-ordination in delivering assistance, and the costs and benefits of increasing co-ordination through some sort of "clearinghouse" that might provide information on planned or contemplated events and perhaps other topics. In general terms, the responses and other information reviewed by the Secretariat suggested the following with respect to those issues:

- Members that addressed the issue said that more competition policy technical assistance is needed, but there were no suggestions on how the resources needed to provide it could be raised. Moreover, there are indications that the World Bank's increasing focus on poverty reduction is reducing the overall funding for such assistance.

- No general conclusions could be drawn with respect to the most efficient forms of assistance in general or for particular situations.

- Member country competition authorities' enforcement officials are more qualified to provide assistance than private contractors, especially if experienced former enforcement officials are not heavily involved in private contractors' work. But all major donors provide all or most of their funding to private contractors. World Bank funding also goes to private contractors.

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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), p. 26. "One 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", Michalopolous (2000), p. 22.

96 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 (1999*a*), p. 141.

97 WTO (1999), p. 26.

98 Jan Pronk, Chairman of the WTO High Level Meeting on Integrated Initiatives for Least Developed Countries, "…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", Geneva, October 27.

- In general, Members do not actively co-ordinate their technical assistance with each other or with international organisations, though some co-ordination results from Members' co-sponsoring or sending representatives to OECD and other seminars that use international panels.

- Competition authorities are generally receptive to requests for co-operation if funding is not an issue, but co-operation becomes problematic or even impossible when a country provides all or most assistance through private contractors.

- There appears to be little co-ordination between (a) international organisations that provide technical assistance (OECD, UNCTAD, World Bank) and (b) regional organisations, though some APEC/OECD co-ordination exists (largely between APEC countries that are OECD Members and the OECD Secretariat).

- There is significantly more co-ordination among OECD, UNCTAD and the World Bank. Avoidance of duplication results both from informal contacts leading to specialisation and from differences in the organisations' criteria for, and means of, providing assistance. In general, UNCTAD and the World Bank focus on less developed countries. Moreover, while UNCTAD holds some training seminars, it focuses on higher-level policy dialogue involving a very broad range of countries. The World Bank also holds some training seminars, but it focuses on providing in-depth, long-term assistance to a small number of countries. OECD outreach consists mostly of capacity building, and is directed to a range of countries that is narrower than UNCTAD's and broader than the World Bank's. The three programs complement each other, and active co-operation is increasing.

- There is also complementarity and co-ordination between these technical assistance activities (of the OECD, UNCTAD, and the World Bank) and the activities of the WTO. In general, most WTO activities focus on what the note referred to as policy dialogue rather than technical assistance, and do not focus on competition law and policy as such, but rather on issues such as the interface between trade and competition policy, and the proper role of competition policy in developing countries. It works following two main frames: i) the Working Group on the Interaction between Trade and Competition Policy, where trade and industry officials sit beside competition authorities; and ii) symposia and regional workshops.

- Additional co-ordination limited to providing some sort of a clearinghouse was widely regarded as desirable, but there is no apparent consensus on what sort of clearinghouse might be useful and cost-justified. UNCTAD's website currently provides the most information, and the OECD website provides an opportunity for providers to post their planned events, but neither organisation has plans or funds to engage in the active follow-up that would be involved in maintaining a real clearinghouse even for planned events.

C. An underlying question relating to special and differential treatment

61. Global trends regarding trade liberalisation, while overall positive, have not benefited non-OECD countries equally[99] raising a number of broad concerns regarding the effectiveness and future relevance of S&D in promoting development.[100] The challenges to S&D have been extensive, [101] leading some to query whether it should remain a permanent principle of the multilateral trading system at all. 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. [102] This approach points to a growing body of analytical and empirical work suggesting that developing country exemptions have had negative effects culminating in the suggestion that certain trade policies need not differ along development lines. In this regard S&D has been described as "ideological baggage" and an infant industry "crutch" which has actually hindered development and competitiveness.[103]

62. Any discussion on the possible application of S&D in a trade and competition context will need to bear these fundamental concerns in mind. As this note emphasised at the outset, while it appears that S&D *could* have a valuable role to play in promoting development at the trade and competition interface, 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 note has highlighted where opinions differ or evidence is lacking on the true value of partial competition regimes for development, whether sectorally or based on other horizontal exceptions and exemptions.[104] We have also seen that the role of transition periods and the optimal phasing in of competition policy remains a contentious question.[105]

63. Nonetheless, it should be recognised that in a trade and competition context there is still a broad consensus for flexibility and progressivity in any rule-making initiatives. This has been matched by calls for S&D to address the special challenges faced by developing countries at the trade and competition interface.[106] Furthermore, when looked at more closely, many of the criticisms of S&D relate more to its actual mechanics, implementation and funding as opposed to its goals and value in promoting development.

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99 OECD (2001), p. 74.

100 Michalopoulos (2000), p. 23; Pangetsu (2000), p. 1293.

101 A number of papers summarise developing countries concerns with S&D. See in particular, OECD (2001) pp. 74-85 and WTO (1999), pp. 25-6. 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 (1999*a*), p. 137.

102 Michalopoulos (2000), pp. 23, 29; Srinivasan (1999), pp. 1047-1064; Finger and Winters (1998).

103 Concerns referred to in UNCTAD (1999*a*), p. 137.

104 See above at paras 39 to 46.

105 See above at paras 54 to 60.

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ANNEX I: SUMMARY OF PROVISIONS CONTAINED IN THE URUGUAY ROUND AGREEMENTS FOR THE DIFFERENTIAL AND MORE FAVOURABLE TREATMENT OF DEVELOPING AND LEAST DEVELOPED COUNTRIES

[Annex II of WTO (1999), "Developing Countries and the Multilateral Trading System: Past and Present", background document from the High Level Symposium on Trade and Development, Geneva 17-18 March 1999]

Agreement on Agriculture		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
Preamble	Recognition of special and differential treatment; in implementing their commitments on market access, developed country Members to take fully into account the needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to those Members, including the fullest liberalisation of trade in tropical agricultural products; the possible negative effects of the implementation of the reform programme on least-developed and net-food importing developing countries to be taken into account.	
4.0 and Schedules	Average tariff reduction of 24 per cent, with minimum cut per tariff line of 10 per cent *(36 and 15 per cent, respectively)*. Option to establish ceiling bindings for previously unbound agricultural tariffs.	
6.1 and Schedules	Trade-distorting domestic support (Total Aggregate Measurement of Support or Total AMS) to be reduced by 13.3 per cent *(20 per cent)*.	
6.2	Investment subsidies generally available to agriculture, agricultural input subsidies generally available to low-income or resource-poor producers, and domestic support to domestic producers to encourage diversification from illicit narcotic crops to be excluded from reduction commitments and not included in Total AMS.	

6.4	*De minimis* provision allowing exclusion of product-specific and non-product specific trade-distorting domestic support of less than 10 per cent of the total value of production of the product concerned or total agricultural production, respectively *(5 per cent)*.	
8 and Schedules	Export subsidy reduction commitments of 14 per cent in terms of subsidized export volume and 24 per cent in terms of budgetary outlays *(21 and 36 per cent, respectively)*.	
9.4	During the implementation period, no requirement to undertake commitments in respect of subsidies to reduce the costs of marketing exports and of government-provided or mandated internal transport and freight charges on export shipments on terms more favourable than for domestic shipments.	
12.2	Disciplines on export prohibitions and restrictions not applicable, unless the developing country Member is a net-food exporter of the specific foodstuff concerned.	
15.1	Recognition of differential and more favourable treatment for developing country Members, as set out in the relevant provisions of the Agreement and embodied in the Schedules of concessions and commitments.	
15.2 and Schedules	Developing country Members to implement reduction commitments over a period of 10 years *(6 years)*.	Least-developed country Members are not required to undertake reduction commitments.
16	Developed country Members to take action as provided for within the framework of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries. Committee on Agriculture to monitor the follow-up to this Decision.	
20	Special and differential treatment to developing country Members, to be taken into account in the continuation of the reform process.	
Annex 2, para. 3	Special and differential treatment with regard to public stockholding for food security purposes.	
Annex 2, para. 4	Special and differential treatment with regard to domestic food aid.	
Annex Section B	Special and differential treatment in the context of the "Special Treatment" provisions of Annex 5, concerning market access conditions mentioned in Article 4.2.	
Notifications	Certain annual notification requirements in the area of domestic may be set aside, on request, by the Committee on Agriculture.	Certain notifications only to be submitted every other year.

Agreement on Sanitary and Phytosanitary Restrictions		
Article	*Provision for Developing Country Members.*	*Provision Specifically for Least-developed Country Members*
Preamble	Recognition of special difficulties developing countries may encounter in complying with SPS measures in importing markets and in formulating such measures on their territory. Desire to assist such countries in their endeavours in this regard.	
9	Members to provide technical assistance.	
10.1	In the preparation and application of SPS Measures, Members to take into account special needs of Developing Country and LDC Members.	
10.2	Possibility of longer time frames for compliance with new sanitary or phytosanitary measures.	
10.3	SPS Committee enabled to grant specified, time-limited exemptions in whole or in part from obligations under the SPS Agreement..	
10.4	Members to encourage and facilitate participation of developing countries in relevant international organisations.	
14	May delay for up to 2 years implementation of most provisions of the Agreement relating to measures affecting imports (with the exception of measures not based on relevant or extant international standards).	May delay for up to 5 years implementation of the provisions of the Agreement.
Ann. B	Members to allow "reasonable" interval between announcement and introduction of measures.	

Agreement on Textiles and Clothing		
Article	*Provision for Developing Country Members.*	*Provision Specifically for Least-developed Country Members.*
1.2	Members agree to use provisions of Art. 2.18 and Art. 6.6(b) (below) to permit meaningful increases in access possibilities for small suppliers and new entrants.	
1.4	Particular interests of cotton-producing exporting Members should, in consultation with them, be reflected in implementation.	
2.18	"Meaningful improvements in access" though accelerated increases in growth rates, or through agreed changes with respect to the mix of base levels, growth and flexibility, for Members subject to restrictions on 31 December 1994 and whose restrictions account for less than 1.2 per cent of all restrictions imposed by relevant Member as of 31 December 1991.	
6.6 (a)		Significantly more favourable treatment to be given to LDCs by Members making use of transitional safeguards.

6.6 (b)	Members whose export volumes are small in comparison with the total volume of exports of other Members and represent a small percentage of imports of a product into importing Member shall be accorded differential and more favourable treatment in the fixing of economic terms of Articles 6.8, 6.13 and 6.14, i.e. in fixing levels of export restraint, growth and flexibility (see also Article 1.2).	
6.6 (c)	Special consideration to be given to needs of wool exporters with wool dependent economies and accounting for small share of importing Members market, when quota levels, and growth rates and flexibility are considered.	
Annex: para. 3)	Developing country cottage industry handlooms and hand made products, traditional handicraft textile and clothing products, when certified as such; certain "historically traded textile products" and products made of pure silk are not subject to the transitional safeguard provisions of Article 6.	

Agreement on Technical Barriers to Trade		
Article	*Provision for Developing Country Members.*	*Provision Specifically for Least-developed Country Members*
Preamble	Recognition of the contribution which international standardization can made to the transfer of technology from developed to developing countries; recognition that by developing countries may encounter special difficulties in formulation and application of technical regulations and standards; and desiring to assist such countries in their endeavours in this regard.	
2.12 & 5.9	Except in "urgent circumstances" Members to allow reasonable interval publication and entry into force of measures to allow producers in exporting Members, particularly developing country Members, opportunity to adapt their products or methods of production.	
11.1	Members to advise other Members, especially developing countries, on request, regarding the preparation of technical regulations.	Special consideration given
11.2, 11.5	Members shall, if requested, advise other Members, especially developing countries, and shall grant them technical assistance on mutually agreed terms and conditions: regarding the establishment of national standardizing bodies and participation in the international standardizing bodies and shall encourage their national standardizing bodies to do likewise (11.2); regarding the steps that should be taken by their producers to have access to conformity assessment systems within the territory of the Member receiving the request (11.5);	

11.3, 11.4	Members shall, if requested, take such reasonable measures as may be available to them to: arrange for the regulatory bodies within their territories to advise other Members, especially developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations and the methods by which their technical regulations can best be met (11.3); arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member (11.4).	
11.6	Members, which are Members or participants of international or regional conformity assessment systems shall, if requested, advise and provide technical assistance on mutually agreed terms for establishment of legal framework and institutions to enable other Members, particularly developing Members, to meet obligations of membership or participation in such conformity assessment systems.	
12.2	Members shall give particular attention to developing Members' rights and obligations and shall take into account the special development, financial and trade needs of developing Members in the implementation of the Agreement, both nationally and in the operation of the Agreement's institutional arrangements.	
12.3, 12.7	Members shall, in preparing and applying technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing Members with a view to ensuring that unnecessary obstacles to exports from developing countries are not created. Technical assistance to be provided by Members to that end, taking account of the stage of development of the requesting Members.	Particular account to be taken of the least-developed Members in provision of technical assistance..
12.4	[Because] developing Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development, Members recognize that developing Members should not be expected to use international standards… which are not appropriate to their development, financial and trade needs.	
12.5, 12.6	Members shall take such reasonable measures as may be available to them to ensure: that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members (12.5); that international standardizing bodies, upon request of developing Members, examine the possibility of, and if practicable prepare international standards concerning products of special interest to developing Members. (12.6).	
12.10	TBT Committee to review application of special and differential provisions	

Agreement on Trade-related Investment Measures (TRIMS)		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
Preamble	Taking into account trade, development and financial needs of developing countries and especially LDCs.	
4	Permission to "deviate temporarily" from requirement to eliminate TRIMS inconsistent with Articles III and XI of GATT 1994, to the extent and in such a manner as Article XVIII of the GATT, the Understanding on the Balance of Payments provisions of GATT 1994, and the 1979 Declaration on Trade Measures Taken for Balance of Payments Purposes, permit deviation from Articles III and XI of GATT 1994.	
5.2	5 years (*2 years*) to eliminate TRIMS inconsistent with Agreement.	7 year transitional period.
5.3	Possible extension of transitional period on the basis of demonstrated particular difficulties in implementation and taking into account the individual development, financial and trade needs of the Member in question, on agreement of Council for Trade in Goods.	

Agreement on the Implementation of Article VI (Anti-Dumping)		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
15	Special regard to be given by developed countries to "special situation" of developing countries when considering application of anti-dumping measures Constructive remedies to be explored prior to imposition of antidumping measures.	

Agreement on the Implementation of Article VII (Customs Valuation)		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
20	Establishment of special and differential treatment	
20.1	Developing country Members not party to the Tokyo Round Agreement on Implementation of GATT Article VII may delay application of all provisions for up to 5 years after entry into force of WTO Agreement for such Members.	

20.2	Developing country Members not party to the Tokyo Round Agreement may delay application of Articles 1.2(b) (iii) and 6 regarding the computed value method, for a period of up to three years following application of other provisions of the Agreement.	
20.3	Provision by developed countries of technical assistance on mutually agreed terms.	
Ann III.2	Possibility of retaining existing system of minimum values under terms and conditions to be agreed by the Committee	
Ann III.3	Right to refuse importers' request to reverse order of Articles 5 and 6.	
Ann III.4	Right to reserve application of Art 5.2 in accordance with the provisions of the relevant note thereto whether or not requested by importer.	
Ann. III.5	If developing country experiences problems in applying Article I insofar as it relates to sole distributors/ importers, a study will be made on request to find appropriate solutions.	

Agreement on Preshipment Inspection (PSI)		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
Preamble	Need recognized for developing countries to have recourse to PSI "for as long and insofar as it is necessary" to verify quality, quantity or price of imports.	
3.3	Exporter Members shall offer to provide technical assistance to user Members, if requested, directed to achieving objectives of the Agreement on mutually agreed terms. Such assistance may be given on a bilateral, plurilateral or multilateral basis.	

Agreement on Import Licensing		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
Preamble	Members to take into account trade, development and financial needs of developing countries.	
1.2	Members shall ensure that administrative procedures used to implement licensing schemes conform to GATT 1994 provisions, taking into account development, financial and trade needs of developing country Members.	
2.2, foot-note 5	Developing country Members that were not signatories to the corresponding Tokyo Round Agreement may delay by up to two years, following notification, of obligation to accept application for automatic licence on any working day before next day customs clearance, and to grant automatic licences within 10 working days of receipt of applications.	
3.5(a)(iv)	Developing countries "would not be expected" to incur additional administrative burden in order to provide import statistics for products subject to non-automatic licensing.	
3.5(j)	Special consideration to be given to importers importing products from developing countries in allocating non-automatic licences.	Consideration to be given to importers products especially from least-developed countries.

Agreement on Safeguards		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
9.1, footnote 2	Safeguards "shall not be applied" against products originating in developing countries if share of imports is not in excess of 3 per cent, and if developing country Members with less than 3 per cent share do not account collectively for more than 9 per cent of imports.	
9.2	Safeguards may be maintained for up to 10 years (4-year initial period + 6 year extension) (*8 years – 4+4*).	
9.2	Safeguards of more than 180 days in duration may be re-imposed after half the time they were in force (*full extent of the period in force*) has elapsed, subject to a minimum non-application period of two years.	

Agreement on Subsidies and Countervailing Measures		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
27	Recognition of principle of differential and more favourable treatment	
27.2 (a)	Developing countries with per capita income below US$ 1,000 (and listed in Annex VII) exempted from prohibition on export subsidies.	Not subject to prohibitions on export subsidies.
27.2 (b) and 27.4	8 year transition periods, within which subsidies phased out, preferably in a progressive manner. Consultations with Committee not later than one year before the expiry of the period of extension sought. Annual consultations if extension justified. Two year phase out if not justified.	
27.3	Prohibition on subsidies contingent on export performance not applicable for 5 years.	8 years.
27.5 and 27.6	Export Subsidies to be phased out within 2 years of attaining "export competitiveness" in any given product; 8 year phase out for Annex VII Members. "Export competitiveness" is defined as at least 3.25 % of world trade in the "product" (HS Section) for two consecutive calendar years.	8 years.
27.7	"Remedy" provisions of Article 7 are applicable to developing country Members for subsidies in conformity with 27.2-27.5. Otherwise Article 4 applies.	
27.8	Subsidies specified in Article 6.1 (i.e ad valorem subsidisation of product in excess of 5 per cent, to cover operating losses, of industries or enterprises, direct forgiveness of debts and grants to cover debt repayment not be presumed to cause serious prejudice; positive evidence must be supplied.	
27.9-10	Subsidies actionable only if they cause injury or nullify or impair benefits to other Members under GATT 1994. Countervailing duty investigations to be terminated where share of total imports less than 4 per cent and where total import share of developing country Members, each with less than 4 per cent share, does not exceed 9 per cent.	
27.11	*De minimis* subsidisation provision requiring termination of countervailing inquiry 2 per cent *(1 per cent*) or 3 per cent if export subsidies eliminated before the end of 8 year period.	
27.13	Certain subsidies granted in context of privatization programmes are not actionable.	

General Agreement on Trade in Services (GATS)		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
Preamble	Recognition of particular need for developing countries to exercise right to regulate or introduce new regulations on supply of services within territory in order to meet development objectives, and desiring to facilitate increased participation of developing countries in trade in services and the expansion of their exports in services, *inter alia* through strengthening domestic capacity.	
III:4	"Appropriate flexibility" with respect to time limits for establishment of enquiry points may be agreed with individual developing country.	
IV:1	Increased developing country participation in services trade to be facilitated through negotiations of specific commitments relating to strengthening domestic services capacity, efficiency and competitiveness through access to technology on a commercial basis, improvement of market access to distribution channels and information networks, liberalisation of market access in sectors and modes of supply of export interest.	See against IV:3 below
IV:2	Members to facilitate developing country access to market information through establishment of contact points.	
IV:3		Special priority to be given to LDCs in implementation of Articles IV:1 and 2, and "particular account" to be taken of LDCs' difficulties in accepting negotiated commitments owing to particular development trade and financial needs.
V:3	Flexibility in application of Article V:1 requirement for substantial sector coverage and elimination of discrimination between Members in context of an agreement entered into by Members with a view to liberalising trade in services.	
XV:1	Provision for flexibility in use of subsidies in development programmes.	
XIX:2	Flexibility for developing countries to open fewer sectors, liberalise fewer types of transaction, progressively extending market access in line with economic development. Flexibility for developing countries to attach conditions when providing market access to foreign suppliers, in order to facilitate increased participation by developing countries in trade in services.	
XXVI:2	Provision for technical assistance on a multilateral basis.	

GATS Annex on Telecommunications		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
para 5 (g)	Provision for placing reasonable conditions of access to public telecoms transport networks and services consonant with need to strengthen domestic telecoms infrastructure and increase participation in international trade.	
para 6 (a) para 6 (c)	In order to facilitate improvement of telecommunications infrastructure, Members and their suppliers encouraged to participate, to "fullest extent practicable" in development programmes of international and regional organizations. Members to provide information "where practicable" to developing countries regarding telecommunications services and technological developments.	6 (d): special consideration to opportunities for LDCs to encourage foreign suppliers to assist in transfer of technology, training and other activities for developing telecoms trade.

Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
Preamble	Recognition that objectives of national systems of intellectual property protection include developmental objectives.	Recognition of special interest of LDCs in respect of maximum flexibility in implementation of domestic regulations in order to enable the creation of a sound technological base.
65.2 and 65.4	Four year transitional period additional to one year available to all original Members (applicable to most but not all TRIPS obligations). Further 5 year extension in cases where Agreement requires extending product patent protection to areas of technology not so protectable by end of general transition period.	
66		Delay for up to 10 years for most TRIPS obligations. Possibility of extension following duly motivated request.
66.2		Developed country Members to provide incentives to enterprises and institutions in their territories for purpose of encouraging transfer of technology to LDCs.
67	Provision by developed Members of technical and financial co-operation.	

Trade Policy Review Mechanism		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
Section D		Technical Assistance to be provided by Secretariat.

Understanding on Rules and Procedures Governing the Settlement of Disputes		
Article	*Provision for Developing Country Members*	*Provision Specifically for Least-developed Country Members*
3.12	Right to invoke 1966 Decision regarding Procedures under Article XXIII in lieu of Arts 4, 5, 6 and 12 of the understanding.	
4.10	Members to give "special consideration" to interests of developing countries during consultations.	
8.10	Developing countries can require that at least 1 panellist in cases concerning them be a national of a developing country.	
12.10	Possibility to extend length of time-limit for resolution. Panels to allow "sufficient time" for developing counties to prepare argumentation.	
12.11	Panel findings to make explicit reference to way in which special and differential treatment taken into account.	
21.2	On surveillance of implementation of recommendations or rulings, particular attention should be paid to matters affecting the interests of developing country Members with respect to matters which have been subject to dispute settlement.	
21.7	If [a matter is raised] by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.	
21.8	If case brought by developing country, DSB when considering appropriate action, to take into account impact on economy of developing country concerned as well as trade coverage.	"Particular consideration" shall be given to the special situation of LDC Members at all stages in the determination of causes of dispute and of dispute settlement.
24.1		Members to "exercise due restraint" in raising matters under these procedures involving an LDC Member. If nullification or impairment established, Members to "exercise due restraint" in seeking compensation or authorisation to suspend concessions or any other obligation pursuant to these procedures.
24.2		If satisfactory solution not found, Director General or Chairman of DSB may offer their good offices

		upon request by LDC to find acceptable solution prior to request for a panel.
27.2	Provision by the Secretariat of services of qualified legal experts from the WTO technical cooperation services to any developing country Member that so requests.	

Notes:

1. GATT 1994 provisions on differential and more favourable treatment of developing and least-developed countries have not been included in this table.
2. All provisions noted as applying to developing countries apply also to least-developed countries.
3. *Italicised* points in parentheses refer to the manner of application of the relevant provisions to developed country Members.