SPECIAL AND DIFFERENTIAL TREATMENT
AND DEVELOPMENT ISSUES
IN THE MULTILATERAL TRADE NEGOTIATIONS:

THE SKELETON IN THE CLOSET

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1 The views expressed in this paper are those of the author and do not necessarily reflect the UNCTAD's views.
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**Executive summary**

Thinking that the special and differential treatment (S&D) is an obsolete concept is a widespread idea and a comfortable one. Unfortunately, it is a stubborn concept that continues to poison trade negotiations, particularly at the WTO as consensus on this crucial issue seems to be less and less achievable. Therefore, a wise forecast may be the following: at the multilateral level, the relevance of S&D and “development issues” – in their various shapes, formats and names – will increase, becoming one of the pivotal requirements for the functioning of the multilateral trading system. The fact that the meaning of S&D and the scope of the “development agenda” varies among developing countries is not an obstacle to the growing relevance of the topic in the shaping of trade rules. The more the trade agenda is expanded, the more demanding the commitments are, and the more necessary it is to accommodate the various interests and levels of development of the WTO members. Likewise, the expansion of the trade agenda is not matched by an equivalent expansion of the participation of developing countries in the trading system: the structural imbalances that justified the S&D concept more than 30 years ago are still there.

At this time, deeper changes in the content of the S&D concept and rules stem from the proliferation of bilateral and regional trade agreements than from the multilateral framework – and this trend is increasing all over the world. However, the issues being discussed at the WTO on S&D (as well as the development concerns in general raised by the developing countries), and the reasons of the lack of consensus at the WTO are highly relevant for any bilateral or regional trade negotiation.

Since the Uruguay Round, the S&D concept has evolved from being a development tool towards being an adjustment tool, mainly devised to ensure the implementation of the trade rules and the levelling of the playing field. Unfortunately, this evolution has not been able to reflect the increasing number of "within the border" trade commitments, nor to take into account the evidence, i.e. the differences between the countries that can take advantage of the trade liberalisation and those that are left behind in the process.

The current WTO negotiations are now blocked on issues related to this narrowing vision of S&D, such as: what are the "mandatory" S&D obligations and how to ensure that they are effectively implemented; how to monitor the utilisation of the S&D provisions; what sort of “graduation” should be applied among the WTO members beneficiaries of S&D.

It is urgent for the concept and its implementation to evolve as quickly as possible, in order to become a positive development instrument and not an obstacle to trade liberalisation. An updated and effective S&D implies: to avoid evolving towards provisions applicable to the LDCs only –while preserving and improving the specific LDCs' S&D mechanisms; to design sectoral S&D instruments adapted to each trade discipline; to avoid "graduations" based on linear criteria such as the income per capita or the volume of trade; to implement a pro-development coherence between the WTO and the international financial institutions; to ensure that S&D provides developing countries with the means required to take advantage of trade liberalisation.

In the post-Doha negotiations, the re-shaping of S&D should be a key instrument to enhance the credibility of the WTO. This paper aims at providing inputs and possible alternatives to trade negotiators and policy-makers. It is largely based on the recent insights stemming from the ongoing WTO negotiations and informal exchanges of views with WTO delegates and trade experts.
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"Quosque tandem abutere patientia nostra?"
Cicero

Introduction

To talk about special and differential S&D treatment may sound out of fashion. But to talk about how to update the S&D instruments is particularly timely: S&D issues, in their different names and shapes (such as "development dimension", "preferential regimes", "vulnerability", "policy spaces", "flexibility", "development-friendly" rules, etc.), will stay with us in the multilateral and regional trade agendas for a long while. To devise satisfactory ways to tackle S&D concerns – i.e. developing countries' concerns – is not only wise, but also necessary for the credibility of trade negotiations. The imbalances and the development gaps targeted by the S&D concept are real and cannot be hidden in the closet. It is not by accident that one of the main stumbling blocks at the Doha negotiations are, and will continue to be, the S&D provisions and the development issues. And it is probably not an exaggeration to say that the delicate balance that sustains the WTO functioning is closely dependent on the future evolution of the S&D issue.

Moreover, to discard S&D issues by saying that they are obsolete is like throwing the baby out with the water: updating the S&D instruments is the best way to build the support of the developing countries in the rules-making process, to enhance the credibility of trade agreements, and to ensure that a new S&D set of rules is not used against liberalisation but rather as a positive instrument to increase and to facilitate liberalisation. The usual lexicon on S&D is plagued with negative measures: exceptions, exemptions, transition periods, assimilated to unjustified crutches and to unfair distortions. Even the tariff preferences that were originally conceived as positive measures to help the developing countries' exporters are, at best, being eroded, and in any case, questioned and criticised: for many developed and developing countries' policy makers and experts, full reciprocity and uniform rules for all the countries should replace the S&D provisions, with some exceptions for the group of the LDCs, on a temporary basis.

Empirical evidence lies at the roots of the S&D concept – today as it did thirty years ago, when it was formulated: there is plenty of data showing the enormous gaps between developing and developed countries in terms of share of world trade, access to financing and technology, diversification of the production, infrastructure, institutional and human resources. The S&D treatment aims at introducing more equity in the unbalanced North/South economic relations by allowing certain policy measures

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3 In this paper, we will use the expression S&D in both the traditional way (usually limited to preferences and similar measures) as well as its more recent and wider interpretations, trying to identify what are the old and the new elements that can be useful in today’s trade negotiations.

4 See Murray Gibbs, Special and Differential Treatment in the Context of Globalization, in UNCTAD, Positive Agenda and Future Trade Negotiations. New York and Geneva 2000, p.73: "'Special and differential treatment is the product of the coordinated political efforts of developing countries to correct the perceived inequalities of the post-war international trading system by introducing preferential treatment in their favour across the spectrum of international economic relations.'"

5 For instance, see the WTO International Trade Statistics Report of 2002 that reminds us that only 5 out of 150 developing countries account for more than 60% of total developing countries' exports. Other statistical evidence and analyses encompassing economic, social, trade, and investment indicators can be found in the annual UNCTAD Trade and Development Report and the World Investment Report, the World Bank World Development Report, the UNDP Human Development Report, the UN World Economic and Social Progress Report, the UN Regional Commissions reports, etc.
and international rules that partially compensate the gaps. Therefore, the “raison d’être” of the S&D, today as it was in the 70’s, lays both on the actual differences in the levels of development as well as the responsibility of the international community to help bridging these differences. The lack of an official definition of what is a "developing country" does not undermine the relevance of the concept.6

In spite of these obvious justifications, the concept of S&D and the instruments of international cooperation that are devised to implement it are increasingly under attack, in particular by the arguments that leveling the playing field provides automatic benefits to all the countries, whatever their economic and social conditions, and that the quicker you remove all sort of distortions, the sooner you achieve development. The main difficulty regarding the implementation of the S&D idea concerns finding the adequate timing and sequencing of the liberalisation. The timing and sequencing of some developed countries’ protectionist policies in agriculture, textiles, footwear and other “sensitive sectors” may not be an automatically good example for developing countries. However, developmental measures such as subsidies to research, financial support to "vulnerable regions" (as within the EU), financial and technical assistance to trade adjustment7, margins of maneuver to develop competitive sectors and to act in case of crises should be inspired by developed countries’ experiences.

It is now widely recognised that the one-size-fits-all approach that is implicit in the reasoning of leveling the playing field does not match reality. It is equally naïve to rely on theoretical economic arguments to convince the developing countries' governments, businessmen and citizens, that trade liberalisation alone will bring welfare and development.

This paper focuses on the current multilateral trade negotiations. It analyses the conceptual framework of S&D vis-à-vis developing countries’ main concerns towards trade liberalisation and the implications of arriving at renewed S&D provisions in the Doha trade negotiations. While the focus of this paper is on the S&D and development issues in the WTO post-Doha process, we are all aware that the S&D instruments are being more deeply transformed by the ongoing bilateral, regional and subregional, North/South and South/South trade negotiations than by the heavy, cumbersome multilateral machinery in Geneva8. These bilateral and regional trade arrangements that are mushrooming all over the world are modifying the content of multilateral S&D rules in three ways: first, by having a "WTO-plus" scope in terms of trade issues and in terms of level of commitments; secondly, by allowing reciprocity in the commitments without differentiating the levels of development, particularly in the North/South agreements; and thirdly, by insisting on technical assistance as the main S&D instrument that can solve structural imbalances between developed and developing countries.

Even if the goal of this paper is confined to the WTO negotiations, the elements that are analysed here regarding the conceptual framework of S&D and its implementation are valid for other fora where trade rules are shaped: to agree on having or not S&D within a small group of countries is easier than to agree at the WTO, but the core issues of S&D are basically the same.

The debate on the validity of the concept and its applicability goes far beyond the scope of this paper. The goal is to look at the state of play of the debate at the WTO, and to identify the core elements that may help in the formulation of national and/or sectoral positions regarding the necessary modernisation of S&D instruments.

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6 The status is self-defined but not automatically granted since it is part of the negotiations on accession to the WTO: see Sam Laird, Raed Saffadi and Alessandro Turrini, The WTO and Development. Paper prepared for the Conference on Policy Reform, Tulane Univ., Nov. 2001, mimeo., p. 2-3.
7 See United States Trade Act of 2002, Section 2, Division A: "Trade Adjustment Assistance", regarding measures in favour of the workers affected by the trade liberalisation.
8 There are several trade arenas where S&D and development concerns are being given a new content more rapidly than at the WTO: in the Americas, through the FTAA and the bilateral and subregional agreements that are being concluded with the US; in the recently launched ACP/EU negotiations involving 77 developing countries and the EU; within the Asian region, through APEC, ASEAN and other trade arrangements; and within the African region, where subregional processes are quickly evolving. These negotiations concern all sort of S&D provisions: from market access to the “new” issues of investment and competition, environment, labour, standards, rules of origin, financial cooperation, etc.
The concept of S&D and its implementation have evolved in parallel with the changing nature of the international economic relations and the development theories. It has been applied and interpreted in various forms and in various areas of the international economic system, mainly but not exclusively in the area of trade rules, financial instruments and development aid. In the area of trade, it was introduced in the GATT 1947 –but the label "S&D" was not used at that time- and it evolved through different amendments.

Our attention in this paper is focused on the transformation and the implementation of the concept in the area of multilateral trade rules. One basic change summarises the evolution of S&D in the multilateral trade rules from the GATT to the WTO: S&D has evolved from being a development tool (until the Uruguay Round) to being an adjustment tool (in the WTO legal framework).

Until the Uruguay Round, when the trade agenda was confined to trade in goods, S&D was conceived as a development tool in particular by allowing flexibility in the use of tariffs and quotas in case of balance of payments crises affecting the local industries (art.XVIII of the GATT 1947, article XXVIII bis), and by helping developing countries’ exports to compensate their difficulties in acceding to international markets (non-reciprocity in the tariff reductions and generalised systems of preferences as provided by the GATT Part IV of 1964 and the Enabling Clause of 1979). Both instruments were closely linked to the nature of the multilateral trade agenda until the 80’s, i.e. "border measures" applied to market access of goods, and "policy spaces" allowed for the utilisation of tariffs applied to imports of goods.

Since the Uruguay Round, the trade agenda has extended beyond the border measures for trade in goods: it includes other forms of trade, and targets “within-the-borders” policies that affect trade and imply the deep integration of economies (services, domestic support and export competition, trade remedies such as antidumping and countervailing duties, investment-related policies, intellectual property regimes, custom valuation). The instruments implementing the concept of S&D in these new trade rules have not evolved accordingly from border measures to within-the-borders measures: in the WTO legal framework, the S&D provisions aimed at compensating the imbalances in the trading system are basically: (i) transition periods to give time to adapt the national legislation and institutions, (ii) some exceptions, exemptions or flexibilities mainly in favour of LDCs, and (iii) technical assistance. These S&D instruments are added to the GATT provisions regarding preferential tariffs, but the erosion of preferences due to the progressive reductions of tariffs and the elimination of quantitative measures (except in agriculture) reduces the impact of GSPs and other non-reciprocal instruments in favour of developing countries.

The overarching idea of the Uruguay Round S&D provisions applied to the “within-the-borders” trade agenda is to provide adjustment tools to the developing countries, in order to modify their laws and economic policies to comply with the new trade rules – taking for granted that these rules will automatically be beneficial for their development. In other words, more than aiming at developing a local productive capacity, the existing WTO S&D measures aim at developing legal and institutional frameworks that suit the agreed trade obligations. This is certainly a laudable goal, but unfortunately, insufficient to provide an equitable playing field when trade flows and trade rules have deep implications on any national economy. Obviously, the simplistic assumption that the WTO trade rules per se lead to development benefits is closely linked to a certain kind of development model – but the ideological discussion goes beyond the scope of this paper.

In other words, when the trade agenda was basically confined to reduce border barriers, the S&D instruments provided some pro-active, positive measures designed to help the national development policies, such as preferences, policy spaces and non-reciprocity. When the trade agenda shifted

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10 See Sam Laird et alia, op.cit., p.3.
towards trade rules that involve constraints to the national development policies, the S&D provisions tend to be concentrated on the adjustment to the new standards through negative measures such as temporary exceptions. In this context, the provision of technical assistance is certainly a positive, pro-development measure, but it cannot provide changes in the economic structure, the supply constraints and the competitiveness of developing countries. In other words, "S&D treatment is not seen as a permanent recognition of the needs of the developing countries while they remain as such, but rather it is seen as a transitional set of measures over specifically defined time periods to allow developing countries to take on the same level of obligations as the developed countries."12

The shift of the multilateral trade rules from border measures to domestic regimes affecting trade was accompanied by another important change in the process of shaping these rules: until the Uruguay Round, tariff reductions were multilateralised through the MFN principle governing the GATT, while codes in trade policy areas such as antidumping, subsidies or procurement were plurilateral, i.e. mandatory only for their signatories that deliberately decided to adhere to them13. In fact, many developing countries did not join all the codes, or did it gradually. With the introduction of the "single undertaking" in the Uruguay Round, the whole set of multilateral rules is the same for all the WTO members, notwithstanding their level of development, with no "opt-in/opt-out" rules. In the scheme of the "single undertaking", since the obligations are conceived to be the same for all the economies, the margin for S&D provisions that accommodate different levels of development is limited. The leveling of the playing field is achieved by introducing the same obligations for all countries rather than by bridging the gap between industrialised and less developed economies. However, the Marrakech Agreement establishing the WTO in 1994 recognises "different levels of development".

One significant exception to this trend was introduced in the Uruguay Round through the General Agreement on Trade in Services (GATS) that is based on a "positive list" approach allowing determining the scope of the national obligations in services in accordance to the domestic situations. The architecture of GATS is usually considered as an innovative and equitable way to implement S&D. In addition to the flexible schedules of commitments regarding the services sectors and modes of supply, the GATS contains "pro-development" provisions, particularly articles IV (on the participation of developing countries in the trade in services) and XIX.2 (that allows for attaching conditions when granting access to the domestic markets). The flexibility provided by this WTO agreement is particularly useful at the multilateral level to take into account the "within-the-border" issues involved by the liberalization of trade in services. This is why the ongoing WTO negotiations in this area are highly relevant from the point of view of assessing to what extent the "development agenda" of the Doha negotiations is being concretely implemented14.

The Uruguay Round Agreements changed the focus of the S&D provisions towards ensuring the implementation of the new rules. But the numerous “implementation issues” raised by developing countries since the preparatory process of the 3rd WTO Ministerial Conference in Seattle demonstrated that many of the new rules did not match the legal, institutional nor economic capacity of all the developing members15. They also demonstrated that the adjustment measures provided by the S&D clauses were not enough to attain the required capacity. For instance, the structural imbalances that impede a developing country from taking advantage of the protection of intellectual property rights and developing its own technology cannot be solved by granting either a longer transition period to comply with TRIPS, or technical assistance to improve the capacity to avoid piracy.

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12 Sam Laird et alia, op.cit., p. 4.
13 See Murray Gibbs, op.cit.
14 See infra, p.17.
15 It is worth reflecting on the continuous validity of the developing countries' concerns expressed in preparation of the Seattle Conference through proposals on S&D, such as those related to "low levels of industrialization, inability to access advanced technologies, lack of domestic savings to invest, excessive dependence on primary product exports, declining terms of trade, volatility of export earnings, vulnerable BOPs situations (…), inefficient infrastructures (…), inability to meet standards of developed countries (…), lack of access to distribution channels, high percentage of the population employed in the agricultural sector, mostly at subsistence levels (…), lack of resources for subsidization (…)"); Murray Gibbs, Special and Differential… op.cit., p.86. Similarly, Rubens Ricupero noted that: "Developing countries frequently refer to their perception that it is the developed countries that actually benefit from special treatment, because they are permitted to use measures unavailable to developing countries for technical reasons, relating to notifications or situations extant at the establishment of the WTO, or measures unavailable for financial reasons." Rebuilding Confidence in the Multilateral Trading System: Closing the 'legitimacy Gap", in: The Role of the World Trade Organisation in Global Governance, ed. by Gary Sampson, United Nations University Press, Tokyo, New York, Paris 2001, p.50.
Since the failure of the Seattle Conference two ideas are increasingly expressed through the developing countries’ positions at the WTO: first, the idea that trade liberalisation does not automatically lead to development gains; second, the idea that developing countries do not have the same capacity as developed countries to take advantage of the opportunities created by trade liberalisation. In the current WTO negotiations, the new S&D provisions that are being discussed are fuelled by these ideas, and by the significant commitments made by the developing countries during the Uruguay Round.

Against this background, the implementation problems as well as the insufficient “pro-development” provisions in the overall WTO rules were identified with an increasing clarity and awareness in the process leading to the 4th WTO Ministerial Conference in Doha. The Doha Ministerial Declaration and the Decision on the Implementation Issues reaffirm the validity of the S&D as an across-the-board concept and in several sectoral issues. The trend towards minimising the scope of the S&D measures that was evident through the Uruguay Round, was reversed by the language of the Doha mandates. The label of a “Doha development round” goes in the same direction. What remains to be seen are the actual results of the ongoing negotiations from the point of view of the development benefits: to what extent the Doha language will be matched by tangible results for the interests of the developing countries? The sections below look at the main stumbling blocks with regard to S&D issues concerning substance and procedure, which have emerged at the WTO since substantive discussions about the Doha mandate on S&D started in March 2002. Section F of this paper looks at the current state of play of the negotiations from the angle of S&D provisions.

B. - Mandatory versus "best endeavour clauses":

One of the main obstacles raised since March 2002 (i.e. since the start of the Special Sessions of the WTO Committee on Trade and Development, that is in charge of the Doha mandates on special and differential treatment) concerns the implementation of paragraph 44 of the Ministerial Declaration: "We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational." This language is inherited from the pre-Seattle positions of several developing countries and LDCs that have been consistently complaining about the lack of impact of the S&D provisions, as well as about the unclear obligations derived from these provisions. Usually, the concerns of these countries were expressed in conjunction with many pending "implementation issues"16, in particular those concerning the S&D “best endeavour” provisions whose implementation has been unsatisfactory because of their weak mandatory commitments17. This is why for many developing countries the value of the S&D issues is closely related to the implementation issues: both topics were introduced by these countries at Doha as key priorities of their agendas, awaiting to be addressed since Seattle.

As soon as the discussions on the S&D issues started according to the Doha mandates, some questions were identified – and are still unsolved – such as the following:

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16 For an overview of the “implementation issues” as they were identified before the Seattle Conference, see UNCTAD, Positive Agenda…op.cit. The paragraphs 22 and 23 of the Seattle Draft Ministerial Declaration (that was never adopted because of the failure of the Conference) identified more than 50 pending implementation issues referring to, inter alia: unclear rights and obligations; provisions whose implementation leads to negative effects for developing countries; obligations whose implementation goes beyond the capacity of the developing countries; provisions setting insufficient transition periods. At Doha, the pending implementation issues were re-drafted and compiled in two documents: the agreed Ministerial Decision on Implementation-Related Issues (WT/MIN(01)/17) and the Compilation of the Outstanding Implementation Issues (Job(01)/152/Rev.1) that was elaborated by the WTO Secretariat. Both documents are covered by the “single undertaking” mandate: see para.12 of the Doha Ministerial Declaration and para. 13 of the Ministerial Decision on Implementation-Related Issues.

17 For a list of “best endeavour” provisions as classified by the WTO, see inter alia: WT/COMTD/W/77/Rev.1/Add.2, WT/COMTD/W/77/Rev.1/Add.1/Corr.1. The WTO distinguishes between the S&D clauses implying "obligations of result" and "obligations of conduct", the latter being considered as "best endeavour clauses" because they contain language such as "taking into consideration the concerns of developing countries", that allows for discretionary measures. One of the WTO’s documents contains 23 "mandatory" S&D provisions that imply "obligations of conduct" (WT/COMTD/W/77/Rev./Add.2), out of a total of 155 S&D provisions.
- How to ensure the enforceability of the "best endeavour" clauses, i.e. the provisions drafted with vague language, where the rights and obligations are not clearly defined (the "soft law" as opposed to the "hard law")? Legally speaking, all the provisions contained in the operational parts of the agreements are binding (or mandatory) for all Members. But so far, no serious effort was devoted to clarify how the "best endeavour" clauses would be fulfilled. Since some developed countries are blocking any drafting and amendments at the Special Sessions of the Committee of Trade and Development, how to improve the effectiveness and operationalisation of S&D without allowing for changes in the existing provisions?

- Another substantive aspect stems from the fact that there are different ways of applying the S&D provisions, according to their nature. The WTO typology of 155 existing S&D clauses identifies six categories of S&D, each one of them raising specific implementation difficulties:

  (a) The provisions aimed at increasing the trade opportunities of developing countries: the enforcement is difficult to monitor since no benchmarks are set to assess the effectiveness of these provisions.

  (b) The provisions under which WTO Members should safeguard the interests of developing countries: these provisions require criteria and mechanisms that are usually missing in the WTO machinery.

  (c) Flexibility of commitments, of action, and use of policy instruments: these S&D provisions are easier to implement since they establish rights for the developing countries but not "mandatory" obligations for developed Members. These are basically "positive" S&D measures aiming at allowing certain margins of manoeuvre for national decisions according to the level of development.

  (d) Transitional time periods: from the legal point of view, the implementation and the enforceability of these S&D provisions is automatic. What is not guaranteed is the effectiveness of the transition periods to achieve their goals, i.e. to achieve the capacity required to comply with the rule at the end of the five-years period provided for the developing countries in the TRIPS agreement, for example. In many cases, the additional time available for the developing countries and the LDCs is useless if no technical assistance or financing for development is provided during that time.

  (e) Technical assistance: all the provisions containing this S&D instrument are "best endeavour clauses" insofar as it is difficult to ensure their enforceability since the delivery of technical assistance relies on available financial and human resources – with the limited exception of the funding of technical assistance through the regular WTO budget, that is not optional. The funding of the development aid is an instrument of national foreign policies: it is hard to make that funding mandatory and to ensure that technical assistance is allocated to the

18 One of the first suggestions discussed was to replace the verb "should" (and similar vocabulary) by "shall" to ensure the mandatory nature of the S&D obligations. This kind of solution would require the negotiations of amendments to the rules, or the negotiation of "authoritative interpretations" of the rules. For some rules such as the MFN clause, GATS, TRIPS, unanimity is required to adopt an amendment, while an authoritative interpretation requires to be adopted by ¾ of Members.

19 The Secretariat was asked to produce a number of documents relating to mandatory and non-mandatory special and differential treatment provisions (WT/COMTD/W/77/Rev.1/Add.1), a review of mandatory special and differential treatment provisions (WT/COMTD/W/77/Rev.1/Add.2), non-mandatory S&D provisions (WT/COMTD/W/77/Rev.1/Add.3), information on the utilisation of S&D provisions (WT/COMTD/W/77/Rev.1/Add.4).

20 For an analysis of each category of S&D rules, see Sam Laird et alia, op.cit.

21 See WT/COMTD/W/77/Rev.1/Add.2, p.5.

22 "The transitional periods for developing countries to implement the agreements have proved to be insufficient in light of the inadequacy of their administrative resources and access to financing. I have pointed out in several statements that the major developed countries have enjoyed 'transitional periods' approaching half a century to implement their GATT obligations in the agriculture and textiles sectors; by contrast, developing countries are being asked to implement the whole set of intellectual property instruments, on which many have no prior legislation, within a mere five years." Rubens Ricupero, op.cit., p.51. See also Clare Short, "Making the development round a reality", in ibid., pp.72-73 on the transition periods. Some of the current proposals on S&D pinpoint the role of transition periods together with technical assistance to ensure the implementation of the rules rather than the development of the supply and the export capacity: see for example the proposal of the EC (TN/CTD/W/13).
areas where it is really needed. Even more difficult is to ensure that this assistance is not provided exclusively to the LDCs.\textsuperscript{23}

\textit{(f) Provisions relating to the LDCs:} this is a horizontal category established by the WTO's typology that contains differentiated S&D instruments corresponding to the previous categories.

C.- \textit{How to monitor S&D rules: the proposed Monitoring Mechanism and the need for benchmarks:}

Instead of examining how the enforcement of the different S&D provisions could be ensured according to each category of the WTO's typology, the Special Sessions of the CTD have focused on the proposal for the establishment of a "Monitoring Mechanism" that is the only issue for which it has been easy to reach a tentative consensus.

In July 2002, on the basis of an African group's proposal, the Special Session of the Committee of Trade and Development agreed to establish a "Monitoring Mechanism" that would be mandated to evaluate the utilisation and the effectiveness of the S&D provisions, and of recommending to the WTO Committee on Trade and Development actions to ensure the implementation of the S&D provisions. At the end of 2002, this was the only conclusion agreed by the Special Session in the area of S&D and implementation issues.

However, no consensus could be reached regarding the terms of reference of this mechanism – that is precisely the crucial question deserving developing countries’ attention.\textsuperscript{24} The evaluation of the "utilisation" of the S&D provisions is the main one that, in the mind of some countries, should be assigned to this Mechanism - rather than a mandate aiming at improving the existing S&D rules and devising what new S&D instruments are needed to ensure the effective participation of developing countries in the trading system. In other words, attention has focused on examining to what extent developing members are using S&D rights rather than examining what they need to use them efficiently.\textsuperscript{25} There is also a risk of transforming this monitoring into an additional instrument to examine what developing countries have done to implement the WTO rules.

Another element that has been marginalized in this debate on the monitoring mechanism is the need for development benchmarks that would guide the evaluation of the economic impact of S&D provisions. The word "benchmarks" appears in the documents discussed at the Special Session, but no substantive inputs were provided in order to define the basic trade and development indicators that could sustain the evaluation task. Uniform benchmarks in all trade disciplines would obviously be useless: some customised criteria according to the nature of the development gaps and imbalances that could be addressed through S&D rules in each discipline may be more appropriate.

Surprisingly, a large number of members stated that the first task of the mechanism should be to "strengthen" S&D provisions before defining the modalities of work of the mechanism. However, no suggestions seem to have been tabled on how this "strengthening" could be achieved: through amending the existing S&D rules, or adding new ones? By providing the Mechanism with wide

\textsuperscript{23} In many international organisations, the funding of all or a significant share of technical assistance is provided by voluntary contributions of donors, meaning that mandatory mechanisms can hardly be used. Additional difficulties come from the effectiveness of technical assistance: this issue is now becoming one of the most intensively debated at the WTO. First, because technical assistance is an integral part of the Doha mandates; secondly, because of the trend of many developed countries to consider technical assistance as a substitute for all other S&D instruments; thirdly, because the WTO assistance cannot address the supply constraints; and finally, because the LDCs and several developing countries are linking the expansion of the WTO agenda to new commitments on technical assistance – for instance regarding the "Singapore issues".\textsuperscript{24}

\textsuperscript{24} A recent US proposal (TN/CTD/W/19) concentrates the terms of reference of the Monitoring Mechanism on four main areas: (a) the implementation of WTO agreements by all Members; (b) developments in the Doha negotiations and working groups; (c) development and delivery of identified technical assistance needs; (d) relationship between the WTO and other international organisations contributing to the broader development agenda and supply-side interests. What is not clarified in this proposal is the role of the Committee on Trade and Development, whose mandate matches these issues.

\textsuperscript{25} "Such exercises would do well not to be narrowly restricted to reviews of actual utilisation of the rules; the more important problems to be addressed would precisely be the reasons for non-utilisation.": ICTSD, Trade Negotiations Insights. September 2002, p.6.
powers to enforce the S&D rules? The word "strengthening" correctly reflects the Doha mandate, but the negotiations should have identified the operational means to achieve this goal.

What is also at stake in the discussion on a monitoring mechanism of the S&D provisions is to establish a balance with other monitoring systems regarding the implementation of the WTO obligations. It would be fair to have some kind of control on how the S&D rules are fulfilled since there are analogous controls on the implementation of other WTO rules: why the implementation of TRIPS, for instance, is carefully monitored both by the WTO bodies as well as by external players such as the medias and the NGOs, while S&D provisions and development oriented rights and obligations are not?

Several sensitive questions need to be agreed among members to ensure the functioning of any monitoring mechanism on S&D provisions (or any international body mandated with similar tasks such as the WTO Committee on Trade and Development), inter alia:

- Identify development benchmarks adapted to the nature of the trade disciplines, i.e.: what kind of institutional development, legal framework, supply capacity, export capacity and competitiveness is required to benefit from the trade liberalisation guaranteed by the discipline?

- Is the S&D provision shaped in such a way that it suits these development requirements, and is the monitoring mechanism able to assess them?

- The notification procedure: any monitoring will require determining how the members will inform about their fulfilment of the S&D rules.

- The link between the WTO bodies and the "development" bodies, i.e. the Committee on Trade and Development and the two new Working Groups on Trade, Debt and Finance, and Trade and Transfer of Technology: which body should be responsible for the monitoring of what? This kind of discussion took place – with no consensus reached- regarding which bodies should be in charge of the Doha mandates on S&D and implementation issues: many members stated that the WTO sectoral bodies should deal with these mandates in the first place.

- To what extent the monitoring mechanism should have a say in the formulation of new S&D provisions on the basis of its identification of the "missing" rules?

Questions of this kind require a wide negotiating capacity of the developing countries. It is certainly easier to confine the monitoring to a minimal role. However, monitoring is the only way to compensate the "best endeavour" nature of the S&D provisions and the weak capacity of the developing countries to ensure their implementation. Within the WTO, the Committee on Trade and Development is the body suited to comply with this task: monitoring functions should be given to it, so as to strengthen its role. Closer links with development agencies outside the WTO should complement its role.

D.- The issue of graduation:

The idea of limiting the scope provisions to the LDCs appeared in the 70's, when the history of the S&D was still very short, in the framework of the discussions that concluded with the Enabling Clause. The category of the LDCs, that is the only one formally established and legally recognised by the GATT and the WTO, contributes to consolidate the current trend towards “graduating” developing and transition economies and having LDCs-only S&D instruments. This trend is contradicted by the proliferation of several other informal and self-defined categories of developing countries (small and vulnerable economies, net food developing importing countries, landlocked and

26 See Sam Laird et alia, op.cit., p.18: "... the Enabling Clause itself contains a provision to the effect that preferential treatment should not be indefinite and should evolve through time".
small islands, etc.), some of them corresponding to certain trade rules and decisions of the Members\textsuperscript{27}, all of them aiming at one basic goal: ensure S&D provisions adapted to the characteristics of their economies.

The self-selecting nature of being a developing country in each WTO discipline also contributes to consolidate the validity of the LDCs' category versus the ambiguities of other developing countries. These ambiguities are extended to include the economies in transition, that are also lacking a category based on clear criteria. So far, in each one of the negotiations on accession to the WTO, the candidates have been pushed to accept a treatment that represents less than the usual S&D level. An informal graduation is being shaped through the negotiations on accession, setting de facto precedents for the overall multilateral implementation and interpretation of the S&D rules\textsuperscript{28}.

The issue of graduation has also been raised within the LDCs' group, because some LDCs could potentially graduate and change their status. The cost of losing the LDCs' preferences (in particular in the area of tariffs) is one of the main concerns of LDCs' trade ministers, together with the erosion of preferences that will be the result of any formula of tariff reductions to be agreed in the Doha negotiations. This fear is increased by the fact that there are no visible incentives for the LDCs to leave that category\textsuperscript{29}. Similarly, for many non-LDCs developing countries, their defence of the S&D provisions is largely based on the lack of visible alternative ways to improve their participation in the trading system. The numbers that are frequently used to demonstrate that the preferences are useless and poorly utilised do not replace the political value of the preferences in the eyes of the developing countries and LDCs' exporters: in several developing countries and LDCs, the acceptance of the trade liberalisation may be a pill easier to "sell" to the domestic business if the government enrobes it with the argument that preferences will remain.

In other words, when talking about graduation and erosion of preferences, for a trade minister adopting a negotiating position, purely quantitative data may be less useful than political economy considerations. Likewise, the issue of alternatives and compensations is inevitably mentioned in the debates on graduation through questions like: what are the "compensating measures" available if a country loses the S&D preferential status? A related question refers to the gloomy perspectives of development faced by the LDCs: "it will be difficult for the LDCs to get on and move up the ladder of development if the more advanced developing countries face a 'glass ceiling' which blocks their development.\textsuperscript{30}"

Another dimension raised by a graduation based on the traditional development indicators concerns the developing countries that give preferential status to other developing countries and to LDCs. For instance, it is interesting to note some sentences of the Hungary's proposal\textsuperscript{31}: "the Hungarian delegation is not able to support an interpretation of the Enabling Clause (...) according to which a country like Hungary would be obliged either to provide trade benefits to countries that are richer than herself or to stop operating a GSP system in favour of poorer developing countries in real need of preferential market access. (...) [A]n obligation to provide continuous economic assistance through preferential market access for countries more developed and competitive than us in order to be allowed to maintain our GSP-regime would not be acceptable for the Hungarian Government, for our

\textsuperscript{27} Such as, for example, the notion of "small supplier" contained in the Agreement on Textiles and Clothing and in some provisions of the agreement on subsidies, the Marrakech Decision on the NFDICs, the Doha paragraph 35 and the work programme on the small economies, etc.

\textsuperscript{28} "The accession process can be seen as almost a reverse form of S&D treatment for developing countries. While the GATT rules negotiated in the 1960s and 1970s provided for various forms of preferential treatment for developing countries, including enhanced access to industrialised countries' markets and less rigorous application of rules and disciplines, the new environment of the WTO is much more demanding. It sometimes obliges acceding countries to shoulder burdens that are not shared by countries that joined in earlier decades". Craig VanGrasstek, "Why demands on acceding countries increase over time: A three-dimensional analysis of multilateral trade diplomacy". WTO Accessions and Development Policies. UNCTAD, New York and Geneva, 2001, p.115. Hopefully, regarding the LDCs, this situation should change in light of the recent guidelines for the accession of the LDCs adopted by the WTO General Council in December 2002.

\textsuperscript{29} The fear of losing preferences may be a greater political factor than the potential gains of an MFN liberalisation: if preferences are under-utilised, MFN liberalisation may be a good way to follow.

\textsuperscript{30} UNCTAD, The Least Developed Countries Report 2002, p.235. See also UNCTAD, Least Developed Country Status: Effective Benefits and the Perspective of Graduation. TD/B/49/7, 1 April 2002.

\textsuperscript{31} TN/CTD/W/16, paras. 5 and 6.
economic operators and for the public at large." Countries like Paraguay, Brazil and India also expressed concerns regarding the discriminatory nature of some unilateral preferential regimes. In other words, the issue of graduation is closely linked to the potential competition of trading partners. All WTO members (LDCs, developing countries and transition economies, as well as developed countries), at the end of the day, have one single question in the back of their minds: what will be the implications of S&D rules on my national trade interests? Will these interests better protected if S&D is limited to the LDCs, that are a minor threat in terms of competition? How can graduation criteria protect my trade interests by eliminating competitors? Usually, the debate on graduation is concentrated on the tariff preferences: what is the role of development-oriented trade rules that concern within-the-borders policies in the debate on graduation?

In light of the above, the debate on graduation should focus on three crucial elements:

(i) The transfer from one category to a "superior" one should be ensured through a smooth, backstopped transition instead of suddenly leaving the crutches of S&D to jump into the international economic competition with no help.

(ii) This smooth transition should be accompanied by pro-development tools, particularly in the economic sectors where the country is not yet "at the level" to face the international markets (investments, financial and technical assistance, technology, human resources and institutional capacity building).

(iii) Finally, and more important, across-the-board quantitative criteria that automatically determine the moment when a country is ready to leave a category are unreliable and simplistic: the situation of each country should be assessed against a set of economic and social development criteria, and pro-development measures should be identified to facilitate the gradual transition mentioned above. In this assessment, an issue-based approach that takes into account the requirements imposed by each trade discipline may be more accurate and equitable than a country-based graduation.

This customised approach leads to a different kind of graduation as compared to the one envisaged by many developed countries. Some analyses point towards similar customisations of the S&D provisions: it has been argued that the transition periods cannot arbitrarily be set for all the developing countries or the LDCs, and that several indicators should be taken into account, such as the levels of the external debt, the UNDP human development index, etc. The search for appropriate development criteria to be applied in the area of trade rules is quite complex. Usually, graduation criteria for the Generalised Systems of Preferences are country-based and product-based, and they target tariff regimes only. For the "within-the-border" trade rules, some inspiration may come from the United Nations "vulnerability index".

In the meanwhile, many proposals at the WTO on S&D continue to focus on a possible country-based graduation. However, some nuances are appearing sometimes: for instance, in the framework of the negotiations on the implementation of para.6 of the Doha Ministerial Declaration on TRIPS and public

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32 Paraguay states that "flexible action is possible (...), but the limit to such flexibility is that it should not cause injury to third parties, because such injury, if it occurs, destroys the balance between the principles of non-discrimination and flexibility. It is unacceptable that, in order to help some, allegedly under the principle of flexibility, others should be injured. This is discrimination, not flexibility." (TN/CTD/W/15, para.14). See India's request to establish a WTO panel on the EU's Generalised System of Preferences, on 19 December 2002.

33 A similar idea was mentioned in one of the UNCTAD "positive agenda" meetings in 1998: see UNCTAD, Preparing for the Future Multilateral Trade Negotiations: Issues and Research Needs from a Development Perspective. New York and Geneva, 1999, p.228. See also ICTSD, Trade Negotiations Insights. Vol.I, Issue No3, September 2002, p.7. A recent Swiss proposal points to the same direction: TN/CTD/W/14, para.6: "in some cases, categories will have to be adapted to the specific provisions and agreement"; the EC has the same thinking (TN/CTD/W/13, para.15): "the various WTO agreements, existing and future, are different in nature and imply different levels of capacity to implement (...) such differences should be taken into account when determining appropriate S&D treatment instruments for countries whose capacities differ."


36 See for instance the recent debate on the agreement on Subsidies and Countervailing Measures: the United States stated that the classification based on per capita incomes is a "model" for S&D provisions.
health, Switzerland proposed a general exemption for all the LDCs, while the rest of WTO members, in particular developing countries, would determine their own eligibility on a case-by-case basis, with criteria agreed by the TRIPS Council. The difficulty raised by an issue-based approach instead of a country-based graduation is that the “burden of proof” (i.e. the demonstration that a certain country needs S&D in a certain trade discipline) switches to the developing country – unless multilateral indicators are set in each trade discipline; the advantage is that it allows for flexibility.

The majority of recent developed and developing countries' proposals on S&D dealing with graduation focus mainly on the market access issues from the traditional point of view of tariff preferences (GSPs), as well as the transition periods and exceptions/exemptions embedded in the trade rules. Therefore, the focus continues to be confined to the "negative" S&D measures rather than on the "positive" S&D measures that provide support to development (such as policy spaces, financing for development, technology transfer, capacity building).

In the ongoing WTO negotiation on S&D, both developed and developing countries do not seem willing to be innovative and to push the debate into new spaces. It is true that a traditional country-based approach to graduation is easier to conceive and to implement than any issue-based approach. But while easy solutions simplify the life of the negotiators, they do not always ensure satisfactory outcomes. It would be desirable for developing countries to take the initiative and to put forward constructive proposals on graduation as part of the Doha “single undertaking”.

E.- The issue of "less than reciprocity" in market access negotiations on agriculture and non-agriculture products:

Article XXVIII bis of GATT 1947, Part IV of GATT and the Enabling Clause set the principle of non-reciprocity as one of the pillars of the S&D in trade negotiations on market access – but this flexibility has to be negotiated. The GATT negotiations on tariffs, as well as many regional trade agreements, have been built on that principle (the European Union in the first place, followed by several regional and subregional schemes in Latin America). This provision has to be seen in the overall context of art.XVIII of GATT 1947 on "Governmental Assistance to Economic Development", that is probably one of the main provisions regarding flexibility in trade commitments. Interestingly, art. XVIII concerns all member countries: it is a real "pro-development" provision that goes beyond the traditional S&D language.

As was already the case during the Uruguay Round, the Doha Ministerial Declaration (paragraph 16) reiterates the possibility of introducing "less than reciprocity" in the mandated negotiations on non-agricultural products: "the negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII bis of GATT 1994 and the provisions cited in paragraph 50 below." Similar language is contained in the Doha mandate on agriculture negotiations (paras. 13-14).

The implementation of the "less than reciprocity" principle in market access (for agriculture as well as non-agriculture products) depends on how the negotiating modalities will accommodate, at the same time, highly contradictory interests such as: (i) the high levels of protection applied by many developed countries to agriculture imports; (ii) the unfair competition and the trade distortions generated by the developed countries' agriculture support that cannot be matched by the financial means of the developing countries; (iii) the margins between the applied and the bound rates used as a de facto "safeguard" by many developing countries and LDCs; (iv) the tariff peaks and tariff escalation in developed countries that affect many developing countries' priority exports, and the definition of "peaks" and "escalation" (should the definition be different for the developing countries and LDCs?); (v) the legitimate expectations of the efficient agriculture producers that are hoping for a real trade liberalisation in these negotiations; (vi) the erosion of preferences that will be deepened by any

37 Sam Laird et alia, op.cit., p.23 note 29.
38 See for instance the proposals of Hungary (TN/CTD/W/10 and TN/CTD/W/16), Paraguay (TN/CTD/W/15), the African group (TN/CTD/W/3/Rev.2), Switzerland (TN/CTD/W/14).
39 Sam Laird et alia., op.cit., p.3.
liberalisation of the MFN rates; (vii) the non-tariff barriers and the rules of origin that constitute market access problems where the "less than reciprocity" concept is very difficult to apply in the negotiations; (viii) the fiscal revenues raised by tariffs that are vital for many developing countries and LDCs in particular.

When setting national positions on the use of the non-reciprocal margins, developing countries will face another difficulty: what are the criteria that determine the adequate "less than reciprocity"? How to use this non-reciprocal possibility to implement a long-term competitiveness policy? How to determine what is more appropriate: a sector-based or an item-based approach, or differentiated timetables for the reduction of tariffs? How to determine when full reciprocity is a solution? What additional measures need to be envisaged in the tariff negotiations?40

In other words, whatever will be the final modalities on agriculture and non-agriculture negotiations on market access, the implementation of the non-reciprocity will be extremely complex. Everybody knows that agriculture is the most sensitive item of the Doha agenda and is mentally prepared to the problems this item will generate in the process; however, the negotiators are less prepared so far to face the almost equivalent problems that will be generated by the non-agriculture negotiations.

The most recent difficulty in this regards stems from the United States proposal of a "tariff equalizer" formula (tabled in November 2002) that would, in particular, reduce tariff peaks and achieve a total elimination of tariffs by 2015. Mr. Zoellick, the United States Trade Representative, said that the proposal would try to give developing countries a larger phase-in period for tariff cuts, but apparently, the final goal of eliminating all tariffs would be the same for all the countries. In any case, as in any other proposal on market access issues, the scope of the non-reciprocity and the way to implement it depends on how the "modalities" for the negotiations are finally shaped.

The notion of "less than reciprocity" also appears in the EU's proposal on agriculture announced on 16 December 2002. This proposal includes several measures aimed, in principle, at "enhancing" the S&D in agriculture. The negotiation will show to what extent the improvements that are being proposed on market access and domestic support are really significant as compared to the existing S&D provisions.

Several key questions emerged in the recent WTO meetings dealing with non-agricultural tariffs and non-reciprocity. All of them are relevant for the developing countries engaged in any bilateral and regional trade negotiation:

- Many developed countries would like to focus on the high level of tariffs applied (and bound) by developing countries, arguing that the level of liberalisation in developed markets is already very satisfactory, and implying that developing countries' reductions should be deeper.

- The "less than reciprocity" principle could be implemented differently in the case of a zero-for-zero approach, a tariff-cut formula, or a request and offer approach.

- Developing countries would like to focus on tariff peaks and tariff escalation, as well as non-tariff barriers that may be "forgotten" in a linear reduction formula.42

- Developing countries wish to apply a "positive list" approach to the agriculture reduction commitments, i.e. to be able to determine which products will be subject to tariff reductions.

- At the WTO, the majority of developing countries is in favour of starting the tariff negotiations on the basis of the bound rates43, while some developed countries have proposed the

40 "Accelerated reductions in tariffs and other forms of support should be encouraged for exports of interest to the developing countries, especially the least-developed countries. (...) Accelerated liberalisation or full reciprocity (...) might be rewarded with financial support, particularly to offset revenue losses and facilitate structural adjustment.": UNCTAD, Back to Basics: Market Access Issues in the Doha Agenda. Geneva and New York, UNCTAD/DITC/TAB/Misc.9, 2003, p. viii.

41 Inside US Trade, Nov. 29, 2002. It is worth noting that the United States Trade Promotion Authority Act that provides clear negotiating goals for all the trade negotiations does not mention any sort of S&D concern.

applied rates as the starting point – in particular in the regional and bilateral negotiations: how to implement the "less than full reciprocity" in that case, since the bound rates of developing countries are usually higher than those of developed members?

- Some developing countries prefer a request and offer approach in the market access negotiations that would preserve the concept of less than reciprocity and target tariff peaks and tariff escalation.

- The issues of discrimination and trade deviation appear when considering the tariff liberalisation that could be achieved at the WTO as compared with the free trade areas that are being achieved through the regional agreements (many of the latter are built on reciprocity or aim at it): what will be the value of non-reciprocal tariff reductions at the WTO if the bilateral and regional agreements contain more reciprocity than the WTO commitments?

- Some developed countries have proposed differentiated coefficients to be applied in the tariff-cut formulae, based on categories of countries: i.e. the "less than reciprocity" principle would be modulated according to some kind of graduation criteria.

- Finally, the modalities on market access for industrial products will have to tackle the issue of "sensitive imports" that exist in developed as well as developing countries: what sort of "less than reciprocity" criteria could be envisaged in this regard?

F.- The meaning of the Doha mandates on S&D and the state of play of the negotiations:

Paragraph 44 of the Doha Ministerial Declaration on S&D contains wide terms of reference for the ongoing WTO negotiations. It is important to read them again in order to assess the difficulties encountered by the negotiators, on the one hand, and on the other the distance between the goals set at Doha and the poor results of the negotiations so far. The Doha mandate implies the following:

a) *The recognition of the legal value –i.e. the contractual nature – of the S&D provisions*, therefore assuming that they all represent commitments for all the WTO Members.

b) *The links with the implementation issues*, since many existing S&D provisions are not operational and miss the objective of addressing development concerns, and the incorporation of the mandates on S&D and implementation into the “single undertaking” of the Doha process.

c) *The proposal of regrouping all the S&D provisions in a "Framework Agreement" to be added to the WTO rules.*

d) *The need to review all the S&D provisions* in order to "strengthen" them and making them "more precise, effective and operational".

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43 "Focussing tariff liberalisation on bound rates will allow some policy space for developing countries whose bound rates are higher than applied rates": ibid., p.viii.

44 In the WTO legal framework, there is no legal basis to use the applied rates as the starting point for negotiating tariffs.

45 For instance, the “Swiss formula” implies a coefficient that determines the depth of the tariff cut: T1=aT0/(a+T0), where T0 is the bound tariff, T1 the new bound tariff, and a coefficient determining the depth of the reduction. The differences in this coefficient would determine the scope of S&D in the modalities for tariff reduction.

46 "We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly LDCs. In that connection, we also note that some Members have proposed a Framework Agreement on S&D (WT/GC/W/442). We therefore agree that all S&D provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on S&D set out in the Decision on Implementation-Related Issues and Concerns."

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The incorporation of the mandate on S&D in the "single undertaking", meaning that these mandates have the same value as other negotiating items included in the Doha Ministerial Declaration and the Decision on Implementation47. Therefore, the Doha mandate on S&D appears strong. It represents a significant achievement of the developing countries in Doha, in particular if we consider that it is the first time the issue of S&D as such is included in the agenda of multilateral trade negotiations. Indeed, the relevance given to the S&D issues at Doha is a positive achievement of the developing countries that have been insisting on this crosscutting aspect of the trade agenda since the preparatory process of Seattle. However, the current state of play of this negotiation is far from complying with the Doha mandate, and two deadlines (31 July and 31 December 2002) were missed.

There is also a serious risk of a new weakening of the S&D issue because of the following elements that appeared since March 2002:

- First, no drafting exercise on S&D provisions has been allowed by developed countries in the Special Sessions of the Committee on Trade and Development. This blocked any attempt to achieve the mandate: how can the S&D rules be imposed if the current provisions are not amended, if no new provisions can be added, and if no authoritative interpretation of S&D rules is being drafted? In this sense, there has been a growing trend in the special sessions to use the language "taking note" of the developing countries and LDCs' proposals without further commitments.

- Secondly, by focusing on the establishment of a monitoring mechanism that would assess the utilisation of the S&D existing provisions, attention is diverted from the identification of development benchmarks that should, instead, assess the effectiveness of the S&D provisions for development purposes. Similarly, the developed countries' trend towards presenting technical assistance as the main (sometimes the only) S&D instrument is obvious in the negotiations48. Another concern comes from the fact that some developed countries are using the monitoring mechanism purely as a "bargaining chip" in the negotiations on S&D.

- Thirdly, the articulation between the pending implementation issues and the improvement of S&D rules is very limited: several developed countries have insisted on dealing with the S&D mandate in the bodies responsible for different trade disciplines, therefore weakening the value of the Committee on Trade and Development as a "central body" on S&D49. In this regard, the risk of diluting the political role of the Committee on Trade and Development was not avoided by the developing countries, due to their limited physical capacity to attend all the WTO meetings convened at the same time (on average, some 40 per week).

- The mandated work on a "Framework Agreement" has not started yet. Since March 2002, members have devoted their time to discussing the WTO classification of "mandatory" and "non-mandatory"

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47 According to the paragraph 12 of the Decision on Implementation, the Committee on Trade and Development is instructed to: (i) identify the S&D provisions that are "already mandatory" and consider the legal and practical implications of converting into mandatory those that are not; (ii) make "clear recommendations" to the General Council by July 2002 in this regard, and examine "additional ways" to make S&D provisions more effective; (iii) to consider "how S&D may be incorporated into the architecture of WTO rules": this language is almost a contradiction to paragraphs 44 and 50 of the Doha Ministerial Declaration that stated that S&D provisions are already part of the existing rules, and no reference is made here to the proposal of concluding a Framework Agreement; (iv) to base its work on the WTO Secretariat classification of S&D provisions done before Doha (WT/COMTD/W/77/Rev.1): this document is assumed to be the starting point of the negotiations; (v) to work in parallel with the work on the implementation issues done at the General Council and in other Councils and Committees: this means complementarities between the Committee on Trade and Development and other WTO bodies, but does not mean that the former can be substituted by the latter.


49 "At this stage, it is difficult to assess the progress made in relation with the implementation issues because: (i) the Decision encompasses eleven agreements (...), each one including several pending "issues and concerns", and (ii) many of these issues are being treated by the relevant WTO bodies in a fragmented and still ongoing process, according to different deadlines": UNCTAD, Trade and Development Board. Review of Developments and Issues in the Post-Doha Work Programme of Particular Concern to Developing Countries. TD/B/49/12, 11 September 2002, para.24.
provisions (without reaching a consensus)\(^{50}\), the graduation issue (with no consensus), and the possible monitoring mechanism (on which a tentative consensus was reached). Many sessions were also devoted to general debates on the objectives of the S&D provisions, as if after some 50 years of trade rules, and more than 30 years of Part IV of GATT and the Enabling Clause, the objectives of S&D were not clear.

- The clarification of "additional ways" to make S&D provisions more effective seems to have disappeared from the mandated work: this language could be used by developing countries to launch a debate on actions that could be undertaken outside the WTO by development agencies to support the effectiveness of S&D provisions (through targeted international financial assistance, for instance, in the areas and sectors corresponding to the S&D rules).

- Some progress was registered in 2002 regarding the adoption of a "work programme" for the LDCs and the small economies that are related to the issue of S&D.

It is worth reminding that the Doha mandates on S&D are not confined to the existing S&D provisions and the implementation issues, but are embodied in the mandates on each area of the Doha agenda aiming at the formulation of new provisions. This is why an assessment should be made of the effective incorporation of S&D or pro-development approaches in the Doha process, in the shaping of the final "single undertaking".

In this regard, there is a crucial topic exemplifying the need for a modernised S&D vis-à-vis the deepening of the trade agenda towards "within-the-border" measures: i.e. the services negotiations. This is an area where we could test to what extent there is a modernisation of the S&D at the multilateral level\(^{51}\). The development-friendly commitments on services that will eventually emerge from the Doha process may also be inspiring for possible WTO negotiations on investment and competition, insofar as some aspects of these topics coincide with services issues (such as the commitments on commercial presence, the domestic regulatory framework and the competition rules).

The developing countries' concerns in the WTO services negotiations concentrate on the ongoing requests/offers process (both North/South and South/South), where they are increasingly interested in identifying priority sectors and modes for their development policies, as well as on market access barriers and sectoral anti-competitive practices that should be addressed by the negotiations. The most effective way to ensure a "pro-development" (rather than an S&D) treatment in services is through asymmetric offers and requests. Paragraph 15 of the Guidelines and Procedures adopted in March 2001 provides for an assessment of how the negotiations reflect the developing countries' concerns – in addition to the overall assessment of the development impact of GATS. Secondly, the GATS "horizontal" or systemic issues (i.e. the GATS rules, domestic regulation, classification issues, etc.) also require to be considered from the point of view of the development needs.\(^{52}\) A new, still unexplored dimension of the WTO negotiations on services refers to the articulation between regional and multilateral commitments: the concept of "preferences" is being considered in the framework of some subregional commitments on trade in services. So far, there are no specific criteria to evaluate what kind of S&D on trade in services may be positive in the framework of integration schemes or free trade areas. The experience of the EU may be relevant in this regard. In both dimensions, the Doha negotiations will be a test for the effectiveness of the GATS' "positive list" structure: to what

\(^{50}\) The identification of the S&D provisions that are 'mandatory' and those that are 'non-binding' was complicated by the lack of agreement on the criteria to classify them as provided by the WTO Secretariat. Therefore, no real progress was made to identify the S&D provisions whose mandatory nature was debatable, not to 'operationalise' the existing S&D provisions": ibid., para.26.

\(^{51}\) See supra, p.6. For an assessment of the state-of-play of the WTO negotiations on services, see Luis Abegattas, "GATS Negotiations on Specific Commitments: Issues for Consideration by Developing Countries". Bridges, November/December 2002, pp. 3-4.

\(^{52}\) For instance, in the provisions on emergency safeguards, what principles could be useful to support the participation of the developing countries in the trade in services? What provision on safeguards could be an appropriate legal framework so as to sustain the specific room of manoeuvre contained in the sectoral commitments? As in many other aspects of the rules on trade in services, North/South imbalances do not provide the full picture: for instance, in energy services, importing or exporting energy countries will have a different understanding of emergency measures, government procurement or subsidies rules.
extent are developing countries able to use this structure to implement "policy spaces" in their trade in services liberalisation?

A final component of the state of play of the S&D issue in the WTO negotiations refers to the possible links that could be established with the pending decision of launching negotiations on the "Singapore issues". A probable scenario is that of an increasing fragmentation among developing countries and LDCs on these issues. Consensus building and credibility in the WTO process will not benefit from that. The temptation to resort to non-multilateral trade agreements will grow.

Concluding thoughts on the future of S&D and development issues in the Doha process.

In the short and medium term, the future evolution of S&D instruments and development issues in the multilateral trade process will be determined by how will evolve three main factors:

1. The increasing proliferation of regional, subregional and bilateral trade arrangements that are already reshaping the content and the scope of S&D more deeply than the WTO process, by: (i) having a Doha ‘plus’ agenda and WTO ‘plus’ commitments of liberalisation; and (ii) by allowing for reciprocity in the commitments without differentiating the levels of development, particularly in the North/South agreements (or by limiting the S&D provisions to the LDCs). What is happening in the regional and bilateral trade negotiations is more important for the evolution of S&D than the ongoing WTO negotiations. The first impact of North/South and South/South "spaghetti bowls" in all the regions is reflected on the different provisions entailing S&D instruments. The national positions of the developing countries on the WTO negotiations on S&D issues should start by looking at the S&D provisions that are being tabled at the regional and bilateral levels.

The fragmentation into bilateral and regional pieces adds to the increasing "calibration" of S&D for different categories of countries (small economies, small islands, land-locked countries). This erodes the MFN level, weakens the effectiveness of the WTO’s role, and fuels the trend towards less S&D, more reciprocity and "WTO plus" commitments. The long-term effects of these trends on the development of developing countries remain to be seen: at this stage, only some of them seem to receive benefits.

However, the fragmentation may be beneficial if developing countries manage to use it to negotiate specific regional and bilateral development instruments that suit their needs and could not be agreed upon at the multilateral level. In the next few years, some North/South negotiations may include S&D and targeted pro-development provisions that represent innovative instruments as compared to the WTO rules – insofar as the developing and transition economies involved in these negotiations are able to lead the process in that direction.

For instance, some provisions contained in the Euro-Mediterranean agreements (that will certainly influence the ACP/EU post-Cotonou process) are inspired by the development and adjustment policies used within the European Union to help the weakest regions of its member states. Therefore, in the Euro-Mediterranean agreements the accent is not on the usual S&D clauses and the “negative” measures such as exceptions or transitions, but rather on policy

53 It is important to remind the Doha mandate on regional trade agreements, that also contains a reference to S&D: “We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.” (para. 29, Doha Ministerial Declaration). This mandate may not lead to significant changes in the WTO rules on regional agreements because of the interests of many WTO members (developed and developing alike) to maintain the status quo.

54 See for instance the EC/Jordan Agreement of 24 November 1997 (WT/REG141/1, 24 December 2002), Title IV, Chapter 2, art.4: the Jordan’s public aid policies are assimilated to those given to the EC’s areas “where the standard of living is abnormally low or where there is serious underemployment, as described in Article 92(3)(a) of the Treaty establishing the EC.” See also Title VII, art.87: “(…) the EC will examine suitable ways of supporting structural policies carried out by Jordan to restore financial equilibrium in the main financial aggregates and encourage the creation of an economic environment conducive to increased growth, while at the same time improving the social well-being of the population.”
spaces supported by economic cooperation, investments, financial and technical assistance to develop supply and competitiveness. This kind of S&D approach requires precise commitments so as to avoid that the development language remains confined to rhetoric and new “best endeavour” provisions. The negotiating mandates contained in the Cotonou agreement point, in theory, to that direction, but the negotiations will demonstrate to what extent they are being effectively used by the ACP countries. On the contrary, the FTAA drafts (as they were tabled in 2002) do not show a similar development orientation insofar as they do not contain mechanisms that would allow to link investments, scientific cooperation, financial assistance and similar measures to the hemispheric trade liberalisation that is being envisaged.

(2) - The increasing focus on technical assistance and capacity building as the main way to implement the S&D concept: technical assistance is obviously not a panacea for all development problems. S&D instruments need to be modulated according to the different trade disciplines: tariff preferences may be useful for market access, but for TRIMS, TRIPS, agriculture, or services, different kinds of S&D provisions are necessary. The deepening and widening of the trade agenda imposes a serious review of the traditional S&D. Even in the cases where technical assistance might be the most appropriate way to implement the S&D principle (for instance in the area of custom valuation, competition policies and rules, SPS/TBT), the current accent on technical assistance does not address the issues of its quality or quantity: what kind of technical assistance and capacity building is the most effective, and who controls the quality? How many resources are allocated for this purpose, and are they "neutral" or rather tied to the trade interests of the donors?

Instead, what should be seriously examined is a pro-development coherence between the WTO and the Bretton Woods institutions, whereby the latter could support the effectiveness of the S&D provisions with financial assistance targeting, for instance, the competitiveness and the supply constraints of the sectors that are being liberalised.

The main goal of an improved coherence should be to provide the developing countries with the means they need to take advantage of the trade liberalisation. The implementation problems raised by the Uruguay Round agreements should be avoided by evaluating the cost of implementing new post-Doha trade commitments, and by planning the developmental support needed to ensure that they will have a positive impact. Since the WTO alone cannot assume these tasks, coherence means ensuring that the financial and development agencies are implementing concrete joint actions to support the efforts of liberalising trade: "the Bretton Woods institutions could well provide incentives or support to developing countries to implement WTO obligations, as well as structural adjustment problems arising there from, without further conditionality".

Likewise, "policy spaces" should not be reduced by further commitments that curtail national development strategies in the sectors that have economic potentialities. The two new Working Groups established at Doha on Trade and Transfer of Technology, and Trade, Debt and Finance, should play a crucial role in identifying how to improve coherence with the WTO. There is a need for the developing countries to ensure that these two Working Groups are given the terms of reference they need to fulfil that goal.

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55 "The essence of S&D should not be the availability of resources from developed countries and international organisations. This should remain as merely a component. The essence of S&D should be reconceptualised through changes to WTO rules. The rules will address the financial aspects, but far more importantly they should fully ensure a balance of rights and obligations, equity, and the promotion of the development prospects of developing countries." ICTSD, Trade Negotiations Insights. Vol.1, Issue No.3, September 2002, p.6.


57 Sam Laird et alia, op.cit., p.23.

The meeting of 17 December 2002 of the Working Group on Trade, Debt and Finance showed some encouraging signs in this regard: some developing countries gave concrete examples of the lack of coherence and gave directions for the work of this new WTO body. For instance, they referred to: the issue of autonomous liberalization advocated by the financial institutions that was not recognised in the services negotiations; the IMF-supported adjustments in the financial sector that are considered as actionable subsidy at the WTO; the need for meaningful market access for products of interest, for financing trade supply capacity and to reduce the impact of the commodities' price volatility. An African Group proposal requests the Working Group, inter alia, to review the WTO agreements from the angle of diversification of value-added exports, financial instability, external indebtedness, and financial services liberalisation.

(3) The risk of a graduation based on simplistic country-based criteria: through the proposals being tabled at the WTO, as well as the policy statements on trade and development of all developed countries, there is a clear trend to accelerate the automatic exclusion of developing and transition economies from the S&D and similar development tools. This trend is visible beyond the WTO in the bilateral and regional North/South processes. The conceptual background sustaining this trend is based on across-the-board quantitative indicators that are set once for all and determine the factual border between the "undergraduated" countries – which deserve S&D, and the "graduated" ones – which are assumed to compete without crutches in the international markets. However, across-the-board quantitative criteria – in particular the LDCs – should not be discarded altogether: for instance, they are useful and valid to identify S&D instruments in case of dumping, or for notions such as "small suppliers" in international trade.

Development tools and policy spaces can be better envisaged through an issues-based approach that looks at the situation within the country in each trade area rather than across-the-board criteria that impose artificial comparisons between the economies of the world. This kind of tailored S&D approaches may be particularly useful in the areas of trade in services as well as other “within-the-borders” trade disciplines – and the Singapore issues.

Development benchmarks would then be required according to each trade discipline, in order to assess if the domestic situation corresponding to the rules and commitments contained by the discipline needs to be addressed through some kind of S&D instruments. The supply constraints, the level of competitiveness, the social costs and the institutional capacity are some of the elements that should be incorporated in the benchmarks. Similarly, the commercial value of the S&D provisions – i.e. their effectiveness in terms of development – can better be assessed at the sectoral level. Obviously, such an approach would enormously complicate the implementation of S&D rules and the MFN levels. However, this may be a way to avoid a country-based graduation that will lead to a two-tier system of WTO Members: the LDCs and the others, with no further differentiations.

It will not be easy for the developing countries to gear the WTO negotiations on S&D towards an evolution of the concept reflecting the changing nature of the trading system. Likewise, it will not be easy to enlarge the debate on S&D so as to reach the identification of the development tools that go beyond the usual short-sighted exceptions, transitions and technical assistance measures. As happened during the Uruguay Round, developing countries need an overall vision of the S&D rules that would suit their needs: it is easier to focus on individual provisions on a one-by-one basis than to devise the development goals that should be achieved when revisiting the S&D rules as a whole. The fragmented dynamics of the WTO negotiations through different bodies is not helpful in this regard. The pro-development links that could be improved between the WTO and the financial and development agencies are not easily visible. For their part, the developed countries have no incentive in ensuring that S&D becomes a development tool if the price to achieve this goal will be paid in terms of trade

59 WT/WGTDF/W/16. See also the paper presented by Cuba: WT/WGTDF/W16.

60 During the Uruguay Round, “a large number of S&D provisions were incorporated into the Multilateral Trade Agreements (MTAs). However, this was accomplished in a somehow ad hoc manner, not as a result of an underlying consensus as to how the trade needs of the developing countries emanating from the development paradigm should be reflected in trade principles and rules.” M.Gibbs, Special and Differential…op.cit., p.76.
interests. But overall, what is missing is a trade policy paradigm recognising that the structural imbalances cannot be addressed solely by trade liberalisation.

What is at stake in the WTO debate on S&D is the notion of development. The next generation of trade negotiators will probably be more concerned by new development strategies, and they will look for a revisited S&D in the WTO rules as one key element of that wider picture.

In the meanwhile, S&D is and will continue to be a pivotal element of the multilateral trade framework. It is conceived to ensure equitable rules. It is hard to build a rules-based system that aims at universality but is not able to devise mechanisms that can accommodate the structural imbalances among its members. To reduce the scope and the effectiveness of the S&D instruments would mean to assume that trade liberalisation provides the same automatic benefits to all. That would also indicate that mercantilist goals prevail over the need to improve the role of the WTO in the overall economic governance of the international economy. Hiding the S&D issue as if it were a skeleton in the closet is not a wise solution.

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