Differentiated Differentiation

Using progressive regulation as a framework for special and differential treatment in the WTO

Aniekan Iboro Ukpe

Propositions

1. Exempting developing countries from strict WTO discipline undermines their integration into international trade (this thesis).

2. The current WTO rules do not advance the interest of the developing country members (this thesis).

3. Poor cognitive abilities are indicative of poor mental health in people.

4. The economic well-being of households is directly proportional to their levels of consumption.

5. Wageningen University can enhance its sustainability status by eliminating the need for PhD candidates to submit 15 hard copies of their thesis.

6. The poor educational system is the main cause of poverty in northern Nigeria.

Propositions belonging to the thesis entitled:

"Differentiated differentiation: Using progressive regulation as a framework for special and differential treatment in the WTO"

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List of Abbreviations

ACP	African, Caribbean and Pacific
AEO	Authorized Economic Operator
AGOA	Africa Growth and Opportunity Act
ASD	Agenda for Sustainable Development
ASEAN	Southeast Asian Nations
AU	African Union
CACM	Central American Common Market
CBDR	Common but Differentiated Responsibility
CDP	Committee for Development Planning
CFCs	Chlorofluorocarbons
CI	Composite Indicator
CIF	Cost, Insurance, and Freight
CTD	Committee on Trade and Development
CTE	Committee on Trade and Environment
CSR	Corporate Social Responsibility
CP	Country Program
CTC	Carbon tetrachloride
CVA	Customs Valuation Agreement
DESA	Department of Economic and Social Affairs
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EBA	Everything But Arms
EC	European Community
EU	European Union
EVI	Economic Vulnerability Index
FOB	Free on Board
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariff
GCI	Global Competitiveness Index
GDP	Gross Domestic Product
GVC	Global Value Chain
GNI	Gross National Income
GNP	Gross National Product
GSPs	General System of Preferences
HAI	Human Assets Index
GFI	Global Financial Integrity

HDI Human Development Index
ICT Information and Communications Technology
IMF International Monetary Fund
IP Intellectual Property
IPRs Intellectual Property Rights
IUCN International Union for the Conservation of Nature
LDCs Least Developed Countries
LICs Low-income Countries
LPI Logistics Performance Index
MDGs Millennium Development Goals
MEA Multilateral Environmental Agreement
MFN Most Favoured Nation
MLF Multilateral Fund [for the Implementation of the Montreal Protocol]
MNEs Multinational Enterprises
NIEO New International Economic Order
NIFDC Net Food-Importing Countries
NAMA Non-agricultural Market Access
OECD Organisation of Economic and Cooperation Development
ODS Ozone Depleting Substance
OHCHR Office of the UN High Commissioner for Human Rights
PMO Project Management Office
PRSP Poverty Reduction Strategy Papers
PSNR Permanent Sovereignty over Natural Resources
SAARC South Asian Association for Regional Cooperation
SCM Subsidies and Countervailing Measures
SDGs Sustainable Development Goals
SDT Special and Differential Treatment
SEPA State Environmental Protection Administration
SPS Sanitary and Phytosanitary Measures
SVEs Small and Vulnerable Economies
TAI Technology Achievement Index
TBT Technical Barrier to Trade
TFA Trade Facilitation Agreement
TRIMS Trade-Related Investment Measures
TRIPS Trade-Related Aspects Intellectual Property Rights
UN United Nations
UNCED United Nations Conference on Environment and Development
UNCTAD United Nations Conference on Trade and Development
UNDP United Nations Development Programme

UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNIDO	United Nations Industrial Development Organization
UPR	Universal Periodic Review
UNSCD	United Nations Conference on Sustainable Development
VERs	Voluntary Export Restraints
WCED	World Commission on Environment and Development
WCO	World Customs Organization
WEF	World Economic Forum
WESP	World Economic Situation and Prospects
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

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Trade liberalisation has not lived up to its promises. But the basic logic of trade - its potential to make most, if not all, better off - remains. Trade is not a zero-sum game in which those who win do so at the cost of others; it is, or at least can be, a positive-sum game, in which everybody is a winner. If that potential is to be realised, first we must reject two of the long-standing premises of trade liberalisation: that trade liberalisation automatically leads to more trade and growth, and that growth will automatically "trickle down" to benefit all. Neither is consistent with economic theory or historical experience.

(Stiglitz, 2006).

1

Chapter 1

Introduction

1.1 Prologue

The advent of globalization has increasingly brought to the fore the specific development challenges of developing countries which constitute the majority of nations in the world.[1] A significant proportion of their population still live in poverty despite the acclaimed gains resulting from the integration of the global economy, particularly, through international trade. The challenge has increasingly been how to ensure that international trade supports development and lift these countries out of poverty.[2] Even though this has formed the core of debates on the reform of the current system of global trade governance, great dissatisfaction remains on how development concerns and broader issues of sustainable development are being dealt with at the World Trade Organization (WTO).[3] From the developing countries' perspective, trade liberalization – the WTO's core tool for delivering development – has not necessarily led to sustained economic growth or improved living conditions for their people.[4] Contrary to the predictions of orthodox theory, trade liberalization has had minimal impact on reducing world poverty (it may actually have increased it), and trade liberalization has almost certainly worsened the distribution of income between rich and poor countries, as well as between skilled and unskilled labour within countries.[5] No less significant is the argument that trade rules have been designed in such a way that does not adequately reflect the development priorities of developing countries.[6]

The WTO's principle of Special and Differential Treatment (SDT) for developing and least developed countries (LDCs) is the system's response to the agitations arising

1 See Gradín, C., Leibbrandt, M. and Tarp, F. (Eds.). (2021). Inequality in the Developing World. Oxford University Press; Nwani, S. E., & Osuji, E. (2020). Poverty in Sub-Saharan Africa: The dynamics of population, energy consumption and misery index. International Journal of Management, Economics and Social Sciences (IJMESS), 9(4), 247-270.

2 Ibid.

3 See Bronckers, M. (2020). Trade Conflicts: whither the WTO?. *Legal Issues of Economic Integration*, *47*(3); Hoekman, B. M. (2019). Urgent and important: Improving WTO performance by revisiting working practices. *Journal of World Trade*, *53*(3).

4 For a review of the literature on this, see Gnangnon, S. K. (2018). Multilateral trade liberalization and economic growth. *Journal of Economic Integration*, *33*(2), 1261-1301. See also Juju, D., Baffoe, G., Lam, R.D., Karanja, A., Naidoo, M., Ahmed, A., Jarzebski, M.P., Saito, O., Fukushi, K., Takeuchi, K. and Gasparatos, A., (2020). Sustainability challenges in sub-Saharan Africa in the context of the sustainable development goals (SDGs). In Sustainability Challenges in Sub-Saharan Africa I (pp. 3-50). Springer.

5 Yameogo & Omojolaibi argue that while it may be true that trade liberalization offers growth opportunities, the evidence indicates that the gain from trade openness does not automatically translate into poverty reduction, as the high rates of trade and income growth in many developing countries do not explain the poverty level. See Yameogo, C. E. W., & Omojolaibi, J. A. (2021). Trade liberalisation, economic growth and poverty level in sub-Saharan Africa (SSA). *Economic Research-Ekonomska Istraživanja*, *34*(1), 754-774 at 755.

6 See Bronckers, M. (2020). Trade Conflicts: whither the WTO?, above n 3; Hoekman, B. M. (2019). Urgent and important, above n 3. For a historical perspective on how the rules of the trading system have been skewed against developing countries, see Chang, H. J. (2002). *Kicking away the ladder: development strategy in historical perspective*. Anthem Press; Shafaeddin, M. (1998). *How did developed countries industrialize? The History of Trade and Industrial Policy: The cases of Great Britain and the USA* (No. 139). United Nations Conference on Trade and Development. (Discussion Paper No. 139).

from the discontent by these countries.[7] Apart from a relaxation of some of the rules which developing countries deemed not to be in their development interest, SDT sought to improve developing countries' trading prospects, and to ensure that, especially, the least-developed among them secure a share in the growth of world trade commensurate with the needs of their economic development.[8] While there is no universally recognized definition for SDT, it is generally understood to refer to provisions such as those which permit developing countries to offer, 'less than full reciprocity' in tariff liberalization negotiations, measures inserted into the legal texts of the WTO to assist developing countries to address certain development, financial and trade needs as well as measures to help developing countries adjust to the rigours of the WTO legal system.[9]

SDT was intended to help the poorest WTO members meet their trade treaty obligations to the fullest extent.[10] But as the thesis demonstrates, SDT in practice has been about seeking exemptions from WTO obligations, instead of creating an enabling environment for poor members to integrate fully into the multilateral trading system. SDT is an acknowledgement by the members of the WTO that countries at different stages of development need different rules to support their economic development.[11] It, however, remains a contested issue in the WTO following the developed members' reluctance to continue to grant SDT to all 'self-declared' developing country members, including a number of emerging countries who ought to have graduated out of such status.[12]

Tension around SDT has been exacerbated as notable emerging economies with significant share of global gross domestic product (GDP) continue to lay claim to SDT, thereby further undermining the rationale for SDT to help those most in need with the transition to full compliance with their WTO obligations.[13] This has pitted the United States (US) and its traditional 'Quad' allies, including the European Union (EU) and Canada, against notable emerging countries like India and China in a highly diverged

7 See generally Srinivasan, T. N. (2019). *Developing countries and the multilateral trading system: From GATT to the Uruguay Round and the future*. Routledge; Simo, R. Y. (2021). Developing Countries and Special and Differential Treatment. In *International Economic Law: (Southern) African Perspectives and Priorities*. 233-281. Kugler, K. & Sucker, F. (eds.). Juta & Co. Ltd.

8 See WTO (2001). Doha Ministerial Declaration of 14 November 2001, para. 2. WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) (hereinafter referred to as 'Doha Ministerial Declaration' or 'Doha Declaration'). See also Preamble to the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994. 1867 U.N.T.S. 154; Hegde, V., & Wouters, J. (2021). Special and Differential Treatment Under the World Trade Organization: A Legal Typology. *Journal of International Economic Law*, *24*(3), 551-571 at 552.

9 See WTO (2016). Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat, WT/COMTD/W/219, 22 September.

10 See Bacchus, J., & Manak, I. (2021). *The Development Dimension: Special and Differential Treatment in Trade*. Routledge.

11 See Weinhardt, C., & Schöfer, T. (2021). Differential treatment for developing countries in the WTO: the unmaking of the North–South distinction in a multipolar world. *Third World Quarterly*, 1-20 at 14.

12 Ibid.

13 Bacchus, J., & Manak, I. (2021). *The Development Dimension: Special and Differential Treatment in Trade*, above n 10 at 2.

debate on the reform of SDT, including on the propriety of self-designation of status.[14] This is a situation that has been encouraged, if not created, by the failure of the WTO to offer any formal definition of 'developing country' or any objective measure to identify which countries should qualify for developing status and hence, leaving countries to self-declare their status as 'developing'.[15]

Developed countries in the WTO have clearly rejected the inherent unfairness in the current application of SDT, which does not differentiate between levels of development, arguing that the poorest countries are made worse off, while those that are economically better off 'free ride' on the rest of the multilateral trading system.[16] Well before the recent tension between the US and China, developed countries have called for reforms to introduce a higher level of differentiation between developing countries to ensure a robust SDT framework that addresses the needs of poor countries in the WTO while also ensuring that advanced developing countries pull their weight in the organization.[17]

The recent proposal by the US calling for reform of SDT offers, perhaps, the clearest insight into the main points of discontent with the current SDT framework. First, it deplores the current categorisation of developed-developing country, which allows some of the wealthiest economies claim developing country status to the detriment of not only other developed economies but also economies that truly require SDT; and, second, it condemns the non-use of economic or other objective indicators to determine country status, hence, deploring self-declaration, which it describes as being responsible for the unwillingness of countries to take on even the most basic of WTO obligations.[18] On its part, the proposal by the EU seeks to limit SDT to only those countries that actually need it.[19] While it does not suggest criteria for determining such countries, it underscores the point that SDT should be 'needs-driven' and 'evidence-based'– effectively, targeting more differentiation among developing countries.[20]

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14 See WTO. (2019). An undifferentiated WTO: self-declared development status risk institutional irrelevance. Communication from the United States WT/GC/W/757, 16 January; European Commission (2018). WTO Modernisation: Introduction to Future EU Proposals. Concept Paper, 18 September, available at https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf. Accessed 22 December 2021; WTO (2019). The continued relevance of special and differential treatment in favour of developing members to promote development and ensure inclusiveness. Communication from China, India, South Africa and the Bolivarian Republic of Venezuela WT/GC/W/765, 28 February; WTO (2019). Statement on Special and Differential Treatment to Promote Development. Co-sponsored by the African Group, the Plurinational State of Bolivia, China, Cuba, India and Oman. WT/GC/202, 9 October.

15 Hoekman, B., & Mavroidis, P. C. (2021). WTO Reform: Back to the Past to Build for the Future. *Global Policy*, *12*, 5-12 at 9. See also Bartels, L. (2019). WTO Reform Proposals: Implications for Developing Countries. *WTO Reform–Reshaping Global Trade Governance for 21st Century Challenges, London: Commonwealth Secretariat*, 61.

16 WTO (2019). Pursuing the Development Dimension in WTO Rule-Making Efforts. Communication from Norway, Canada, Hong Kong, China, Iceland, Mexico, New Zealand, Singapore, and Switzerland, WT/GC/W/770/Rev.3, 7 May; WTO. (2019). An Undifferentiated WTO, above n 14; European Commission (2018). WTO Modernisation, above n 14.

17 See World Street Journal. (2004). Robert Zoellick's Letter to WTO Member Nations, 11 January, available at https://www.wsj.com/articles/SB107393275634376900. Accessed 22 December 2021; Mandelson, P. (2005). 'Doha for Development' Speech to Informal Meeting of EU Development Ministers, Leeds, UK, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_639. Accessed 22 December 2021.

18 WTO. (2019). An undifferentiated WTO, above n 14 at paras. 1.6-1.9 and 4.1-4.5.

19 European Commission (2018), WTO Modernisation, above n 14.

20 Ibid, section II (b).

On the other hand, developing countries reject differentiation contending that they have rather been disadvantaged by the rules of the multilateral trading system, which are rigged in favour of the developed countries.[21] They argue that the system has failed to deliver to them the perceived benefits negotiated in the 1986-1994 Uruguay Round of multilateral trade negotiations that established the WTO and that developed countries have simply paid lip service to their commitment to provide SDT.[22] These polarized views by the North-South divide in the WTO has caused a rift in the WTO's negotiating agenda to review SDT provisions with a view to "strengthening them and making them more effective and operational".[23]

With a view to offer a bridge between these positions, a major objective of this thesis is to examine current approaches to the application of SDT in the WTO to better understand their failings and to articulate a feasible reform to SDT application in the WTO. With the deadlocked Doha Round negotiations and the tension around SDT, the onus is on academics and practitioners to redirect their attention to help the WTO make its only existing pro-development instrument deliver on its promise.[24] In pursuing its objective, the thesis makes a case for a rules-based approach to defining access to SDT, which includes the identification of SDT access criteria that are both objective and flexible with respect to differing socio-economic needs.[25] Termed 'differentiated differentiation', such an approach would address tensions around questions of access to SDT and move the WTO toward an evidence-based, case-by-case approach to SDT, with the goal of making SDT wholly transitional and aimed at full compliance with WTO members' obligations. Further, the thesis provides insights into how we may identify and establish objective and effective criteria that settle and depoliticize the questions of access to SDT and is flexible enough to track development needs. Overall,

21 See WTO (2019), The continued relevance of special and differential treatment in favour of developing members, above n 14.

22 Ibid.

23 Paragraph 44 of the 2001 Doha Ministerial Declaration mandates the 'strengthening' of Special and Differential Treatment (S&D) provisions in the WTO Agreement, and making them 'more precise, effective and operational'. The Declaration provided the mandate for the deadlocked Doha Round of multilateral trade negotiations which was launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001. Styled as a Development Round, it had a fundamental objective to improve the trading prospects of developing countries. It relatedly concerned itself with how to address the problems developing countries face in implementing the WTO agreements. See Kumar, M. (2018). The Development Round. In Negotiation Dynamics of the WTO (pp. 101-150). Palgrave Macmillan, Singapore; Martin, A., & Mercurio, B. (2017). Doha dead and buried in Nairobi: lessons for the WTO. *Journal of International Trade Law and Policy*, 16(1), 49-66.

24 Indeed, the current WTO Director-General, in her acceptance speech, prioritized SDT reform as one area needing urgent attention from members to strengthen the WTO and reposition it for the future. See Statement of Director-General Elect Dr. Ngozi Okonjo-Iweala to the Special Session of the WTO General Council (13/02/2021), available at https://www.wto.org/english/news_e/news21_e/dgno_15feb21_e.pdf. Accessed 20 December 2021. See also Hoekman, B., & Wolfe, R. (2021). Reforming the World Trade Organization: practitioner perspectives from China, the EU, and the US. *China & World Economy*, *29*(4), 1-34 at 11-15. Details on the Doha Round is available at https://www.wto.org/english/tratop_e/dda_e/dda_e.htm. Accessed 25 April 2022.

25 The rules-based approach aims to define objective criteria for SDT eligibility on an agreement-by-agreement basis. See Paugam, J. M & Novel, A. S. (2005). WHY AND HOW DIFFERENTIATE DEVELOPING COUNTRIES IN THE WTO? Theoretical Options and Negotiating Solutions, paper presented at Ifri/AFD Conference, 28 October, available at: www.ifri.org/sites/default/files/atoms/files/novel_paugam_nov_2005.pdf. Accessed on 20 December 2021.

it clarifies the case for a rules-based approach to differentiation in the WTO, including how to objectively differentiate between developing countries for the purpose of SDT.

1.2 Problem statement

The current framework for SDT in the WTO lacks any objective criteria to identify a developing country. This results in unfettered access to SDT for any country which self-designates as a developing country. This undermines the ability of the system to respond to the needs of its poorest members, or to ensure that the advanced developing members pull their weight in the organization. To address this problem, the WTO needs to identify and establish objective and effective criteria that settle and depoliticize the questions of access to SDT and is flexible enough to track developmental needs.

1.3 Objective and research question

A major aim of the multilateral trading system has been to design trade rules and modulate trade liberalization commitments among members with divergent priorities, needs, and development levels.[26] This research aligns with that in seeking an appropriate and de-politicized balance of rights and obligations among WTO members when it comes to setting the link between levels of development and the depth of policy commitments. This thesis examines the current approach to the application of SDT in the WTO to understand their failings and achieve the specific objective of identifying how we may successfully set SDT access criteria that are not just objective but are flexible enough to take into account different socio-economic needs. It is expected that such approach will be one that will help resolve the tension around the questions of access to SDT and move the WTO toward an evidence-based, case-by-case approach to SDT, with the goal of making it wholly transitional and aimed at full compliance with WTO members' obligations.

The central research question that this thesis seeks to answer is:

> ***How can the WTO determine access to SDT in an objective manner, while balancing the rights and obligations of its members and accounting for divergent levels of development?***

To address this question, the following three sub-questions were formulated:

1. *How can countries manage the reality of their different development constraints when committing to trade rules?*

26 Low, P. (2021). Special and differential treatment and developing country status: Can the two be separated?. In *Rebooting Multilateral Trade Cooperation: Perspectives from China and Europe*. Hoekman, B., Xinquan, T., & Dong, W. (Eds). 75-101. Centre for Economic Policy Research.

This question is about the problem of access to SDT resulting from the lack of concrete criteria to identify a developing country at the WTO or more aptly, a country with a justifiable need for SDT (except for LDCs). In addressing this question, the thesis will identify how WTO members could allow and limit access to SDT without undermining the balance of rights and obligations among themselves.

2. *How can SDT be tailored to respond to countries' heterogenous needs without generating distortions (because of incentives for misrepresentation)?*

Different needs require different treatment. This research question is essentially one of how to differentiate among developing countries in accommodating their differing development needs, while ensuring that the costs of multilateralism are shared equitably among all members.

3. *How to set the benchmarks to trigger access to SDT and to limit its availability to those countries that justifiably need it?*

Access to SDT should be defined by objective eligibility criteria and is not unlimited. At once the need for it ceases, the beneficiary is graduated out of it. This question is concerned with how to apply single and uniform rules to all countries in a manner that takes into account different levels of development, as a matter inherent to the rule itself. It reflects on the gradual phasing in of obligations in both WTO and extra-WTO legal acquis.

1.4 Theoretical framework

This thesis bases its theoretical framework on Rolland's postulations of two radical paradigms for evaluating how development can be [better] integrated in the WTO's legal architecture.[27] She introduces the two paradigms as conceptual benchmarks to assist in situating the legal and institutional nature of current WTO rights and obligations for developing countries, including the proposals for reform of such framework.[28] Representing separate legal frameworks, both correspond to contrasting conceptions of the relationship between disciplines and the constraints experienced by most developing members in the WTO. Essentially, they border on a normative query concerning the place that development could or should occupy in the WTO. The two paradigms reflect how the costs and benefits of trade liberalization and their impact on the development of poor members are balanced in the WTO's mandate and ethos.

The first paradigm represents an 'idiosyncratic approach' to development in the

27 Rolland, S. E. (2012). *Development at the WTO*. Oxford University Press.
28 Ibid, at 4.

WTO. No different from what is with the current WTO framework, the idiosyncratic model assumes the primary normative focus of the WTO is on trade liberalization and the special needs of developing members are dealt with on a case-by-case basis rather than at a systemic level.[29] This includes the question on whether any country should get exemption from rule obligation, based on a development need.

The idiosyncratic paradigm lacks a structured approach to incorporating development in the WTO. While not necessarily meaning a complete absence of development issues in the rules of the WTO, there is however, no conscious mainstreaming of development in the rules. There is no overarching legal obligation to pursue a particular development outcome, beyond hortatory statements such as those in the preamble to the WTO Agreement. This means that it is up to individual members to negotiate the scope and nature of development-related rules on a case-by-case basis, and as the need arises.[30] Such negotiations could be done as part of new individual or collective commitments during a multilateral Round of negotiation or as part of the accession package of a new member.[31] On the other hand, this paradigm allows a dynamic appreciation of members' development needs. As members' needs change, they can negotiate suitable exceptions or derogations without being restricted by the constraints of a predefined notion of development. As WTO Rounds of negotiations typically involve high stake political horse-trading, developing members who do not want to take advantage of development provisions such as SDT, do not have to pay the high political price currently associated with SDT in the WTO.[32] They could simply opt out of such negotiations and hence, avoid the bargaining exercise.

One draw-back of the idiosyncratic model stands out in all of these. It lacks the security and predictability of a rules-based system in defining the rights and obligations of its developing members, particularly, in regard to development provisions. It rather allows for arbitrariness and power play in the treatment of development issues. Even among developing countries, we could have some big developing countries with clout negotiate (on behalf of other developing countries) a general discipline that primarily takes care of their own interest. Theoretically, the lack of an overarching legal framework for development at the WTO means that there is no principle regulating the use or application of special rules that favour developing countries, hence, there is no legal barrier to such abusive 'mainstreaming' of development by countries.[33]

As Rolland suggest, in mainly seeking *ad hoc* solutions (in the form of exemptions and opt-outs, whether in general agreements or in individual members' schedules of commitments and accession protocols) in dealing with development issues rather than through an established overarching normative principle, the idiosyncratic model cannot

29 Ibid, at 4-5.
30 Ibid, at 5.
31 Ibid.
32 See Low, P. (2021). Special and differential treatment and developing country status: Can the two be separated?, above n 26 at 85-86.
33 Rolland, S. E. (2012). *Development at the WTO*, above n 27 at 5.

birth any specific substantive regulatory outcome for developing countries.[34] At best, it may determine how and when development-oriented rules can be produced and implemented – leaving it as, essentially, a procedural model.

The second paradigm, styled the normative co-constituent, sees development-oriented obligations as a core of the WTO's legal framework. Unlike the idiosyncratic paradigm, it considers development to be of equal priority with the trade liberalization objective of the WTO. Here, development constraints are not just deemed as balanced against trade liberalization, the rules of the WTO are deemed to sufficiently account for development concerns, hence, obliterating the need (or a much-reduced need) for any member to negotiate exemptions, opt-outs, or even safeguards.[35]

The normative co-constituent model allows for variable geometry in obligations and commitments undertaken by WTO members. While some members may choose not to undertake too burdensome or exacting commitments, others may choose to undertake such higher and burdensome commitments, indicating a deeper level of liberalization. Such variable geometry of obligations and commitments may take the form of allowing each member to opt in or out of each agreement, or integrating all members in all agreements but differentiating each member's obligations under the agreements.[36] Rolland notes that the first reflection of variable geometry, awakens the ghost of the Tokyo Round where the lack of a single undertaking resulted in a patchwork of agreements with varying (and generally low) membership.[37] Also, non-reciprocity in the Tokyo Round was responsible for developing countries' failure to secure valuable concessions.

On the second reflection of variable geometry, Rolland says that it evokes the controversial formulation of the Appellate Body in the *EC–Tariff Preferences* case on differentiation, as developing countries rejected what they felt was an attempt by the Appellate Body to destroy the unifying legal category of 'developing members.'[38] She, however, draws a distinction between differentiation in the *EC–Tariff Preferences* case, and differentiation in the normative co-constituent paradigm. In *EC–Tariff Preferences*, differentiation eclipses the unifying category of 'developing countries,' hence, eroding the ability of these countries to exercise collective political leverage through that common identification.[39] Contrastingly, the normative co-constituent paradigm considers development to be a core normative pillar of the WTO supported by a legal mandate for addressing development considerations throughout the organization's activities in exchange for developing countries accepting a general differentiation of their commitments.[40]

34 Ibid.
35 Ibid, at 6.
36 Ibid.
37 The Tokyo Round is the seventh Round of Multilateral Trade Negotiations in the GATT. It held from 1973 to 1979 and was directed at not only the further reduction of tariffs, for the first time the negotiations laid particular emphasis on multilateral agreements in the area of non-tariff measures, thus responding to their growing importance in world trade. See Letiche, J. M. (1982). The Tokyo Round of multilateral trade negotiations (1973–79). In *International Economics Policies and their Theoretical Foundations*. Letiche, J. M. (ed.) (pp. 413-439). Academic Press.
38 Rolland, S. E. (2012). *Development at the WTO*, above n 27 at 6.
39 Ibid, at 6-7.
40 Ibid, at 7.

This thesis aligns itself with the normative co-constituent paradigm which essentially, puts development at the heart of the WTO's trade liberalization objective. While not discountenancing the system's core principles of reciprocity and non-discrimination,[41] the normative co-constituent paradigm underscores the point that trade liberalization is not an end in itself but a means to an end – development.[42] Hence, it is consistent with a core argument of the thesis that trade liberalization obligations must be linked to members' capacity for it to result in any meaningful gains, for the developing members in particular.

The thesis acknowledges trade liberalization as the WTO's own tool for achieving development. As countries liberalize their trade in furtherance of their WTO obligations, they will reap the gains from trade. However, the gains from trade may not automatically trickle to all countries, and so governments must be prepared to consciously design appropriate trade policies and strategies to direct the gains from trade liberalization.[43] While the WTO may not be able to determine the specific policies governments put in place to achieve this, it should concern itself with how to ensure that members live up to their treaty obligations and implement agreements signed – thereby, liberalizing their trade. Implicit here is the assumption that these countries have the capacity to implement the rules they have signed up to. Capacity is critical for an effective implementation of these rules. Accordingly, a fundamental question posed by the normative co-constituent paradigm borders on how we link legal obligation to capacity in a manner that reflects the heterogenous needs of countries while also precluding discrimination. This is a core inquiry of the thesis. The normative co-constituent paradigm of development fuels the various analysis in this thesis. More specifically, the thesis adopts the second reflection of this paradigm which calls for 'integrating all members in all agreements but differentiating each member's obligations under the agreements.' It rejects the paradigm's first reflection about variable geometry to the extent that it seeks to continue the practice of opt-outs and exemptions from WTO discipline which this thesis finds as undermining the development and trade interest of developing countries.[44]

41 The two principles are embodied in the Most Favoured Nation clause and national treatment clause in Articles I and III of the GATT, respectively. They have been variously referred to as 'pillars of the GATT/WTO architecture' and 'cornerstone of the WTO'. See Bagwell, K., Staiger, R. W., & Yurukoglu, A. (2020). Multilateral trade bargaining: A first look at the GATT bargaining records. *American Economic Journal: Applied Economics*, *12*(3), 72-105. Chowdhury, A., Liu, X., Wang, M., & Wong, M. C. S. (2021). The Role of Multilateralism of the WTO in International Trade Stability. *World Trade Review*, 1-22.

42 Arguably, it is in this light that Rolland (2012) suggests that the mercantilist ethos of the WTO where liberalization results from the exchange of equally valuable concessions in absolute terms falls short of taking into consideration heterogenous development needs of countries. She argues that trade liberalization could be more development-oriented, for instance, by valuing concessions relative to each member's trade capacity. See Rolland, S. E. (2012). *Development at the WTO*, above n 27 at 7.

43 See Stigliz, J., (2021). From Manufacturing-Led Export Growth to Twenty-First Century Inclusive Growth Strategy. In Gradín, C., Leibbrandt, M. and Tarp, F. (Eds.). (2021). Inequality in the Developing World. Oxford University Press.

44 See Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law. *Journal of International Economic Law*, *9*(4), 779-821 at 792. See also Hoekman, B. M., Michalopoulos, C., & Winters, L. A. (2003). *More favorable and differential treatment of developing countries: Toward a new approach in the World Trade Organization* (Vol. 3107). World Bank Publications; Srinivasan, T. N. (2019). *Developing countries and the multilateral trading system* above, n 7; Bronckers, M. (2020). Trade Conflicts: whither the WTO?, above n 3.

1.5 Methodology

In finding answers to the research questions, the thesis employs qualitative research methods, including case studies and literature (document) review, and engages in doctrinal legal analysis of treaty texts and case law. Qualitative legal research aims to study things in their natural settings, understand and interpret their social realities and provide inputs on various aspects of social life.[45] It is suitable for examining whether a specific phenomenon exists and if so, the nature of the phenomenon.[46] Legal doctrinal analysis is a 'critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation.[47] Hence, the thesis engages in an extensive literature review in development studies and trade economics to trace the development of SDT (including its reflection in the form of exemptions and opt-outs from legal discipline) in the General Agreement on Trade and Tariff (GATT)/ WTO system with a view to ascertain its objective. It interrogates over three decades of preferential trade relations between the EU and African, Caribbean, and Pacific (ACP) countries to determine whether resort to exemptions and opt-outs, on a largely unqualified basis, has meant that developing countries awkwardly shield themselves from

the gains of trade liberalization in terms of increased trade performance and integration into world trade as suggested by some.[48] In this endeavour, the thesis relies largely on the analysis of secondary data contained in documents relating to EU-ACP trade relations.

The thesis undertakes a doctrinal analysis of various GATT/WTO legal texts and case law that respectively embed and espouse the principle of graduation in one form or the other, to assess and improve their practical applicability and effectiveness, where necessary and possible. For instance, the Enabling Clause contemplates graduation in predicating developing countries assumption of strict WTO rules on the basis of factual economic changes.[49] Also, the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)[50] reflects the principle of graduation in that, it bases the gradual phasing out of a developing county's export subsidy on attaining thresholds indicating levels of competitiveness. Here, graduation is more broadly read to encapsulate the idea of progressive regulation, which contemplates the application of single and uniform rules to all WTO members in a manner that accounts for different levels

45 Bhat, P. (2019). *Idea and methods of legal research*. Oxford University Press.

46 Al Amaren, E. M., Hamad, A. M., Al Mashhour, O. F., & Al Mashni, M. I. (2020). An introduction to the legal research method: To clear the blurred image on how students understand the method of the legal science research. *International Journal of Multidisciplinary Sciences and Advanced Technology*, *1*(9), 50-55 at 54.

47 Hutchinson, T. (2014). Vale Bunny Watson: Law Librarians, Law Libraries, and Legal Research in the Post-Internet Era. *Law Libr. J.*, *106*, 579 at 584.

48 See Hoekman, B. M., Michalopoulos, C., & Winters, L. A. (2003). *More favorable and differential treatment of developing countries*, above n 44.

49 The Enabling Clause is properly known as the 1979 GATT Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903, BISD 26S/203, adopted on 28 November 1979, available at https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm. Accessed 17 October 2021.

50 1869 U.N.T.S. 14.

of development as a matter inherent to the rule itself.[51] The analysis of primary legal materials provides empirical, policy-relevant guidance on how a uniform set of rules for all WTO members may be adapted in its application, to take into account members' different levels of socio-economic development. In order to address the challenge of how to fashion single and uniform rules for all WTO members, but subject the application of such rules to graduation, the thesis takes guidance from WTO legal provisions that already reflect the application of single and uniform rules in one way or the other. Instructively, economic indicators are used to determine which developing countries are allowed to use export subsidies under Article 3(1)(b) of the SCM Agreement. To understand and analyse how exactly the heterogenous needs of countries can be taken to account, the thesis adopts a case study approach based on a review of literature in the field of international environmental law on how economic indicators may be successfully linked to the assumption of legal obligation in a manner that supports differentiation but precludes discrimination. In this regard, the thesis focuses on the Montreal Protocol on Substances that Deplete the Ozone Layer,[52] where delays by developing countries in undertaking binding obligations on control measures is determined by hard economic data.[53] The thesis uses the case of China's implementation of the Montreal Protocol as a case study. The case study provides an insightful guide into how to formulate objective and measurable criteria for determining access to SDT – easing existing tensions between specificity and suitability concerns in the process.

In qualitative research, the researcher uses both analytical techniques and their views on the subject-matter in question to develop new concepts or to reinterpret existing ones. It is in this light that the thesis employs the mix of techniques described above, including literature review, doctrinal legal analysis, and case study, to better understand the failings and flaws of the current approaches to the application of SDT in the WTO, and to articulate a feasible reform proposal.

1.6 Structure of the thesis

The remainder of this thesis is structured as follows. Chapter 2 provides the conceptual outlay to the entire research. It traces the nexus between trade and development and goes on to review existing literature on theoretical and historical definitions of development, showing how these have in turn shaped development in the WTO. On the basis of doctrinal legal analysis of GATT/WTO legal texts and the *EC-Tariff Preferences* case,[54] the chapter attempts a delimitation of SDT as a concept, including its scope and

51 Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law, above n 44.
52 1522 U.N.T.S. 3. Also referred to in this thesis as 'the Montreal Protocol'.
53 See Article 5 of the Montreal Protocol, available at https://ozone.unep.org/treaties/montreal-protocol. Accessed 18 December 2021. Insightfully too, the responsibility of Annex 1 Parties under the Kyoto Protocol to reduce their anthropogenic emissions is linked to some economic data. (See Article 3(1) Kyoto Protocol to the United Nations Framework Convention on Climate Change. 2303 U.N.T.S. 148).
54 Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004.

practice in the WTO. The chapter queries the effectiveness of the WTO's development model which encourages minimal legal obligations and even total exemptions from legal disciplines for its developing country members.

Chapter 3 establishes the goals of SDT on the basis of both a literature review of trade economics and policy analysis, covering decades of preferential EU-ACP trade relations. In doing so, it reviews the extent to which exemptions, opt-outs, and non-reciprocal preferences, as reflections of SDT, have impacted the trading prospects of ACP countries.[55] It finds that such application of SDT has undermined the development and trade interest of developing countries. Using a case study method to review, on the basis of literature, how differential treatment under the Montreal Protocol has helped China in its successful implementation of the Protocol, the chapter proffers suggestions for re-balancing WTO rules to better achieve the goals of SDT.

Chapter 4 conducts a doctrinal legal analysis on selected WTO treaty texts, including the SCM Agreement, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),[56] the Agreement on Safeguards (Safeguards Agreement)[57] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).[58] These Agreements embed the principle of graduation in one form or the other, and the analysis aimed to assess and improve their practical applicability and effectiveness, where necessary and possible. Again, this chapter also turns to the case study method to review, on the basis of literature, the effectiveness of the principle of graduation as applied under the Montreal Protocol. This is complemented by a similar study of the operationality of the graduation criteria for LDCs under the UN system. These comparative case studies not only deepen understanding on how economic data may be successfully linked to the assumption of legal obligation in a manner that supports differentiation but precludes discrimination, it also provides indirect support for the possible effectiveness and non-discriminatory use of progressive regulation.

Underscoring the utility of differentiation in achieving the objective of SDT, that is, to enable the poorest countries meet up their treaty obligations, Chapter 5 analyses existing proposals for the reform of SDT in the WTO on the basis of a literature review. The proposals are evaluated against minimal benchmarks of clarity, relevance, effectiveness, justiciability and enforceability, which represent a set of minimum prescriptive requirements applicable to a rules-based regulatory approach.[59] The chapter builds on the shortcomings of existing proposals to articulate a new and feasible reform proposal that meets this set of minimal prescriptive benchmarks. 'Differentiated

55 See Hoekman, *et a*l. (2003). *More favorable and differential treatment of developing countries,* above n 44. They suggest developing countries miss the opportunity to restructure their economies and policies under a competitive environment due to the current approach to SDT and thereby fail to improve their trade performance and advance their integration into international trade.

56 1867 U.N.T.S. 493.

57 1869 U.N.T.S. 154

58 1869 U.N.T.S. 299.

59 See Decker, C. (2018). Goals-based and rules-based approaches to regulation. *BEIS Research Paper*, No. 8, available at SSRN: https://ssrn.com/abstract=3717739. Accessed 16 March 2022.

differentiation' is proposed as a unique, rules-based approach for differentiating between developing countries for purposes of SDT.[60]

Chapter 6 demonstrates the operationalization of the differentiated differentiation approach using the WTO's customs valuation agreement (CVA). A major premise of differentiated differentiation is that SDT should be geared towards supporting countries to improve their rule implementation capacities. SDT is determined on an agreement-specific basis as countries' needs vary across agreements. Under this approach, graduation from SDT is not horizontal, given that a country may graduate from SDT under a particular WTO agreement, but may remain eligible for SDT under another agreement. The approach is consistent with a more targeted and needs-based approach to SDT.

Chapter 7 concludes the research by summarizing the answer to the research question. The chapter restates the major contributions of the thesis to knowledge and makes some policy recommendations. Lastly, it offers suggestions for further research and concludes on the entire research.

60 The proposal on 'differentiated differentiation' is espoused in detail in Chapter 5.

Chapter 2

Contextualizing the trade and development link

2.1 Introduction

One of the major concerns of societies over the years has been how to deal with the problem of poverty in the world, increase human welfare and guarantee overall economic development in all countries.[1] Hence, it is no surprise that poverty reduction is a major focus of the most comprehensive global governance framework for sustainable development– the 2030 Agenda for Sustainable Development (ASD) with its 17 Sustainable Development Goals (SDGs).[2] Indeed, the 2030 Agenda acknowledges that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.

Development aid, population control, capital accumulation, and investment in heavy industry have all been applied without necessarily resulting in the expected greater prosperity and well-being of countries, particularly, as far as developing countries are concerned.[3] The advent of globalization, while signalling the closer integration of world economies, has also precipitated concerns about rising inequalities between and within countries.[4] Such concerns on the impact of globalization on inequality border on the expectation of most economists that trade liberalization is to be associated with higher growth, and that growth is good for the poor.[5] Accordingly, it should ordinarily follow that increasing trade would lead to less poverty.[6] If however, it is the case that trade liberalization is associated with increasing inequality, welfare gains from trade could be wiped out for those at the bottom of the income distribution.[7]

1 Gradín, C., Leibbrandt, M. and Tarp, F. (Eds.). (2021). Inequality in the Developing World. Oxford University Press.; Nwani, S. E., & Osuji, E. (2020). Poverty in Sub-Saharan Africa: The dynamics of population, energy consumption and misery index. International Journal of Management, Economics and Social Sciences (IJMESS), 9(4), 247-270; Juju, D., Baffoe, G., Lam, R.D., Karanja, A., Naidoo, M., Ahmed, A., Jarzebski, M.P., Saito, O., Fukushi, K., Takeuchi, K. and Gasparatos, A., (2020). Sustainability challenges in sub-Saharan Africa in the context of the sustainable development goals (SDGs). In Sustainability Challenges in Sub-Saharan Africa I (pp. 3-50). Springer, Singapore; Martin, A., & Petersen, M. (2019). Poverty alleviation as an economic problem. Cambridge Journal of Economics, 43(1), 205-221.

2 United Nations, Transforming our World: the 2030 Agenda for Sustainable Development (ASD), General Assembly Resolution A/70/1, 18 September 2015. The 2030 Agenda was a follow-up to the 2000 Millennium Declaration with its Millennium Development Goals (MDGs)– the first comprehensive global governance framework for the achievement of sustainable development. United Nations, United Nations Millennium Declaration, General Assembly Resolution A/RES/55/2. See de Jong, E., & Vijge, M. J. (2021). From Millennium to Sustainable Development Goals: Evolving discourses and their reflection in policy coherence for development. *Earth System Governance*, *7*, 100087.

3 Baffoe, G., *et al* (2020). Sustainability challenges in sub-Saharan Africa in the context of the sustainable development goals (SDGs), above n 1.

4 See Stigliz, J., (2021). From Manufacturing-Led Export Growth to Twenty-First Century Inclusive Growth Strategy. In Gradín, C., Leibbrandt, M. and Tarp, F. (Eds.). (2021). Inequality in the Developing World, above n 1, at 284-312; Flaherty, T. M., & Rogowski, R. (2021). Rising Inequality As a Threat to the Liberal International Order. International Organization, 75(2), 495-523; Ravallion, M. (2018). Inequality and globalization: A review essay. Journal of Economic Literature, 56(2), 620-42.

5 Yameogo, C. E. W., & Omojolaibi, J. A. (2021). Trade liberalisation, economic growth and poverty level in sub-Saharan Africa (SSA). Economic Research-Ekonomska Istraživanja, 34(1), 754-774; Baria, K. M., Alib, S., Ahmadc, R., & Nawazd, A. (2020). The Nexus between Economic Growth, Trade Liberalisation, and Volatility Revisited: Empirical Evidence from the European Union Countries. Nexus, 14(4).

6 Gnangnon, S. K. (2019). Does multilateral trade liberalization help reduce poverty in developing countries?. Oxford Development Studies, 47(4), 435-451.

7 Yameogo, C. E. W., & Omojolaibi, J. A., (2021). Trade liberalisation, economic growth and poverty level in sub-Saharan Africa above n 5 at 755, 758-759.

Thus, while it may be true that trade liberalization offers growth opportunities, the evidence indicates that the gain from trade openness does not automatically translate into poverty reduction, as the high rates of trade and income growth in many developing countries do not explain the poverty level.[8] Bourguignon argues that globalization is associated with rising inequality within many countries and that the poor do not always share in the gains from trade.[9] He submits that the recent acceleration in globalization has resulted in a world in which 'the rich get richer and the poor get poorer'.[10] On the other hand, there is a strong case to support globalization as mainly reducing inequality, to the extent that it has helped some poor countries break into global markets; benefit from the reduced cost of transport, and lowered trade barriers in industrialized markets.[11] A rallying message from both points is that globalization could actually result in rising inequality or reduce inequality. The defining mark is whether the poor are also able to take advantage of opportunities created by globalization and benefit therefrom.

Instructively, Ravallion takes a middle course in arguing that the evidence from the literature only suggests that while trade may have helped promote growth and poverty reduction in the developing world, it is only one of several relevant factors, which include the initial distribution of income and human development.[12] He suggests that whether globalization is inequality increasing depends on conditions like the distribution of endowments of human and financial capital within a country, the competitiveness of markets, and the presence of appropriate government policies.[13]

Such thoughts have shaped development thinking in its attempt to articulate approaches that could bring about even economic growth and development in the world. Moving away from previous overly ambitious attempts to evolve a single universal measure that will stimulate economic growth, efforts are increasingly being directed at achieving a combination of policies that will invariably encourage economic development in all countries.[14] Trends in the last four decades have demonstrated that countries taking advantage of the tremendous expansion in world trade have also made substantial progress in promoting economic development and reducing poverty. Evidence from economic theory is increasingly being put together to shore up trade as a more reliable tool for achieving poverty reduction and promoting economic development.[15] The World Bank strongly suggests that developing countries that successfully integrated

8 Ibid, at 755.

9 Bourguignon, F. (2015). The globalization of inequality. Princeton University Press.

10 Ibid, at 2.

11 See Yameogo, C. E. W., & Omojolaibi, J. A. (2021). Trade liberalisation, economic growth and poverty level in sub-Saharan Africa above n 5; Panagariya, A. (2019). Free trade and prosperity: how openness helps the developing countries grow richer and combat poverty. Oxford University Press; Urata, S., & Narjoko, D. A. (2017). International trade and inequality (No. 675). ADBI Working Paper, available at https://www.adb.org/sites/default/files/publication/230591/adbi-wp675.pdf. Accessed 21 April 2022.

12 Ravallion, M. (2018). Inequality and globalization, above, n 4 at 628.

13 Ibid, at 630 – 631. See also Yameogo, C. E. W., & Omojolaibi, J. A. (2021). Trade liberalisation, economic growth and poverty level in sub-Saharan Africa (SSA) above, n 5.

14 See Petrakis, P. E. (2020). Theoretical Approaches to Economic Growth and Development. Springer Books.

15 See Wright, W. (2020). How trade openness can help to 'deliver the poor and needy'. Economic Affairs, 40(1), 100-107.

into the global economy in the 1990s recorded a 5 percent per capita growth while those who did not, implicitly protecting their domestic markets with tariff barriers and other measures, saw their economies decline.[16] Leaders of both developed and developing countries agree that trade can substantially stimulate development globally, benefitting countries at all stages of development.[17] Further describing trade liberalization as an important element in the sustainable development strategy of a country, world leaders concluded that trade can indeed significantly boost economic growth and help reduce poverty.[18]

Trade openness or the liberalization of domestic trade policies is a common denominator in the approaches countries have adopted to exploit the opportunities provided by trade.[19] Trade is not an end in itself but a means to an end, namely, promoting growth and well-being of national economies, as it allows for greater specialization and better allocation of resources.[20] Explaining the link between trade and development, which essentially is one between a country's trade policy and its level of economic development, is not however without controversy. The controversy revolves around two theoretical justifications for international trade by economists. The first is the classical theory dating back to Adam Smith; that free trade will lead to the most efficient use of a country's resources and therefore enhances welfare and growth.[21] In challenging the mercantilist views on protectionism, Smith (1776) had argued that countries possess certain natural advantages in production thereby enjoying some absolute advantage in such areas of production. While England's cool weather was thought to be conducive for the production of wool, Italy's sunny weather was thought to be better for the production of grapes. A perfectly competitive market situation would thus dictate that consumers can buy wool cheaper from England and wine cheaper from Italy. Countries would accordingly enjoy greater economic wealth by specializing in the areas where they have an absolute advantage.

Espousing the classical theory further, David Ricardo (1821) argued that given a perfect market situation and the full employment of resources, countries can reap welfare gains by specializing in the production of those goods with the lowest

16 Collier, P., & Dollar, D. (Eds.). (2002). Globalization, growth, and poverty: Building an inclusive world economy. World Bank Publications. See also Deyshappria, R. (2018). Globalization-poverty nexuses: Evidences from cross-country analysis. Empirical Economic Review, 1(1), 24-48.

17 See United Nations, Transforming our World: the 2030 Agenda for Sustainable Development (ASD), above n 2 at paras. 62 and 68; United Nations. (2020). Inter-agency Task Force on Financing for Development, Financing for Sustainable Development Report 2020. New York, USA available at https://developmentfinance.un.org/fsdr2020. Accessed on 14 June 2021.

18 Ibid.

19 Gabriel, A. A., & David, A. O. (2021). Effect of Trade Openness and Financial Openness on Economic Growth in Sub-Saharan African Countries. African Journal of Economic Review, 9(1), 109-130; Raghutla, C. (2020). The effect of trade openness on economic growth: Some empirical evidence from emerging market economies. Journal of Public Affairs, 20(3), e2081.

20 Rodrik, D. (2018). What do trade agreements really do? Journal of economic perspectives, 32(2), 73-90.

21 Smith, A. (1776). An inquiry into the nature and causes of the wealth of nations: Volume One. London: printed for W. Strahan; and T. Cadell, 1776. See also Irwin, D. A. (2020). Chapter Five. ADAM SMITH'S CASE FOR FREE TRADE. In Against the Tide (pp. 75-86). Princeton University Press.

opportunity cost.[22] He demonstrated that it did not necessarily matter if a country had an absolute advantage in the production of a particular good but what matters is having a comparative advantage in the production of whatever it could produce most efficiently in the absence of any trade. Accordingly, even the least competitive country can produce at least one good more efficiently than any other good. Thus, by specializing in the good which it has a comparative advantage, all countries would gain by trading with each other, and none would lose.

In his book The National System of Political Economy, Friedrich List (1885) set out a contrasting theory about the link between trade and development.[23] Challenging the *laissez-faire* theories of the classical economists led by Adam Smith, he put politics and the nation back at the core of the discourse on political economy. His arguments for infant industry promotion as a partway to industrial development are distilled into strong suggestions that developing countries' trade policy should be designed to protect their infant industries from foreign competition to foster their growth and allow them to become competitive vis-à-vis their counterparts in industrialized nations.[24] Implicit here is the point that governments need to consciously reallocate resources away from commodity products to manufacturing in order to promote economic development. List (1885) justifies the intervention of the state in the economy on the basis that private interest must be restrained if it runs contrary to the societal or national interest.[25] He argues that only where the interest of individuals has been subordinated to those of the nation have the nations been brought to a harmonious development of their productive powers.[26] Put succinctly, "the State is not merely justified in imposing, but bound to impose, certain regulations and restrictions on commerce (which is in itself harmless) for the best interests of the nation".[27]

While a full discussion on the inconclusive theoretical and empirical debates on the link between trade and economic growth and the adverse effect when considering poverty is beyond the scope of this thesis, the thesis assumes that trade will not automatically result in improved living standards for all or overall, economic development. As the case in sub-Saharan Africa indicates, trade liberalization could hurt the domestic economy where it is unable to adjust to the new and increasing competition from abroad.[28] For the gains from trade to translate into increased equality and inclusive growth in such countries like those in sub-Saharan Africa, their governments must consciously design

22 Ricardo, D. (1821). On the principles of political economy. London: J. Murray.

23 List, F. (1885). The National System of Political Economy, trans. Lloyd, S. S., with Introduction by Nicholson, J. S. Longmans, Green and Co.,1909.

24 See Levi-Faur, D. (1997). Friedrich List and the political economy of the nation-state. Review of International Political Economy, 4(1), 154-178. See also Irwin, D. A. (2020). Chapter Eight. MILL AND THE INFANT INDUSTRY ARGUMENT. In Against the Tide (pp. 116-137). Princeton University Press.

25 List, F. (1885). The National System of Political Economy above n 23 at 132.

26 Ibid.

27 Ibid, at 135

28 Yameogo, C. E. W., & Omojolaibi, J. A. (2021). Trade liberalisation, economic growth and poverty level in sub-Saharan Africa, above n 5 at 754.

appropriate trade policies and strategies to direct trade liberalization towards those objectives.[29] To a great extent, achieving this would be circumscribed by such factors as the context, sequencing, rate, and extent of liberalization.[30]

The rest of this chapter is structured as follows: Section 2.2 explores the definition of the concept of development: first, from a theoretical perspective, second, from a more substantive one and lastly, from a rights perspective. Section 2.3 undertakes a more focused analysis of how development is theorized at the WTO, emphasizing the sustainability requirement. Section 2.4 traces the evolution of agitations by developing countries in the GATT/WTO system to get special attention for their peculiar development needs, how the system responded to those agitations and how the rights and interests of members have been affected by the responses. Section 2.5 concludes that the current application of special provisions for developing countries in the WTO undermines their development interest, hence, the need for reform.

2.2 Delimiting the concept of development

The notion of development is fraught with controversies and disagreements over a precise definition.[31] Frankema notes that there is no single, universally accepted, definition of 'development'.[32] He suggests that the concept would differ in meaning depending on whose perspective is being sought.[33] The several theoretical, philosophical, and practitioners' postulations to define and delimit the concept only suggest that the controversies are not just about lexicology but reflect society's inability to agree on a uniform system of thought or way of life.[34] Cultural, ideological, and political variables come to play in sustaining the diversity of views on the concept of development.[35] In other words, among governments, countries, and even practitioners of development, these variables contribute to shaping their understanding of the concept of development and in effect, their approaches to dealing with the development concerns of the world's people. No doubt, to be able to effectively deal with a problem, particularly in terms

29 Stigliz, J., (2021). From Manufacturing-Led Export Growth to Twenty-First Century Inclusive Growth Strategy above n 4; Arabiyat, T. S., Mdanat, M., & Samawi, G. (2020). Trade openness, inclusive growth, and inequality: evidence from Jordan. The Journal of Developing Areas, 54(1).

30 See Pavcnik, N. (2017). The impact of trade on inequality in developing countries (No. w23878). pp. 63-64. National Bureau of Economic Research.

31 Abuiyada, R. (2018). Traditional development theories have failed to address the needs of the majority of people at grassroots levels with reference to GAD. International Journal of Business and Social Science, 9(9), 115-119.

32 Frankema, E. (2022). What is development?, In Frankema, E., Hillbom, E., Kufakurinani, U. and Selhausen, F. (eds.), *The History of African Development: An Online Textbook for a New Generation of African Students and Teachers*. African Economic History Network E-Book.

33 Ibid.

34 See Juego, B. (2020). IPE scholarship about Southeast Asia: Theories of development and state–market–society relations. In The Routledge Handbook to Global Political Economy (pp. 488-510). Routledge. See also Gore, C. (2000). The rise and fall of the Washington Consensus as a paradigm for developing countries. World development, 28(5), 789-804.

35 Qerimi, Q. (2012). Development in international law: A policy-oriented inquiry. p. 27. Martinus Nijhoff Publishers.

of designing appropriate strategies to that effect, it is necessary to first have the right understanding of the problem, including its causes, origin, reflections, and impact without being prejudiced by idiosyncratic biases.

This thesis acknowledges that defining a concept like development or even how the concept is understood by society is necessarily coloured by a complex web of interactions and peoples' expectations of what the outcome of such interactions should be.[36] In order to show how theories about development depict a particular theoretical way of viewing the world, the thesis proceeds to examine two major theories of development.

2.2.1 Theoretical conceptions of development

2.2.1.1 Modernization theory

Modernization theory explains development in terms of the process of evolution of society from a traditional one to a modern one.[37] All societies are thought to have started from the same underdeveloped state and evolved through similar stages of development over time. In other words, today's underdeveloped countries are in a similar position to that which today's developed countries were in years before. Therefore, the way to go in helping underdeveloped countries out of poverty is to accelerate them along this supposed common path of development, by various means such as investment, technology transfers, and closer integration into the world market.[38]

Modernization theory looks at the internal factors of a country and argues that with assistance, underdeveloped countries can advance through the same path of development as industrialized countries.[39] It attempts to identify the social variables that contribute to the social progress and development of societies and seeks to explain the process of social evolution accordingly. The theory stresses not just the inevitable and evolutionary changes that traditional society must undergo to transform, but also the responses to those changes.[40]

In his book, The Politics of Modernization, Apter (1965) describes modernization as a form of development that requires a stable social system, differentiated social structure, social skills, and knowledge adaptable to technologically advanced systems.[41] This description of the theory of modernization emphasizes traditional society as gradually

36 Ibid, at 28.

37 See Eisenstadt, S. N., Schramm, W., Rogers, E. M., Oshima, H. T., & Lerner, D. (2021). 3. The Changing Vision of Modernization and Development. In Communication and change (pp. 31-64). University of Hawaii Press; MacNeill, T. (2020). Culture in Development Theory. In Indigenous Cultures and Sustainable Development in Latin America (pp. 57-83). Palgrave Macmillan, Cham; Ocran, M. K. (2019). Economic Development: Facts, Theories and Evidence. In Economic Development in the Twenty-first Century (pp. 19-70). Palgrave Macmillan, Cham.

38 Ibid. See also Nasong'o, S. W. (2019). Rethinking Africa's Development Models: Between Modernization and Dependency Paradigms. Journal of African Interdisciplinary Studies, 3(1), 34-41 at 35-36.

39 Ibid.

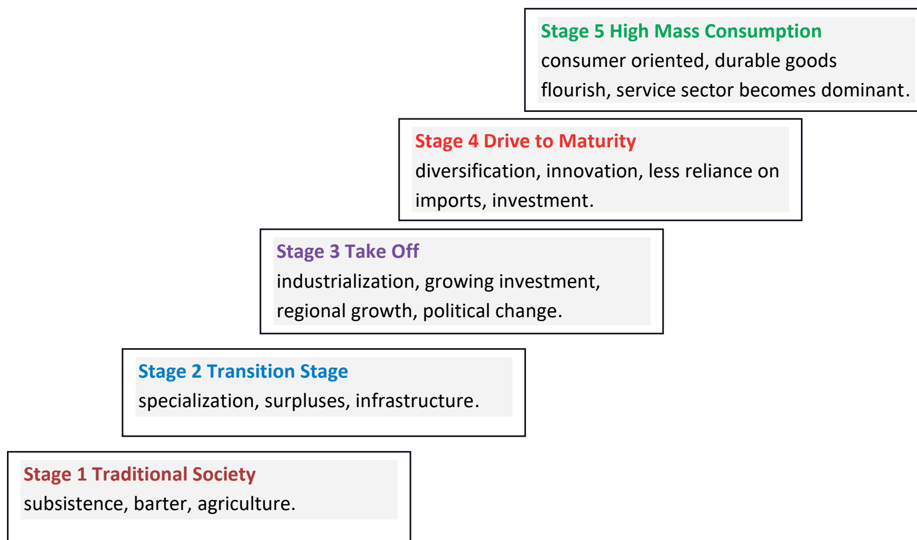
40 See Eisenstadt, S. N., Schramm, W., *et al.* (2021). The Changing Vision of Modernization and Development, above n 37; MacNeill T., (2020) Culture in Development Theory, above n 37 at 61-63; Ocran, M. K. (2019). Economic Development: Facts, Theories and Evidence, above n 37 at 33 – 37; Nasong'o, S. W. (2019). Rethinking Africa's Development Models, above n 38 at 35-36.

41 Apter, D. (1965). The Politics of Modernization, The University of Chicago Press.

evolving to replicate the institutions and values of today's developed societies. These values expounded capitalism as the engine of economic growth in Western societies. Rapid innovation and technological growth became self-sustaining in Western Europe because they were embedded in the capitalist system.[42] Entrepreneurs competed as costs were lowered in order to enhance profits. Increased revenue was, in turn, reinvested to make more profits. This ceaseless accumulation and expansion spurred growth. Thus, the theory contemplates that the progressive transformational change in traditional society will result in the establishment of Western-styled systems of free-market economy and liberal democracy.

In his work, The Stages of Economic Growth, Rostow (1959) outlined five stages of the evolutionary process of traditional societies, using the metaphor of take-off: from the traditional society to the take-off (old resistances fall, political power accrues to a group interested in promoting economic growth, the country's saving rate grows, modern technology is applied); to the drive to maturity (economic growth spreads, integration into international markets); and the age of high mass consumption (fruits of growth finally transferred to the bulk of the people); airplanes flying smoothly in the sky.[43]

Figure 1: Rostow's Model – Stages of Economic Growth



According to Rostow, development requires substantial capital investment.[44] For the economies of LDCs to grow, the right conditions for such investment would have to be created. According to him, if aid is given or foreign direct investment occurs at

42 Ocran, M. K. (2019). Economic Development: Facts, Theories and Evidence, above n 37 at 33-37; Nasong'o, S. W. (2019). Rethinking Africa's Development Models, above n 38 at 35 – 36.

43 Rostow, W. W. (1959). The stages of economic growth. The economic history review, 12(1), 1-16.

44 Ibid, at 5.

stage 3, the economy needs to have reached stage 2. If stage 2 has been reached, then the injection of an investment may lead to rapid growth.

2.2.1.2 Dependency theory

Dependency theory argues that resources flow from a 'periphery' of poor and underdeveloped states to a 'core' of wealthy states, enriching the latter at the expense of the former. Having its root in the Singer-Prebisch thesis,[45] the dependency theory holds, as an underlying argument, that poor states are impoverished, and rich ones are enriched by the way poor states are integrated into the world system, not the least, the world market economy.[46] Thus, the dependency theory rejects the modernist view that expounds on the integration of underdeveloped countries into the global economy as a driver of development in those countries. Indeed, while acknowledging that the origin of poverty cannot be understood without reference to the world economic system, the theory suggests that the complex interaction of trade networks, that is itself a fall-out of the expansion of capitalism, is responsible for the disadvantaged position of developing countries in the global economy.[47]

Putting this in perspective, Tamanaha described the developed-developing country relationship as one between "a Western core and developing periphery, whereby the wealth of the former is based upon keeping the latter in a state of permanent dependency and underdevelopment".[48] Vernengo surmises that central in the relations between the core and periphery is the "inability of the periphery to develop an autonomous and dynamic process of technological innovation".[49] The theory rejects the notion that underdevelopment is a condition but rather sees it as a process of impoverishment intricately linked to development. In other words, some countries are underdeveloped because others are developed.

Upon interrogating typical North-South relations over centuries, some western writers have concluded that economic growth in developed countries is responsible for the poverty in less developed countries particularly in the sense that the development of the industrial system in the West changed and impoverished several countries in Africa,

45 Coined after economists, Hans Singer and Raul Prebisch, the Prebisch-Singer thesis is more of an observation rather than a complex theory by the two that commodity exporting countries (developing countries) would over time only be able to purchase fewer and fewer manufactured goods from developed countries in exchange for a given quantity of their exports, thus signalling a deterioration in the terms of trade of the former. The thesis suggests that over the long run the price of primary goods such as coal, coffee cocoa declines in proportion to manufactured goods such as cars, washing machines and computers. See Singer, H. W. (1950). The distributions of gains between investing and borrowing countries. American economic review 40: 473–85 and Prebisch, R. (1962). The economic development of Latin America and its principal problems. Economic Bulletin for Latin America.

46 See MacNeill, T. (2020). Culture in Development Theory, above n 37; Ocran, M. K. (2019). Economic Development: Facts, Theories and Evidence above n 37.

47 See Selwyn, B. (2019). Poverty chains and global capitalism. *Competition & Change*, *23*(1), 71-97.

48 Tamanaha, B. Z. (1995). The lessons of law-and-development studies. American Journal of International Law, 89(2), 470-486 at 477.

49 Vernengo, M. (2006). Technology, finance, and dependency: Latin American radical political economy in retrospect. Review of Radical Political Economics, 38(4), 551-568 at 552. For a detailed review of the literature on the *core-periphery* model, see MacNeill, T. (2020). Culture in Critical Development Theory, above n 37.

Asia, and the Americas, through colonialism, imperialism and extractive terms of trade.[50] Some of the arguments are that the almost four centuries-old slave trade saw slaves taken from Africa to the Caribbean and the Americas where their unpaid and forced labour produced such profitable commodities as sugar or cotton, which were taken to Europe for huge profits, and more significantly, fuelled the industrial revolution there.[51] Indeed, It is projected that more than half of the entire slave trade took place during the 18th century, with the British, Portuguese, and French being the main carriers of nine out of ten slaves seized in Africa.[52] The slave plantations of South America also provided cash crops for imperialist Western countries thus boosting their overall trade balance.[53]

The proponents of the dependency theory, support the position that the cost of development in one locality is the underdevelopment of another.[54] In other words, poverty is a necessary companion to the immense affluence of the developed world. While the colonial slaves worked hard to meet the needs of their colonizers, the needs of the colonies remained unmet, not the least with impoverished economies. In sum, proponents argue that while the grossly unequal exchanges between the rich countries of the West and poor countries of the South may have enriched a few in the latter, it ultimately created an international system of inequality. The proponents see capitalism continuing this trend in the form of today's international finance institutions promoting policies that indirectly favour rich countries and the activities of powerful multinational corporations in poor developing countries. In historically familiar patterns, most of these multinational corporations who bargain their way into these countries from a position of strength, take all the natural resources in these countries and only leave a litany of damaged environment, create income gaps, and distort the local economy.[55]

With its finely compartmentalized stages towards modernity, modernization theory ignores the very different conditions in countries such as the existence of ethnic minorities, religious conflict, different resource endowments, etc., and the extent to which these shape value systems and culture from country to country. Two countries may be at the same level of poverty but with very different cultures which dictate their inclination to embrace equally different development programmes. On the other hand, while assuming that poor countries will always be poor and underdeveloped or developing countries will always remain so, the dependency theory fails to recognize that many of

50 See Rodney, W. (1972). How Europe Underdeveloped Africa, Panaf Publishing Inc. Abuja. See also MacNeill, T. (2020). Culture in Critical Development Theory, above n 37.

51 See Inikori, J. E. (2020). Atlantic slavery and the rise of the capitalist global economy. *Current Anthropology*, *61*(S22), S159-S171; Wright, G. (2020). Slavery and Anglo-American capitalism revisited. *The Economic History Review*, 73(2), 353-383.

52 Bradley, K., & Cartledge, P. (Eds.). (2011). *The Cambridge world history of slavery: Volume 1, the ancient Mediterranean world*, p. 583. Cambridge University Press.

53 See Wright, G. (2020). Slavery and Anglo-American capitalism revisited, above n 53.

54 See Forje, J. W. (1982). The underdevelopment of the underdeveloped regions of the world: exposing the politics of poverty and the politics of affluence. *Transafrican Journal of History*, *11*, 65-79; Rodney, W. (1972). How Europe Underdeveloped Africa above n 50.

55 Blinder, A. S. (2019). The free-trade paradox: The bad politics of a good idea. *Foreign Aff.*, *98*, 119; Rodrik, D. (2011). *The globalization paradox: why global markets, states, and democracy can't coexist*. Oxford University Press.

today's developed countries were not always the rich, industrialized nations that they are today. Their transformation was more often than not a direct result of conscious policy choices and the expansive gains of economic globalization. To the extent that both the modernization and dependency theories fail to explore country-specific leanings, they can be said to be over-deterministic.[56] Invariably, they fail to acknowledge that sovereign countries have the right to, for instance, choose to be a capitalist economy, choose to stick to their own culture, or even operate a mix of both.

2.2.2 Substantive conceptualization of development

The concept of development has indeed undergone several transmutations in respect of its meaning and coverage.[57] From being explained within the context of the 'vision of the liberation of peoples' in the 1950s and 1960s, the concept was replaced by a 'vision of the liberalization of economies'– starting in the mid-1970s.[58] This conceptualization of development underscores it as a process of structural societal change. In perhaps a reflection of Rostow's evolutionary process of traditional societies to western-styled market economies, development here contemplates a major societal shift from say, rural or agriculture-based society to an urban or industry-based society. Over time, the process of structural change is reflected in deep-seated changes to socio-economic relations in society, including the interaction between the owners of labour and capital. This means that development involves changes to socio-economic structures, including ownership, the organization of production, technology, the institutional structure, and laws.[59] This view of development underscores the point that over time, all countries undergo societal changes and economic development. Countries do not have to follow through the same development path nor subject themselves to a prescriptive process of change. Countries, particularly those at the earlier phases of development, should have the right to define their vision of societal transformation, including whether they want to measure it in terms of modernization or emancipation from underdevelopment. How that is achieved, whether by industrialization or by greater openness to trade, should also be their prerogative.

A second perspective describes 'development' in light of the practice of international development agencies.[60] According to Sumner and Tribe, this perspective sees development as occurring in terms of a set of short- to medium-term 'performance indicators'

56 See Eisenstadt, S. N., Schramm, W., *et al.* (2021). The Changing Vision of Modernization and Development, above n 37; Zafarullah, H., & Huque, A. S. (2021). Development Policy: Ideas and Practice. In *Handbook of Development Policy*, (pp.12-24). Edward Elgar Publishing.

57 Sumner, A., & Tribe, M. A. (2008). International development studies: Theories and methods in research and practice, p. 10. Sage.

58 Gore, C., (2000) *The Rise and Fall of Washington Consensus as a Paradigm for Developing Countries,* World Development, Volume 8, Issue 5, 789–804 at 795. See also Marangos, J. (2020). *International Development and the Washington Consensus: A Pluralist Perspective*. Routledge.

59 Ocran, M. K. (2019). Economic Development: Facts, Theories and Evidence, above n 37.

60 Zafarullah, H., & Huque, A. S. (2021). Development Policy, above n 56 at 16; Pogge, T., (2021). Sustainable Development Goals: framework and progress. In *Handbook of Development Policy*, pp. 147-158. Edward Elgar Publishing.

– goals or outcomes – which can be measured and compared with targets.[61] In contrast to the earlier longer-term perspective of development as a process of societal structural change, development here is based on a particular set of objectives, for example, changes in a country's poverty or income levels, adult literacy level, life expectancy, etc.[62] Zafarullah and Huque suggest that this was indicative of a shift in the practice of development from "substantial investments for projects in infrastructure and technical assistance to a humane approach to development".[63] This delimitation of the concept of development was directly shaped by the interventions of the international development agencies to reduce global poverty and achieve the 2000-2015 United Nations Millennium Development Goals (MDGs).[64]

The MDGs represented a concerted initiative for developing countries to address their numerous problems and inadequacies.[65] They provided the opportunity for countries to forge a global partnership in interacting and working together to accomplish the target of halving global poverty and creating a more sustainable environment.[66] The UN 2030 ASD outline the strategies for implementing the post-MDGs development project with the active involvement of civil society.[67] The first SDG aims to "[e]nd poverty in all its forms everywhere." Its seven related targets aim, among others, to eradicate extreme poverty for all people everywhere, reduce at least by half the proportion of men, women and children of all ages living in poverty, and implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable. World leaders are committed to mainstream sustainable development at all levels, integrating economic, social, and environmental aspects and recognizing their interlinkages to achieve sustainable development in all its dimensions.[68]

Implicit in the perspective that describes 'development' in light of the practice of international development agencies is that all countries undergo societal change. However, rather than emphasizing the process of change, this perspective concerns itself with the outcome of such change. On the whole, has poverty reduced or increased in a particular country? Has per capita income increased or decreased? Has life expectancy

61 Sumner, A., & Tribe, M. A. (2008). International development studies: Theories and methods in research and practice_above n 57 at 13.
62 Ibid.
63 Zafarullah, H., & Huque, A. S. (2021). Development Policy, above n 56 at 16.
64 See the official MDGs site at https://www.un.org/millenniumgoals/poverty.shtml. Accessed 10 May 2022.
65 Zafarullah, H., & Huque, A. S. (2021). Development Policy, above n 56.
66 See Motala, S., Ngandu, S., Mti, S., Arends, F., Winnaar, L., Khalema, E., ... & Martin, P. (2015). Millennium development goals: Country report 2015; Mahembe, E., & Odhiambo, N. M. (2018). The dynamics of extreme poverty in developing countries. *Studia Universitatis Vasile Goldiș Arad, Seria Științe Economice*, *28*(2), 18-35.
67 See United Nations, Transforming our World: the 2030 Agenda for Sustainable Development, above n 2.
68 United Nations General Assembly Resolution A/RES/66/288, The Future We Want, Annex, para. 3 (11 September 2012). The 'Future We Want' is the Declaration on sustainable development and a green economy adopted at the UN Conference on Sustainable Development in Rio on June 19, 2012, galvanized a process to develop a new set of SDGs which will carry on the momentum generated by the MDGs and fit into a global development framework beyond 2015. For a succinct description of the journey from the MDGs to the SDGs, see https://www.local2030.org/library/251/From-MDGs-to-SDGs-What-are-the-Sustainable-Development-Goals.pdf. Accessed 10 October 2021.

shortened or lengthened? A criticism of this perspective of development lies in its assumption that a people's well-being can be determined based on certain universal values. Sumner and Tribe argue that to the extent that this perspective hinges on certain goals and objectives which may not be shared by many of the people who are thought to be benefiting from development, it raises a question of 'ownership'.[69] Can the ordinary people – the people at the bottom of the income distribution – for whom these goals and objectives are set, identify with them? Do they consider such goals as being in their interest and of priority? True, it may not be realistic to expect unanimity in defining goals and objectives in any country, but it should suffice that the articulation of the objectives is participatory at the least.

To the extent that such values or goals are agreed upon by legitimate representatives of the people as opposed to being foisted on a government or country by international development agencies, they stand worthy of pursuit. In her book, Development at the WTO, Rolland describes the evolving policy thrust of such international agencies and how they are shaping development policy.[70] She traced the system of development governance from the United Nations-styled development agenda in which states had sovereign rights to determine their development priorities to the current styled economically-weighted Bretton Woods system in which developing states, in particular, are hardly involved in shaping their development agenda.[71]

A third perspective conceptualizes development as a 'set of ideas' that naturally shapes and frames reality and power relations by valuing certain things over others.[72] For instance, material wealth may be viewed as a determinant of a person's or society's well-being. Thus, a country without economic assets is termed underdeveloped or inferior, in comparative terms at least. Sumner and Tribe suggest that 'real development', would however warrant an evolution of such a set of ideas based on 'alternative value systems' which rather emphasizes spiritual or cultural assets as the determinant of an individual or society's economic well-being.[73] Implicit here is that development is a well-rounded concept, covering all aspects of a people's life– economic, social, cultural, and even spiritual. Its reflection in each society is defined by people's value system.

In espousing sustainable development as a central principle, the global trade regime provides a framework for countries to commit to certain trade policy disciplines in furtherance of greater trade openness. The process would usually require that countries undertake numerous reforms and subject their internal trade policy regime and institution to periodic scrutiny by other members of the multilateral trading system.

69 Sumner, A., & Tribe, M. A. (2008). International development studies: Theories and methods in research and practice above n 57 at 13.
70 Rolland, S. E. (2012). *Development at the WTO*. Oxford University Press.
71 Ibid.
72 See Hickey, S. and Mohan, G., Relocating Participation within a Radical Politics of Development: Critical Modernism and Citizenship. In Hickey, S. (2004). *Participation: from tyranny to transformation: exploring new approaches to participation in development.* Zed books.
73 Sumner, A., & Tribe, M. A. (2008). International development studies: Theories and methods in research and practice above n 57 at 10.

Oftentimes, both the WTO and members are more concerned about the process of complying with institutional expectations and practices than about the actual outcome of subjecting members' domestic policies to strict WTO disciplines. Without prejudice to the point that following through with the process could bring about desirable structural reforms in society, it still leaves to chance how much of that directly results in concrete outcomes like creating wealth or reducing poverty. It would perhaps be more beneficial for developing countries to give more attention to their domestic trade policies and how the WTO could help them benefit from trade opportunities in terms of concrete welfare gains.

Despite the WTO's lofty ambitions in fostering development, it is limited in terms of the tools it can employ, thus, indicating that some of the broader aspirations of development cannot be positively met by the WTO as it would need different tools to do so than just trade liberalization.

2.2.3 Rights-based approach to development

The notion of development has today evolved from a mere reflection of a country's GDP per capita or its industrialization level to reflect its continuing evolution as an economic, social, and political construct, underscoring the difficulty in defining its conceptual boundaries.[74] Besides the conceptual theories of development discussed earlier in this thesis, Rolland discusses some other classical theories of institutional perspectives to development.

Describing what she terms as the structuralist view to development, she fingers the skewed global political-economic system as the mainstay of underdevelopment in the world.[75] Instructive in this regard are the operations of international economic institutions like the World Bank and the International Monetary Fund (IMF) which grant loans with both political and economic strings to developing countries, effectively compelling them to give up their critical economic sectors to foreign interests.[76] Structuralists deplore the current interconnectedness of the global market economy in which richly endowed developing countries are merely a conduit for developed countries' wealth. It is however thought that such need not be the case in the WTO where membership voluntariness suggests that members have exercised their right to participate in trade liberalization, including to determine which sectors of their economies they want to open up; the timing, and the sequencing of such opening up.[77] Their trade policy is supposedly driven

74 See Rolland, S. E. (2012). *Development at the WTO* above n 70 at 15. See also Nafziger, E. W. (2012). *Economic development*. Cambridge university press.

75 Rolland, S. E. (2012). *Development at the WTO* above n 70 at 19-20.

76 Ibid, at 19, See also Vaubel, R. (2019). The political economy of the International Monetary Fund: a public choice analysis (pp. 204-244). Routledge.

77 See Asami, T. (2021). Timing of international market openings and shrinking middle-income class. Review of Development Economics; Aremu, J. A. (2020). Sequencing and Negotiating Nigeria's Regional and International Trade Agreements in the Digital Age: Issues and Policy Prescriptions. In Strategic Policy Options for Bracing Nigeria for the Future of Trade (pp. 173-220). Palgrave Macmillan, Cham; Langhammer, R. J. (2019). Liberalization Attempts and Outcomes. In Foreign Economic Liberalization (pp. 57-70). Routledge.

by domestic interest rather than by external considerations. Developing countries have often sought a preference of first stimulating competitiveness in a sector before opening it up.[78] In this way, they seek to ensure that domestic concerns are not undermined in the liberalization of critical sectors of the economy.

Rolland next turns to discuss some legal and social conceptualization of development as a human right, expounding on such concepts as the 'right to development' and 'sustainable development'. She first describes the goals of development rights as being co-extensive with those of human rights.[79] This view sees development as the provision of certain basic human needs, including food, water, and shelter, as a matter of right inherent to human beings.

The connotation of human rights conventionally stretches beyond civil and political rights to include such economic and socio-cultural rights that could best advance the development of a people.[80] Implicit here is that not even economic growth should solely suffice to paint a picture of a country's level of development. Nafziger underscores the point that [economic] development goes beyond economic growth to include changes like the material well-being of the poorer half of the population, a decline in agriculture's share and an increase in services and industry share of gross national product (GNP), an increase in the education and skills of the labour force, and technological breakthroughs in the country.[81] Essentially, he defines economic development in terms of people and their capabilities. At the risk of being overly ambitious, Nafziger's definition underscores that development should be viewed within the context of the total emancipation of an individual. It would mean, for instance, that such an individual should have the right to aspire to whatever he chooses and also, that necessary conditions exist within which those aspirations can be achieved. Put differently, the process would require removing the many different kinds of material and immaterial barriers to an individual's freedom (including poverty, insecurity, or unaccountable government, a lack of good infrastructure complicating physical mobility or a lack of access to safe drinking water, food or electricity).[82]

The United Nations Development Programme (UNDP) does suggest that people and their capabilities should be the ultimate criteria for assessing the development of a country.[83] Development [rights] has thus been defined in very broad and dynamic

78 Eckhardt, J., & Lee, K. (2018). Global value chains, firm preferences and the design of preferential trade agreements. *Global Policy*, *9*, 58-66; Schwab, D., & Werker, E. (2018). Are economic rents good for development? Evidence from the manufacturing sector. *World Development*, *112*, 33-45.

79 Rolland, S. E. (2012). *Development at the WTO* above n 70 at 25.

80 See United Nations General Assembly. (1966). International Covenant on Economic, Social, and Cultural Rights, Article 1(1). Treaty Series, 999, 171. African Union. (1982); African Charter on Human and Peoples' Rights, Article 22(1). 21 ILM 59.

81 See Nafziger, E. W. (2012). *Economic development*, above n 74 at 37. See also Frankema, E. (2022). What is development?, above n 32.

82 Frankema, E. (2022). What is development?, above n 32 at 1.

83 http://hdr.undp.org/en/content/human-development-index-hdi. Accessed 10 October 2021. See also UNDP. (2020). Human Development Report 2020. The Next Frontier: Human Development and the Anthropocene. New York, available at http://hdr.undp.org/en/content/human-development-report-2020. Accessed 10 October 2021.

terms, including as a life free of 'starvation, undernourishment, escapable morbidity, and premature mortality, as well as the freedoms that are associated with being literate and numerate…'.[84] As the subject matter of human rights continues to evolve to now include such abstracts as gender empowerment and socio-economic opportunities, transparency guarantees, and protective security, so do the boundaries of development continue to evolve.[85] The UN Declaration on the right to development places the human person at the centre of development. Instructively, development is not defined solely in terms of economic growth, but as a 'comprehensive' and multi-faceted 'process', with social, cultural, political as well as economic elements.[86] The Declaration further identifies participatory policymaking[87] and social justice[88] (including the "fair distribution of the benefits of development for individuals") as core attributes of the right to development.

Although the right to development has met the procedural requirement to be translated into an international soft law instrument, it is yet to be accorded such status of an international legal standard of a binding nature.[89] While acknowledging the authority of the United Nations General Assembly to proclaim and/or recognize international human rights, Alston argues that it would require more than just a proclamation by the Assembly for such rights to assume a binding nature.[90] He noted that during the making process of the Universal Declaration on Human Rights and the International Covenants on Human Rights, the majority of states at the time agreed on the general principles and objectives of these instruments.[91] Indeed, many of the enshrined rights were already codified at the national level, thus underscoring the ease with which nations recognized the authority of the Assembly to proclaim such comprehensive packages of human rights.[92]

In the case of rights like the right to development, there has been no common recognition by nations that an entirely new right or at least a new formulation of existing rights has been proclaimed.[93] This has been attributed to the proclamation of

84 See Sen, A. (1999). Development as Freedom, p. 3. (New York, NY: Anchor).).
85 Maguchu, P. (2020). Localizing the Human Rights-Based Approach to Fight Corruption: The Role of Ubuntu. *Cross-cultural Human Rights Review*, *2*(1), 5-22; Sarkar, R. (2020). International Development Law: Rule of Law, Human Rights & Global Finance. Oxford University Press.
86 See UN General Assembly, Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128, Articles. 2(1), 4(2), and 8(1), available at https://digitallibrary.un.org/record/126476?ln=en. Accessed 21 October 2021. See also Nafziger, E. W. (2012). *Economic development*, above n 74 at 37.
87 UN General Assembly, Declaration on the Right to Development, above n 86, Articles. 1(1), 2(3) and 8.
88 Ibid, at Articles. 2(3) and 8(1).
89 See Alston, P. (1984). Conjuring up new human rights: A proposal for quality control. American Journal of International Law, 78(3), 607-621. See also Barry, B. (2017). Is There a Right to Development?. In *International Justice* (pp. 9-23). Routledge; Schrijver, N. (2020). A new Convention on the human right to development: Putting the cart before the horse?. *Netherlands Quarterly of Human Rights*, *38*(2), 84-93.
90 See Alston, P. (1984). Conjuring up new human rights, above n 89 at 613. Article 13 of the 1948 Charter of the United Nations provides the legal basis for the Assembly to proclaim human rights. The Charter is available at https://legal.un.org/repertory/art13_1b_2.shtml. Accessed 10 May 2022.
91 Alston, P. (1984). Conjuring up new human rights, above n 89 at 618.
92 Ibid, at 608.
93 Ibid, at 612 and 613. See also Schrijver, N. (2020). A new Convention on the human right to development, above n 89.

such right without a prior examination of the matter and without the assistance of any relevant documentation[94] and the suspicion of most western countries over the formulation of such right as part of the structural approach to human rights.[95] The result has been the vagueness that characterises such rights, thereby allowing states flexibility to recognize them but without committing themselves to any substantive obligation for the actualization of the right.[96]

Alston suggests that the Assembly has managed to remain a reflection of the global public and governmental opinion, and this is what gives its proclamation of human rights credibility.[97] This underscores the point that the right to development places the task of defining development and determining the nature of development rights and obligations on states– from which such public and governmental opinions are ordinarily collated from. Each state has a right to pursue the development policy of its choice.[98] Interestingly, this calls to question the propriety of international economic institutions, including the Bretton Woods institutions, in setting a development agenda or defining development for developing countries.[99] Often, trade, financial matters, and other development concerns of developing countries that have serious implications for the realization of the right to development are discussed away from them– in exclusive clubs like the G8, G20, the WTO, the IMF etc.[100] Even where developing countries are members of some of these clubs, their weak voices are drowned out by the global powers who drive the agenda of these institutions. The right to development ordinarily requires that partnership between states at the global and regional levels should be based on the principle of sovereign equality of states whereby every state is allowed to enjoy its self-determination over its development priorities.[101] This underscores the need for reforms to turn global institutions into a platform for the implementation of the sovereign equality principle and hence, establish a conducive environment for the realization of the right. In effect, trade rules must be [re]designed in such a way that they reflect the development needs of developing countries as much as the interest of big multinational corporations from advanced countries.[102] This is vital to avoid an asymmetric partnership in which the stronger party prescribes the rule of the game for its exclusive self-interest and turn development from a right to simple charity.[103]

In the WTO, the rights-based approach to development would require that

94 Alston, P. (1984). Conjuring up new human rights, above n 89 at 612.
95 Schrijver, N. (2020). A new Convention on the human right to development, above n 89 at 85.
96 Ibid.
97 Alston, P. (1984). Conjuring up new human rights, above n 89 at 609.
98 See UN General Assembly, Declaration on the Right to Development, above n 86. See also Abomaye-Nimenibo, P. D., & Samuel, W. A. (2019). The Divergent Role of Government in Instituting Public Policy in a Political Economy. *Journal of Research and Opinion*, 6(8), 2409-2426.
99 Kamga, S. D. (2018). Realizing the right to development: Some reflections. *History Compass*, *16*(7), e12460.
100 See Adebola, T. (2019). Access and benefit sharing, farmers' rights and plant breeders' rights: reflections on the African Model Law. *Queen Mary Journal of Intellectual Property*, *9*(1), 105-121, 111.
101 Kamga, S. D. (2018). Realizing the right to development: Some reflections, above n 99 at 5.
102 Ibid.
103 Ibid.

developing countries are allowed to set their development priorities and pursue them in a manner that best suits their interest, as long as it is within the legal framework of the WTO. Rolland notes that allowing developing countries such flexibility may be viewed quite differently by developed and developing countries, in the context of international trade.[104] She cites the example of the ostensible development-oriented effort of the 1990s to include a so-called 'social clause' setting minimum standards on labour conditions in trade agreements, and how that was stoutly opposed by developing countries which argued that it was a protectionist ploy by industrialized members to limit poor countries' comparative advantage in cheap labour.[105] She also argues that developing countries' attempt to benefit from their comparative advantage in international trade, even if it comes at the price of social development and environmental safety, has put them at loggerheads with developed countries.[106]

Rolland next describes sustainable development as another rights-based approach to development in the sense that it ranks the environment as "a global good to which all persons, individually and collectively, present and future, have a right of access".[107] While the principle of sustainable development is discussed in detail in the next section, suffice at this point to emphasize that sustainable development connotes the utilization of the world's natural resources in pursuance of economic prosperity in a manner that does not compromise the opportunities of future generations.[108] At the heart of this is the equitable distribution of such resources. Against the backdrop of the ever-growing debate on trade and development, the thesis next turns to examine the relationship between trade and development in the WTO.

2.3 Contextualizing the trade and development debate in the WTO

The importance of an inquiry into the trade and development link in the WTO cannot be overemphasized, particularly, in the face of growing consternation on the role of the WTO in the global economic governance.[109] Whether the WTO is an appropriate forum for raising development questions continues to be a raging debate between the protagonists who argue that trade liberalization promotes development and the antagonists who sight the negative impact of trade liberalization to argue that the WTO is anything but about development.[110] However, recourse to the preamble of the WTO reveals that the organization is entrusted with a development mandate of some sort. Nevertheless, the

104 Rolland, S. E. (2012). *Development at the WTO* above, n 70 at 27.
105 Ibid.
106 Ibid.
107 Ibid, at 28.
108 See Brundtland, G. (1987). Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly Document A/42/427. (The Brundtland Report).
109 See Rewizorski, M., Jędrzejowska, K., & Wróbel, A. (2020). *The Future of Global Economic Governance*. Springer.
110 See Herbert, E. B. (2020). The role of world trade organisation in international trade and investment. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 11(1), 47-55; Qureshi, A. H. (2017). International Trade for Development: The WTO as a Development Institution?. In *Globalization and International Organizations* (pp. 447-462). Routledge; Ismail, F. (2005). Mainstreaming Development in the World Trade Organization. *J. World Trade*, *39*, 11.

preamble of the WTO Agreement unmistakably suggest that the mandate of the WTO should be read in the light of the need to contribute to development.

Established in 1995 to regulate trade among its members, the WTO took over the organizational structure that had developed under the earlier GATT system. The GATT itself was established in 1947 as a legal framework for the mutual reduction in tariffs negotiated among its members but over time, translated into a full-fledged *defacto* trade body.[111] As can be garnered from the preamble of the WTO, the core objective of the WTO is the economic development of its members. The opening paragraph of the preamble to the WTO Agreement sets out the policy objectives of the WTO:

> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

As can be deciphered, the main reasons for the establishment of the WTO are:

- The increase of standards of living;
- The attainment of full employment;
- The growth of real income and effective demand; and
- The expansion of production and trade in goods and services.

Without a doubt, all four reasons/objectives are measurable economic indices and have been used by different acknowledged development agencies to rank the development status of countries at one time or the other.[112] The preamble to the WTO Agreement further urges members to consider "the twin tools of the reduction of trade barriers and the elimination of discrimination in trade relations" as the instruments for achieving such economic development objectives. This is a clear representation of members' belief that trade openness or trade liberalization has the potential to bring about poverty reduction, wealth creation, and overall economic development. Accordingly, members reaffirmed in the 2001 Doha Declaration that trade can indeed play a major role in the promotion of economic development and the alleviation of poverty. Evidence exists in support of the view that multilateral trade liberalization promotes economic development.[113]

111 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 United Nations Treaty Series. 194. For details on the history of the GATT, see Mbengue, M. M. (2019). Trade and Development. *The Oxford Handbook of United Nations Treaties*, 285-306.

112 See Nafziger, E. W. (2012). *Economic development*, above n 74.

113 Yameogo, C. E. W., & Omojolaibi, J. A., (2021). Trade liberalisation, economic growth and poverty level in sub-Saharan Africa above n 5; Tahir, M., & Hayat, A. (2020). Does international trade promote economic growth? An evidence from Brunei Darussalam. *Journal of Chinese Economic and Foreign Trade Studies*.

Interestingly, the preamble to the WTO Agreement also acknowledges the importance of pursuing economic development in a sustainable manner. This is reflected in its prompting to members that the optimal use of the world's resources in pursing economic development objectives should be guided by the sole objective of sustainable development. It ordinarily follows that the pursuit of economic development at the WTO is circumscribed by the broader objective of sustainable development. Put differently, trade liberalization should only be pursued in a manner that will promote sustainable development.[114] To aid a better appreciation of the latitude of the economic development objective of the WTO, this thesis next attempts to delimit the concept of sustainable development and trace its link with international trade law.

2.3.1 What is sustainable development?

The Brundtland Commission, also known as the World Commission on Environment and Development (WCED) in its report, 'Our Common Future', defines sustainable development as: "[d]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs."[115] Inherent in the principle of sustainable development is the notion that economic growth and the use of natural resources should not hamper future generations. The United Nations Millennium Declaration identified the underlying principles and themes of sustainable development as including economic development, social development, and environmental protection.[116] The 2030 Agenda for Sustainable Development reinforces these themes, with its 17 Goals, 169 targets, and 232 indicators providing comprehensive coverage of the economic, social, and environmental aspects of development.[117]

As a concept, sustainable development means different things to different people in different contexts. However, having recourse to its historical evolution which goes back well beyond its formal coinage by the Brundtland Commission, this thesis aligns with the view that sustainable development as a concept is used to describe the various political, legal, and economic initiatives that seek to resolve the social, environmental and economic conundrum which currently face humans as occupants of planet earth.[118]

114 See WTO. (2018). Mainstreaming Trade to Attain the Sustainable Development Goals. WTO Publishing, available at https://www.wto.org/english/res_e/publications_e/sdg_e.htm. Accessed 11 October 2021.

115 See Brundtland, G. (1987). Report of the World Commission on Environment and Development above n 108. See also Mensah, J. (2019). Sustainable development: Meaning, history, principles, pillars, and implications for human action: Literature review. *Cogent Social Sciences*, *5*(1), 1653531.

116 See also United Nations (2002), Plan of Implementation of the World Summit on Sustainable Development, annexed to the Report of the World Summit on Sustainable Development, A/CONF.199/20 (Johannesburg, South Africa, 26 August-4 September), available at https://digitallibrary.un.org/record/478154?ln=en. Accessed 11 October 2021.

117 See United Nations, Transforming our World, above n 2. As earlier indicated, The SDGs, which are the centrepiece of the 2030 Agenda for Sustainable Development, are the successors to the MDGs post 2015.

118 Lélé, S. M. (1991). Sustainable development: a critical review. World development, 19(6), 607-621. See also Mensah, J. (2019). Sustainable development: Meaning, history, principles, pillars, and implications for human action, above n 115 and Mbengue, M. M., & de Moerloose, S. (2017). Multilateral development banks and sustainable development: On emulation, fragmentation and a common law of sustainable development. *Law and Development Review*, 10(2), 389-424.

At a minimum, it involves the following principles: the sustainable use of natural resources and equity between generations, or intergenerational equity; the equitable use and distribution of the outcomes of development within one generation, or intragenerational equity; as well as the integration of environmental protection in the development process.[119]

The concept of sustainable development can be traced back to a much older debate on renewable resources in the field of forest management, dating back to the 12th to 16th centuries.[120] Its roots lie in a cornerstone terminology of international forestry– 'sustained yield'. The term 'sustained yield' was itself a fair translation of the German word *'nachhaltig'* or *'nachhatend'* as used to describe how to achieve *"such conservation and growing of timber that there will be a continual, steady and sustained usage"*.[121] Describing the underlying principle of 'sustained yield', Duerr and Duerr posited that:

> To fulfil our obligations to our descendants and to stabilize our communities, each generation should sustain its resources at a high level and hand them along undiminished. The sustained yield of timber is an aspect of man's most fundamental need: to sustain life itself.[122]

In the course of the debate on renewable resources, the word 'sustainability' was thrown up as a direct derivative of the term 'sustained yield' and was also used in describing how to achieve the conservation and cultivation of timber in such a manner as to achieve a continuous, steady and sustained use.[123] By the time of the first UN Conference on the environment in 1949, the principle of sustainable development was already entrenched in global efforts aimed at the conservation of the world's natural resources.[124] Tasked with producing both the evidence and the solutions to one of the world's most intractable problems– then known as *"the improvident use of the world's natural resources"*, the 1949 Scientific Conference made a case for sustainable development as a strategy in the use of the word's natural resources.

However, it was not until the UN Conference on the Human Environment held

119 Mbengue, M. M., & de Moerloose, S. (2017). Multilateral development banks and sustainable development, above n 118 at 393.

120 Lélé, S. M. (1991). Sustainable development above n 118.

121 See Grober, U. (2007). Deep roots-a conceptual history of 'sustainable development' (Nachhaltigkeit), available at https://ideas.repec.org/p/zbw/wzbpre/p2007002.html. Accessed 11 October 2021. Grober makes reference to The 'Sylvicultura oeconomica', the earliest comprehensive handbook of forestry, written by the German, Hanns Carl von Carlowitz (1645-1714).

122 Duerr, W. A., and Duerr. J. B. (1975). The role of faith in forest resource management. In *Social sciences in forestry; a book of readings*. By Rumsey, F and Duerr, W. A. (p. 36). Saunders.

123 See Grober, U. (2007). Deep roots-a conceptual history of 'sustainable development', above 121. However, the first use of the term *sustainable* in the contemporary general sense was by the Club of Rome in1972 in its classic report, "Limits to Growth" written by a group of scientists from the Massachusetts Institute of Technology in which they described a desirable world system to be one that is "*sustainable without sudden and uncontrolled collapse"*. See Meadows, D. H., Randers, J., & Meadows, D. L. (2013). The Limits to Growth (1972) (pp. 101-116). Yale University Press.

124 The 1949 UN Scientific Conference on the conservation and utilization of resources (Lake Success, New York, 17 August to 6 September) was the first UN body to address the depletion of those resources and their use.

in Stockholm from 5 to 16 June 1972, that the concept of sustainable development received its first major international recognition. Also known as the First Earth Summit, the Conference adopted a declaration that set out principles for the preservation and enhancement of the human environment, and an action plan containing recommendations for international environmental action. Although the term was not referred to explicitly, the international community agreed to the notion (which at the time, was already at the core of sustainable development) that both development and the environment hitherto addressed as separate issues could be managed in a mutually beneficial way.[125] It was following this that the Brundtland Commission renewed the call for sustainable development, culminating in the elaboration of its report, 'Our Common Future' in 1987, with the landmark definition of sustainable development.

The Brundtland Report engendered the United Nations Conference on Environment and Development (UNCED) in 1992 in Rio de Janeiro, Brazil, as its recommendations formed the primary topics of debate at the UNCED. Also known as the Rio Earth Summit, the Conference set a new framework for seeking international agreements to protect the integrity of the global environment in its Rio Declaration and Agenda 21. Agenda 21 called for the international community to prioritize sustainable development and proceeded to recommend that national strategies be designed and developed to address the economic, social, and environmental aspects of sustainable development.

In 2002 the World Summit on Sustainable Development (WSSD), also known as Rio+10, was held in Johannesburg to review progress in implementing the outcomes from the Rio Earth Summit. The WSSD developed the Johannesburg Plan– a plan of implementation for the actions set out in Agenda 21, and also launched several multi-stakeholder partnerships for sustainable development.

Twenty years after the first Rio Earth Summit, the United Nations Conference on Sustainable Development (UNCSD) was held in Rio de Janeiro on 20-22 June 2012. Also known as Rio+ 20, the conference focused on two themes in the context of sustainable development: green economy and an institutional framework. The conference outcome document, 'The Future We Want', reaffirmed the international community's commitment to sustainable development. Outcomes of Rio+20 included a process for developing new SDGs, to take effect from 2015 and to encourage focused action on sustainable development in all sectors of the global development agenda.[126]

Also of significance to the trade–development debate at the WTO, was the publication of the World Conservation Strategy in 1980– itself, a strong pointer to sustainable development as it is known today.[127] Underscoring a linkage between conservation and development, as key to maintaining a sustainable society, the strategy

125 Mensah, J. (2019). Sustainable development: Meaning, history, principles, pillars, and implications for human action, above n 115.

126 Weitz, N., Carlsen, H., Nilsson, M., & Skånberg, K. (2017). Towards systemic and contextual priority setting for implementing the 2030 agenda. *Sustainability Science*, *13*(2), 531–548.

127 International Union for Conservation of Nature and Natural Resources (IUCN). (1980), World Conservation Strategy: Living Resource Conservation for Sustainable Development, chapter 20. United Nations.

affirmed that the conservation of nature cannot be achieved without development to alleviate the poverty and misery of hundreds of millions of the world's populations.[128] This reflected thoughts that started in the 1970s following the disparity in economic fortunes of developed and developing countries. Putting such thoughts into perspective, Tolba and Elkholy noted that:

> While the world economy has grown incredibly… much of the growth has been in countries that were already consuming an inordinate share of the world's resources. Many of the least developed countries had little economic growth and a substantial fall in per capital production during the 1980s.[129]

Contrary to widespread expectations at the time, the gains of the economic boom were not evenly self-distributing among nations: rich countries were getting richer and poor countries were getting poorer. The United Nations declared 1980s and 1990s as lost decades for developing countries as the majority suffered economic stagnation in these periods despite adopting stringent structural adjustment policies prescribed by the Bretton Woods institutions.[130] The situation in Latin America and Sub-Saharan Africa was particularly worrisome as countries in the regions were generally embroiled in serious budget deficits and debt contrast problems. There was a reversal of the positive growth rates of the 1960s and 1970s as per capita income fell on the average in Sub-Saharan Africa and rose by a mere 9 percent in Latin America, in contrast to 36 percent and 80 percent respectively, between 1960 and 1980.[131]

In sum, while the world's economy was being described as growing considerably, the fact was that countries that were already enjoying a disproportionate share of the world's resources experienced much of the growth. Poor countries, on the other hand, experienced little economic growth, if any. It was this imbalance that moved the United Nations to develop specific development strategies over the decades to ensure that the gains of global economic growth are equitably distributed among the world's people.[132] Hence, sustainable development sought to establish equities, not just between the present and future generations, but also within current generations.[133]

128 Ibid, at chapter 20. See also Marcomick, J., *The Origins of the World Conservation Strategy*, Environmental Review, Vol. 10 No. 3, pp. 177-187, (Forest History Society: North Carolina, 1986).
129 Tolba, M. K., & El-Kholy, O. A. (1992). The World Environment, 1972-1992: Two decades of Challenge. (p. 816). Chapman and Hall.
130 Easterly, W. (2001). The lost decades: developing countries' stagnation in spite of policy reform 1980–1998. *Journal of Economic growth*, *6*(2), 135-157.
131 Jolly, R. (2010). United Nations Intellectual History Project, Briefing Note 7Ralph Institute for International Studies, The CUNY Graduate Center, available at http://unihp.org/briefing/. Accessed 11 October 2021.
132 Bartelmus, P. (2002). *Environment, growth and development: The concepts and strategies of sustainability*. Routledge.
133 Mensah, J. (2019). Sustainable development: Meaning, history, principles, pillars, and implications for human action, above n 115.

2.3.2 Sustainable development in WTO law and policy

No doubt, the principle of sustainable development is an integral part of WTO policy and jurisprudence, having been incorporated into the system by the WTO Agreement, the Doha Development Agenda, Decisions of the WTO Dispute Settlement Bodies, and acknowledgments by senior officials of the WTO.[134] Former WTO Director-General Pascal Lamy expressly acknowledged that sustainable development is a formal goal of the WTO.[135] Explaining the reflection of the principle in the WTO Agreement, he said:

> [t]he term "sustainable development" means securing a growth path that provides for the needs of the present generation without compromising the ability of future generations to meet their own needs. From a policy perspective, the pursuit of sustainable development requires a careful balancing between progress in each of its pillars: policies designed to advance economic development, for instance; to conserve the environment, and to ensure social progress.[136]

It is trite that the WTO is a member-driven organization. Arguably, it follows that organizational policies are what members say they are. Against this backdrop, it becomes instructive to point out that in the 2001 Doha Declaration, WTO members proclaim as follows:

> We strongly reaffirm our commitment ***to the objective of sustainable development as stated in the preamble to the Marrakesh Agreement***. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the promotion of the environment and the promotion of sustainable development can and must be mutually supportive.[137] [***Emphasis added***]

The WTO Appellate Body in the *US–Shrimp* case reinforced members' supreme authority in shaping organizational policies when it acknowledged that the preamble of the GATT reflected members' agreement that sustainable economic development is a goal of the trading system and indeed, 'informs' all of the covered agreements of the WTO Agreement.[138] It went on to characterize the concept of sustainable development as integrating economic and social development and environmental protection.[139] Flowing from this, it can be deduced that the WTO not only affirms sustainable development as one of its integral objectives, but also that sustainable economic development, as

134 See Lydgate, E. B. (2012). Sustainable development in the WTO: from mutual supportiveness to balancing. *World Trade Review*, *11*(4), 621-639 at 623.

135 See Forward by Paschal Lamy in Simpson G. P., (2005). The WTO and Sustainable Development, (United Nations University Press, available at https://digitallibrary.un.org/record/555965?ln=en. Accessed 11 October 2021.

136 Ibid, at vii.

137 Doha Ministerial Declaration, para. 6.

138 Appellate Body Report, *United States-Import Prohibition of Certain Shrimps and Shrimp Products* WT/DS58/AB/R, para. 129.

139 Ibid, at fn. 107 of para. 129.

contemplated by the WTO Agreement, cannot be achieved without regard to the other two pillars of sustainable development– environmental conservation and social welfare.[140] Development at the WTO ought therefore to reflect both the mutual supportiveness of the three pillars of sustainable development and also the need to balance the goals they represent.[141] Instructively, paragraph 51 of the Doha Declaration admonishes the WTO's Committee on Trade and Development (CTD) and that on Trade and Environment (CTE) to coordinate discussions within the WTO to ensure such balancing in the pursuance of sustainable development.

A question that ordinarily arises would be whether all the three elements of sustainable development need to be pursued simultaneously. Put differently, is it permissible for an organization like the WTO to focus on the pursuit of one of such elements, say economic development? Arguably, since there are numerous institutions simultaneously pursuing the different elements of sustainable development across the world, there is nothing wrong with any one of them, including the WTO, concentrating its effort in one direction. However, such predisposition should not compromise global efforts (whether institutional or otherwise) in the pursuit of all three elements of sustainable development.[142] The SDGs are instructive here to the extent that they recognize that ending poverty must go hand-in-hand with strategies that build economic growth and addresses a range of social needs including education, health, social protection, and job opportunities, while tackling climate change and environmental protection.[143]

Indeed, such predispositions exist among global institutions today as can be deciphered from their mandates. While institutions like the World Bank and the WTO have a clear bias for economic development, several UN agencies like the United Nations Educational, Scientific and Cultural Organization (UNESCO), the UN's Office of the High Commissioner for Human Rights (OHCHR) have their core mandates in social development. Others like the United Nations Environment Programme (UNEP) and the International Union for the Conservation of Nature (IUCN) are biased towards environmental protection. Given the WTO's only available tool for development, trade liberalization, it would be unrealistic to expect the organization to, for instance, champion governance reforms or development financing in the world. Basically, in terms of positive contribution, the assessment of the WTO should be limited to what

140 The concept of sustainable development rests, fundamentally, on three conceptual pillars, including 'economic sustainability', 'social sustainability', and 'environmental sustainability'. See Purvis, B., Mao, Y., & Robinson, D. (2019). Three pillars of sustainability: in search of conceptual origins. *Sustainability science*, *14*(3), 681-695; Mensah, J. (2019). Sustainable development: Meaning, history, principles, pillars, and implications for human action, above n 115.

141 See Lydgate, E. B. (2012). Sustainable development in the WTO, above n 134. See also Meléndez-Ortiz, R., & Biswas, T. (2011). Trade governance and sustainable development. Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries, Cambridge University Press, Cambridge, UK, 100-134.

142 Nash, K. L., Blythe, J. L., Cvitanovic, C., Fulton, E. A., Halpern, B. S., Milner-Gulland, E. J., ... & Blanchard, J. L. (2020). To achieve a sustainable blue future, progress assessments must include interdependencies between the sustainable development goals. *One Earth*, *2*(2), 161-173.

143 United Nations. The sustainable development agenda, available at https://www.un.org/sustainabledevelopment/development-agenda-retired/. Accessed 22 March 2022.

it can achieve (improved socio-economic welfare from trade) having regard to the tools available to it.

The WTO's focus on economic development can also be justified based on the argument that globally, poverty is more widespread and significant than for instance, environmental degradation, which is much more localized.[144] In very explicit terms, Anijah-Obi captured the relationship between poverty and environmental degradation from a developing country perspective:

> [t]he concept of equity and meeting the needs of the citizens is central to sustainable development… those who are poor and hungry will often destroy their immediate environment in order to survive. They are responsible for tiling tire soils and cutting down forests. They live in slums and throw waste into gutters and streams because they lack the basic necessities of life. They lack the resources and materials necessary for living within a minimum standard conducive to human dignity and well-being.[145]

Expounding on the intricate link between poverty and environmental degradation, Heady argues that this is reflected in the management of the world's natural resources.[146] He explains that several of the world's poor rely on natural resources for their livelihood and are very vulnerable to deterioration in the resource. According to him, this has been tragically demonstrated by famines in sub-Saharan Africa, and less so by the declining living standards of fishing communities in Britain and Canada.[147] The point here is that the living standard of a people directly reflects on the state of their environment, including their utilization of the earth's resources.[148] Poverty reduces people's capacity to use resources in a sustainable manner. In other words, the lesser the incidence of poverty in the world, the more predisposed humans will be to sustainable living.

The linkage between poverty and environmental degradation stokes reflections on the issue of how to ensure that in the ever-rising wave of globalization, multinational enterprises (MNEs) engage in socially responsible business practices that do not further impoverish poor communities or their environments.[149] Free trade must not just promote

144 See Masron, T. A., & Subramaniam, Y. (2019). Does poverty cause environmental degradation? Evidence from developing countries. *Journal of poverty*, *23*(1), 44-64; Kassa, G., Teferi, B., & Delelegn, N. (2018). The poverty-environment nexus in developing countries: Evidence from Ethiopia: A systematic review. *Asian Journal of Agricultural Extension, Economics & Sociology*, 1-13.

145 Anijah-Obi, F. N. (2001). *Environmental Protection and Management: Planning, Process and Strategies*, Clear Lines Publications, Calabar, Nigeria. Cited in Nwagbara, E. N., Abia, R. P., Uyang, F. A., & Ejeje, J. A. (2012). Poverty, environmental degradation and sustainable development: a discourse. *Global Journal of Human Social Science Research*, *12*(11-C). See also Agbonifo, P. E. (2021). Socio-economic implications of poor environmental management: a framework on the Niger Delta questions. *Environment, Development and Sustainability*, 1-18.

146 Heady, C. (2000). Natural resource sustainability and poverty reduction. *Environment and Development Economics*, *5*(3), 241-258.

147 Ibid, at 241.

148 van Noordwijk, M. (2019). Integrated natural resource management as pathway to poverty reduction: Innovating practices, institutions and policies. *Agricultural Systems*, *172*, 60-71.

149 See Berger-Walliser, G., & Scott, I. (2018). Redefining corporate social responsibility in an era of globalization and regulatory hardening. American Business Law Journal, 55(1), 167-218.

sustainable development but its rules as well as effective national systems should ensure respect for international commitments in areas like anti-corruption, human rights and sustainable business at the global level. Implicit here is that corporations take responsibility for their impacts on stakeholders, and for greater transparency with regard to corporate nonfinancial risks and environmental and social impacts.[150] The notion that corporations should engage in socially responsible business practices, also known as corporate social responsibility (CSR), has become embedded in the landscape of law and business.[151] It connotes that business enterprises conduct their operations in ways that further economic, social and environmental sustainable development in accordance with the definition by the Brundtland Commission.[152]

In a bid to hold MNEs to higher levels of environmental responsibility, governments are increasingly taking to regulations that mandate socially responsible behaviour and policies for formerly voluntary CSR engagement.[153] While it is without doubt that the SDGs cannot be achieved without the contributions of MNEs,[154] it is less clear what their role should be in achieving international policy goals like the SDGs. Despite the lack of consensus on MNEs' impacts on society and the environment, several criticisms abound on the degree to which companies contribute to sustainable development. In the main, they observe that 'most companies develop reactive strategies towards sustainability challenges, and regularly use their CSR/sustainability strategy as window dressing or greenwashing'.[155]

Being what they are (an intergovernmental agreement that urges companies to help solve developmental challenges), the SDGs do not just define the world's sustainable development priorities, they offer an insight into how institutional pressures may influence MNEs' sustainability efforts, including those that emerge from the SDGs themselves.[156] As political and economic institutions govern corporate behaviour, including their sustainability activities, institutions could actually serve as an important and primary driver for MNEs to engage with specific SDGs in furtherance of sustainable development.[157] The EU's draft directive on human rights and environmental due diligence – a critical component of its sustainable corporate governance initiative – is a typical example of how institutional mechanism could be directed to ensure the private

150 Ibid, at 168.
151 Ibid.
152 Ibid. See also Sustainable business – a platform for Swedish action, available at https://www.government.se/49b750/contentassets/539615aa3b334f3cbedb80a2b56a22cb/sustainable-business---a-platform-for-swedish-action. Accessed 26 April 2022.
153 This trend of imposing formerly voluntary CSR engagement on MNEs through statutes or regulation is referred to as the legalization of CSR. See Berger-Walliser, G., & Scott, I. (2018). Redefining corporate social responsibility in an era of globalization and regulatory hardening, above n 149 at 169.
154 Van Zanten, J. A., & Van Tulder, R. (2018). Multinational enterprises and the Sustainable Development Goals: An institutional approach to corporate engagement. *Journal of International Business Policy*, *1*(3), 208-233.
155 Ibid, at 210.
156 Ibid.
157 Ibid.

sector shoulders its share of the responsibility for sustainable development.[158] The WTO will have to keep pace with this trend if it will succeed in integrating its majority poor members into the multilateral trading system. With insufficient state regulation to ensure that MNEs internalize harmful environmental externalities or follow basic moral tenets in their labour practices, such members often have to rely on international law to achieve this.[159] One way the WTO could be proactive about this is by adopting new rules that place mandatory obligations on MNEs to behave in a morally and socially acceptable manner in exchange for access to the international market.

An important dimension of sustainability lies in the relationship between actions aimed at alleviating poverty and actions aimed at protecting the environment.[160] However, there is no consensus among scholars on the environmental impacts of actions designed to reduce poverty, or the poverty impacts of actions designed to protect the environment.[161] Despite the debate, it is without doubt that the SDGs require actions in pursuance of either goal to be mutually reinforcing. Hence, both governments and the private sector will have to prioritise mechanisms and pathways that not just link the solutions to these two challenges but ensures that progress on one will also imply progress on the other.[162]

158 See Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937. COM (2022) 71 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071. Accessed 17 April 2022. The Directive, as proposed by the European Commission, aims to foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies' operations and corporate governance. The new rules will ensure that businesses address adverse impacts of their actions, including in their value chains inside and outside Europe. It will harmonise existing corporate due diligence frameworks of member states.

159 Van Zile, C. (2011). India's mandatory corporate social responsibility proposal: Creative capitalism meets creative regulation in the global market. APLPJ, 13, 269, 276; Berger-Walliser, G., & Scott, I. (2018). Redefining corporate social responsibility in an era of globalization and regulatory hardening, above n 149 at 207.

160 See Alpízar, F., & Ferraro, P. J. (2020). The environmental effects of poverty programs and the poverty effects of environmental programs: The missing RCTs. *World Development*, *127*, 104783.

161 Ibid, at 1. See also Ferraro, P. J., & Simorangkir, R. (2020). Conditional cash transfers to alleviate poverty also reduced deforestation in Indonesia. *Science Advances*, 6(24), eaaz1298; Roy, J., Tscharket, P., Waisman, H., Abdul Halim, S., Antwi-Agyei, P., Dasgupta, P., ... & Suarez Rodriguez, A. G. (2018). Sustainable development, poverty eradication and reducing inequalities. In Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty (Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)). Intergovernmental Panel on Climate Change, available at https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_Chapter5_Low_Res.pdf. Accessed 15 May 2022.

162 Ibid.

2.4 Development in the GATT/WTO system

Since the establishment of the GATT in 1947, developing countries have constituted the majority of its membership.[163] Almost half of its original contracting parties were developing countries, albeit there was no formal recognition for such country status at the time nor was there any recognition of special provisions applying to such countries' rights and obligation within the system. The principle at the time was that rights and obligations were the same for all contracting parties.[164] The Most Favoured Nation (MFN) rule in Article 1 of the GATT requiring WTO members that grant tariff preferences to any country to accord the same to all other WTO Members "immediately and unconditionally is generally described as a 'cornerstone' of the GATT and 'one of the pillars of the WTO trading system'."[165]

Over the years, developing countries however expressed great discontent with the GATT system as not sufficiently taking care of their interests despite them constituting the majority of the membership.[166] They specifically pointed to the system's cornerstone principles of reciprocity and non-discrimination as incapable of promoting fair trade among the wide variance of unequal trade partners.[167] They described such principles as ignoring their peculiar development status, particularly as exporters of primary commodities.[168] The US had led the push for reciprocity to be a foundational principle of the GATT, such that any gains from tariff cuts agreed would have to be paid for by reciprocal tariff concessions, helping to ensure that the US would maintain its industrial comparative advantage.[169] By implication, any increased market access to the US had to be paid for by opening up markets to US-manufactured industrial goods. Rejecting this, developing countries felt that the limited size of their domestic market meant that their bargaining power was inadequate to induce concessions from other countries; moreover, they wanted to be able to protect infant industries during the early stages of industrialization.[170] Also, developing countries thought that since their exports were mostly concentrated in raw materials, which generally entered the industrialized countries duty-free anyway, the system of reciprocal, bilateral bargaining over specific

163 About two thirds of the WTO's around 164 members are developing countries. Membership information is available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. Accessed 17 October 2021.

164 See generally Hudec, R. E. (2010). *Developing countries in the GATT legal system*. Cambridge University Press. See also Simo, R. Y. (2020). Developing Countries and Special and Differential Treatment. In *International Economic Law: (Southern) African Perspectives and Priorities*. 233-281 at 242. Kugler, K. & Sucker, F. (eds.). Juta & Co. Ltd.

165 Ojha, S. (2020). The Rise of Exceptions and the Eclipse of the Elemental Principle of Most-Favoured-Nation. In *Proceedings of the 18th International RAIS Conference on Social Sciences and Humanities* (pp. 133-142). Scientia Moralitas Research Institute.

166 Mbengue, M. M. (2019). Trade and Development, above n 111. Koul, A. K. (2018). Developing Countries in the GATT/WTO. In *Guide to the WTO and GATT* (pp. 635-670). Springer, Singapore.

167 Koul, A. K. (2018). Developing Countries in the GATT/WTO, above 166 at 637.

168 See Hudec, R. E. (2010). *Developing countries in the GATT legal system,* above n 164.

169 See Wilkinson, R., & Scott, J. (2008). Developing country participation in the GATT: a reassessment. *World Trade Review*, *7*(3), 473-510.

170 Ibid, at 486.

tariff lines, was not in their interest.[171] This system included the principal supplier rule, which provided that each country would be expected to consider the granting of tariff or preference concessions only on products of which the other countries, members of the Preparatory Committee, are, or are likely to be, principal suppliers.[172]

Accordingly, for any particular product, the importing country negotiates its tariff rate with its principal supplier and not with all suppliers of the same product.[173] However, as developing countries' exports were mostly concentrated in raw materials, they were rarely ever principal suppliers of anything.[174] Put differently, due to the low-income elasticity of their exports, developing countries were not in a position to offer sufficient incentives to induce improved access to markets of interest to them.

For developing countries, new approaches which would improve market access for commodity exports, guarantee price stability, and encourage greater policy space to help them develop manufacturing capacities were considered as the minimum to not only facilitate their participation in world trade but also correct the perceived trade imbalance in the GATT system.[175] In more precise terms, developing countries believed that to develop economically, that is, to become more than mere economically disadvantaged exporters of primary commodities, they require some special treatment, even if that were to conflict with the GATT principle of non-discrimination.[176]

Looking ahead, this group of countries felt they needed to develop their manufacturing capacities to be able to guarantee jobs and export earnings required to finance their development.[177] Unfortunately, they did not consider the GATT principles as promoting that objective but rather as hindering their ability to expand their exports and ensure access for their exports in developed country markets.[178] Developing countries in the GATT system thus sought a system of preferences that would give them enhanced access into industrialized countries' markets and assistance that will help them take advantage of such access. In effect, developing countries sought to be accorded special and differential treatment in making commitments during trade liberalization.

By the Havana Round of multilateral trade negotiations (1947–1948), developing countries had almost successfully challenged the GATT requirement for equal application of trade policies based on the premise that the peculiar structural features of their economies and the distortions arising from historical trading relationships constrained their trade

171 Ibid.
172 This basically captures the product-by-product, principal supplier method of tariff negotiations, by which a country could only be requested to make tariff cuts on a particular product by the principal supplier of that product to that country. See UN (1947), 'Preparatory Committee of the United Nations on Trade and Employment', Press Release No. 36, 8 April, available at https://docs.wto.org/gattdocs/q/GG/PRESSRELEASE/36.pdf. Accessed 14 May 2022.
173 See Wilkinson, R., & Scott, J. (2008). Developing country participation in the GATT, above n 169.
174 Ibid, at 486.
175 See Hudec, R. E. (2010). *Developing countries in the GATT legal system,* above n 164.
176 See Jackson, J. H., & Davey, W. J. (1986). Legal Problems of International Economic Relations: Cases Materials and Text on the National and International Regulation of Transnational Economic Relations. p. 1138.
177 Ibid, at 1139.
178 Koul, A. K. (2018). Developing Countries in the GATT/WTO, above n 166.

prospects.[179] In response to this, the Havana Charter[180] included a clause on 'Government Assistance to Economic Development and Reconstruction', which allowed contracting parties to obtain the permission of other contracting parties to use otherwise illegal protective measures, to promote the establishment, development, and reconstruction of particular industries or branches of agriculture.[181] This effectively signalled the very first attempt at codifying SDT. Following a 1948 amendment, this clause was introduced into the GATT as Article XVIII but notwithstanding, developing countries continued to take part in GATT as equal parties.[182] Requests made for weakening or suspension of their obligations continued to be discussed in specific working groups to ensure that the requirements of the provisions of Article XVIII were fulfilled.[183]

In the years following, developing countries increased their agitations to have their peculiar needs not just recognized but reflected in the global trade regime. A breakthrough came during the GATT Review Session of 1954–1955 where Article XVIII of the GATT was revised to specifically address the concerns of developing countries.[184] Paragraph A was revised to provide for the possibility of modifying or withdrawing obligations to reduce tariffs in order to promote the establishment of a particular industry; Paragraph B was revised to include a specific provision that allowed countries at 'an early stage of their development' to adopt quantitative restrictions on imports whenever monetary reserves were deemed to be inadequate in relation to the country's long term development strategy; Paragraph C, in its purport, allowed developing countries to impose trade restrictions, including both tariffs and quantitative restrictions, to support infant industries with a view to raising living standards. Further, a completely new Article XXVIII (bis) was introduced to provide for negotiation rounds for tariff reductions. It specifically recognized the needs of less-developed countries for "a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes."[185]

In 1958, the Habler Report by an expert panel appointed by the 1957 Ministerial Meeting found there was some substance in the continued feeling of discontent among primary producing countries – that the existing rules and conventions concerning commercial policies were relatively unfavourable to them.[186] Among other things, the

179 See Hudec, R. E. (2010). *Developing countries in the GATT legal system,* above n 164. See also Jackson, J. H., & Davey, W. J. (1986). Legal Problems of International Economic Relations, above n 176 at 1138, 1139.

180 United Nations Conference on Trade and Employment. (1948). Havana charter for an International Trade Organization: March 24, 1948, available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf. Accessed 10 October 2021.

181 Ibid, Article. 13, paras. 1 & 3.

182 Simo, R. Y. (2020). Developing Countries and Special and Differential Treatment in International Economic Law above n 164 at 242.

183 Ibid.

184 Koul, A. K. (2018). Developing Countries in the GATT/WTO, above 166 at 638.

185 See generally Srinivasan, T. N. (2019). *Developing countries and the multilateral trading system: From GATT to the Uruguay Round and the future*. Routledge; Hudec, R. E. (2010). *Developing countries in the GATT legal system,* above n 164; Wilkinson, R., & Scott, J. (2008). Developing country participation in the GATT, above n 169.

186 GATT, Trends in International Trade, 11–12 (Herberler Report, 1958), (Sales No. GATT/ 1958-3). See Koul, A. K. (2018). Developing Countries in the GATT/WTO, above 166 at 638-639.

Report recommended a reduction in developed countries' internal taxes on primary products that had been hindering import demand and consumption.[187] Subsequently, in 1961, GATT parties adopted a declaration on the 'Promotion of Trade of Less Developed Countries' which, inter alia, advocated for the grant of preferences in market access for developing countries not covered by preferential tariff systems.[188] Following this, the GATT contracting parties made concessions concerning import restrictions due to concerns about industrial development and balance of payments problems in developing countries. However, when it came to the important development issues of market access and stabilization of raw materials prices, GATT contracting parties showed less concern and refused binding obligations. Thus, developing countries continued their agitation for a dedicated institution that would promote issues of trade and development in a manner that takes into cognizance their peculiar development needs. These agitations eventually resulted in the birth of the United Nations Conference on Trade and Development (UNCTAD) in 1964.[189]

2.4.1 Part IV of the GATT

Prompted by the establishment of the UNCTAD in 1964, the GATT contracting parties in the following year adopted a new Part IV of the GATT, dealing specifically with trade and development. Part IV of the GATT contains the first formal acknowledgment, in the GATT legal text, of the special development needs of developing countries.[190] Significantly, it introduced the principle of non-reciprocity into the GATT legal text after the Tokyo Round of negotiations in 1964. The principle of non-reciprocity is embedded in Article XXXVI (8) of the GATT 1947. In *verbatim*, it provides as follows:

> "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting parties."

A GATT note on the interpretation of this provision states that developing countries "should not be expected, in the course of negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs ...".[191] However, as this chapter of the thesis has sought to establish, the general spirit and original intent of the GATT itself was that parties were to negotiate on 'a reciprocal and mutually advantageous basis'. Setting forth the basis of the parties' relationship, the preamble to the GATT underscores this point in the following words:

187 GATT, Trends in International Trade, above n 186 at 12.
188 Koul, A. K. (2018). Developing Countries in the GATT/WTO, above 166 at 639.
189 Ibid, at 640; Srinivasan, T. N. (2019). *Developing countries and the multilateral trading system*, above n 185.
190 Hegde, V., & Wouters, J. (2021). Special and Differential Treatment under the World Trade Organization: A Legal Typology. *Journal of International Economic Law*, 24(3), 551-571.
191 See Annex I Notes and Supplementary Provisions, Ad Article XXXVI, para. 8, GATT 1947, available at https://www.wto.org/english/docs_e/legal_e/gatt47_03_e.htm#annexi. Accessed 17 October 2021.

> … [E]ntering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce, …

Ordinarily, this reading appears not to reckon with any special needs of a party as being sufficient to accord such party non-reciprocal trade advantages. However, the notion of 'mutual advantage' in the preamble to the WTO when read together with the GATT note on the interpretation of Article XXXVI requires taking account of special needs and modifying a strictly formalistic interpretation of reciprocity in favour of a more substantive one. This is despite the non-bindingness of the preamble when taken alone.

By the 1964–1967 Kennedy Round of multilateral trade negotiations, the doctrine of non-reciprocity had gained notoriety among GATT contracting parties. It was at this time interpreted as follows:

> [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 the light of the development, financial and trade needs of developing countries themselves. [192]

Effectively, GATT members no longer expected developing countries to grant comparable consideration for trade concessions given to them.[193] It is, however, noteworthy to mention that Part IV of the GATT only dropped the reciprocity requirement for developing countries when developed countries negotiate [non-preferential] concessions with them. It did not operate to permit a preferential trade system as sought by developing countries. Developed countries who wanted to accord preferential treatment to imports from developing countries at the time were required to seek specific exemptions gotten through waivers under GATT Article XXV:5.

In effect, Part IV was limited by the largely hortatory language with which its provisions were phrased. The provisions fell short of imposing any substantive obligation on GATT Contracting Parties. Another problem with Part IV of the GATT was that it lacked measurable criteria against which to evaluate the GATT Parties' compliance with its provisions. Part IV offered no additional opportunities for developing countries to derogate from GATT disciplines nor did it guarantee them additional concessions from developed countries.[194]

192 GATT (1967), Committee on Trade and Development - Eighth Session - Punta del Este, Uruguay - 16-20 January - The Trade Negotiations and Developing Countries - Report by the Chairman of the Sub-Committee on the Participation of Less-Developed Countries. COM.TD/W/37. para. 9, available at https://docs.wto.org/gattdocs/q/1966_70.HTM. Accessed 17 October 2021.

193 See Srinivasan, T. N. (2019). *Developing countries and the multilateral trading system*, above n 185.

194 See Rolland, S. E., (2012), Development at the WTO, above n 70 at 70.

2.4.2 The generalized system of preferences (GSP) scheme

The evolution of GSP schemes can be traced back to 1964. The Secretary-General's report at the first UNCTAD meeting in 1964 directed attention to a seeming need for preferential tariff rates in developed country markets as a possible incentive to drive an industrial revolution in developing countries.[195] The report argued that such preferences in favour of developing countries' exports of manufactured products could help them reduce their dependence on the export of primary commodities with its traditionally high price instability and overall declining terms of trade.[196] In this way, it was thought that developing countries would benefit not only from job creation and industrialization but also from increased export earnings from trade in manufactured products. The report accordingly proposed the creation of a generalized and non-reciprocal system of preferences which would see developed countries lower duties on imports from developing countries, thus having exporters/producers from developing countries enjoy a price advantage over their counterparts in developed countries.[197]

Following divergence in views as to the acceptability of the principle inherent in such a proposal, it was not until the second UNCTAD conference in 1968 that a compromise was adopted following discussions at several international fora. The 1968 conference agreed on a unanimous resolution on the '[p]referential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries'.[198] Resolution 21 called for the establishment of a 'generalised non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries'.[199] The objectives of the GSPs was set out as:

(a) To increase their export earnings,
(b) To promote their industrialization, and
(c) To accelerate their rates of economic growth.[200]

A 1971 waiver to the MFN principle in GATT Article 1 subsequently legitimized the GSP.

Contrary to the MFN principle, the waiver permitted developed countries to accord more favourable tariff treatment to products originating from developing countries for a

195 United Nations Conference on Trade and Development (1964). Final Act and Report of the First United Nations Conference on Trade and Development - UNCTAD I (23 March - 16 June 1964). (E/CONF.46/141, Vol. I), available at https://unctad.org/meeting/first-session-united-nations-conference-trade-and-development-unctad-i. Accessed 13 October 2021.

196 Ibid, at paras. 26-30.

197 Ibid, at para. 54, General principle eight.

198 Resolution of the Second Session of UNCTAD on the Expansion and Diversification of Exports of Manufactures and Semi-Manufactures of developing countries ("Resolution 21 (II)"), Annex D-3, available at https://www.wto.org/english/tratop_e/dispu_e/246r_e_e.pdf. Accessed 23 March 2022.

199 Ibid, at para. 1.

200 Ibid.

period of ten years. The GSP aimed to promote developing countries' exports by allowing their products preferential access to the markets of developed countries. Its primary objective was summed up as simply to permit infant-industry protection in developing countries while improving their export earnings through rapid industrialization and stimulation of economic growth.[201] However, due to the varied economic system and tariff regimes of developed countries, a unified system of concession was impracticable, thus leaving individual developed countries to fashion out their respective schemes. Benefits under the schemes were tied to a recipient country's level of economic development. Preference-giving countries maintained absolute discretion to unilaterally modify or withdraw the preferences, product coverage, and beneficiary countries. Thus, while developing countries succeeded in getting trade preferences entrenched in the GATT, the operation of preference schemes worked to undermine their quest to independently determine their development priorities.

2.4.3 The Enabling Clause

Without prejudice to the introduction of the GSP at the second UNCTAD Conference in 1968, it was not until the 1973–1979 Tokyo Round of multilateral trade negotiations that the principle of special and differential treatment for developing countries was officially adopted as the Enabling Clause[202] and given permanent codification within the GATT system. Paragraph A of the Enabling Clause provided for preferential market access for developing countries on a non-reciprocal and non-discriminatory basis; Paragraph B provided for differential and more favourable treatment of developing countries with regard to GATT provisions on non-tariff barriers; Paragraph C provided for the conclusion of preferential agreements between developing countries and Paragraph D provided for special treatment for LDCs.

In its application, the Enabling Clause operates to exclude the GSP and other preferential agreements between developed and developing countries, (and among developing countries *inter se*) from the application of the MFN Clause in Article I:1 of the GATT.[203] The Enabling Clause effectively ended the time limitation of the MFN exemption under GSPs as it provided the exemption on a permanent basis.

An important dimension to the advent of the Enabling Clause was the introduction of the principle of graduation to the global trade regime. Encapsulating the spirit and intent of this principle is the following provision:

201 See the Preamble to the GATT Decision on Generalized System of Preferences (the 1971 Waiver Decision) (25 June 1971, BISD 18S/24), available at https://referenceworks.brillonline.com/entries/international-law-and-world-order/ivd2-gatt-decision-on-generalized-system-of-preferences-the-1971-waiver-decision-SIM_032465. Accessed 17 October 2021.

202 GATT (1979), L/4903, BISD 26S/203.

203 See the Enabling Clause, para. 1. See also Hegde, V., & Wouters, J. (2021). Special and Differential Treatment under the World Trade Organization, above n 190; Shekhar, S., & Janardhan, S. (2019). Mercantilist Concerns in US GSP Law: Termination of GSP Benefits to India. *Global Trade and Customs Journal*, *14*(7/8); Ukpe, A. I. (2008). Defining the Character of the Enabling Clause: Towards a More Beneficial GSP Scheme, available at http://dx.doi.org/10.2139/ssrn.1265733. Accessed 13 October 2021.

> Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.[204]

A controversial aspect of the principle of graduation is the GATT contracting parties' agreement that preferences given to developing countries will expire over time as the economic development of the countries concerned progress. Implicitly, this means that developing countries would progressively assume the same rights and obligations of the multilateral trading system as developed countries.[205] A major problem here was that no objective criteria existed to measure the development status of a country in order to determine when a developing country should be graduated out of the developing country category. This opened a leeway for preference schemes to be designed in such a way as to undermine a basic requirement of the Enabling Clause, that is, that preferences be granted to developing countries on a 'general and non-discriminatory basis.'[206] Hence, it is no surprise that the GATT/WTO dispute settlement bodies have at various times been called upon to determine the compatibility of preference schemes with this requirement of the GATT and Enabling Clause.[207]

2.4.3.1 Non-discrimination under the Enabling Clause

In the *EC-Tariff Preferences* case, the attack by developing countries on developed countries' GSP programmes which discriminated among developing country members came to a head. India had initiated the case against the EC, following Council Regulation No. 2501/2001, which sought to apply a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004. Five categories of tariff preferences were provided under the regulation. These were the general arrangements, special incentive arrangements for labour rights protection, special incentive arrangements for environmental protection, special arrangements relating to least-developed countries, and special arrangements aimed at combating drug production and trafficking (the drug arrangements). The general arrangements were accessible to all developing countries and

204 See the Enabling Clause, para. 7.
205 Ibid. This is the foundation of the idea of progressive regulation as expounded by Cottier (2006) and espoused in this thesis, particularly, at chapters 4, 5 and 6. See Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law. *Journal of International Economic Law*, 9(4), 779-821.
206 See fn. 3, Paragraph 2(a) of the Enabling Clause.
207 See GATT Panel Report, *United States – Customs User Fee*, L/6264, adopted 2 February 1988, BISD 35S/245, GATT Panel Report, *European Communities – Refunds on Exports of Sugar Complaint by Brazil*, L/5011, adopted 10 November 1980, BISD 27S/69, GATT Working Party Report, Report of the Working Party on the Australian Request to Grant Tariff Preferences to Less Developed Countries, adopted 23 December 1965, L/2527 and the *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC-Tariff Preferences)*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS/246/AB/R.

accorded duty-free access to products that were deemed 'non-sensitive' and a preferential tariff scheme for products deemed to be 'sensitive'. The special incentive arrangements for labour rights protection and the protection of the environment accorded additional preferences to countries that were determined by the EC to comply with certain labour and environmental standards. The special arrangements for least-developed countries offered additional preferences that were exclusively accessible to least-developed countries. The drug arrangements also exclusively offered additional preferences not available under the general arrangements to 12 countries pre-determined by the EC to be facing a peculiar problem with the production of illicit drugs.[208]

India, which was mainly a beneficiary of the general arrangements challenged the drug arrangement, arguing that it (the drug arrangements) gave beneficiaries the possibility to get duty-free access to the EC market regarding certain covered products, compared to other developing countries that had to pay full or only partly lowered tariff duties.[209] A major plank of India's argument, which incidentally touched on the character of the Enabling Clause, was that the drug arrangements violated Article I:1 of GATT 1994 and were not justified under the Enabling Clause. First, India argued that a violation of Article I:1 of GATT 1994 was apparent since the drug arrangements did not fulfil unconditional MFN treatment.[210] Secondly, India also argued that the EC had not obtained a waiver that would have exempted them from the MFN obligation.[211] India's arguments in effect were that the Enabling Clause is a limited exception allowing derogation from GATT Article I:1 and that once it alleges a violation of the GATT Article, the EC would ordinarily assume the burden of raising the Enabling Clause as an affirmative defence. The EC however argued that the Enabling Clause is an autonomous and permanent right and not a defence for developed countries to grant differential and favourable treatment to developing countries. Therefore, a waiver was not necessary for GSP schemes to comply with Article I:1 of GATT 1994.[212]

In effect, India had the burden to prove that the measure was not in conformity with the Enabling Clause, as the Enabling Clause excludes the application of GATT Article I:1.'[213] In finding that the drug arrangements were not in accordance with the MFN obligation in Article I:1 of GATT, the Panel determined that the Enabling Clause was to be regarded as an exception to Article I:1 of GATT 1994. The Clause did not exclude the applicability of Article I:1 of GATT 1994. Accordingly, the EC had to prove that the disputed measure conformed with the Enabling Clause.[214] Based on its consideration of the terms of the Enabling Clause and GATT Article I:1, and the object

208 The drug arrangements applied to Bolivia, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.
209 *EC-Tariff Preferences*, Panel Report, above n 207 at para 2.8.
210 Ibid, at para 4.8.
211 Ibid, at para 4.18.
212 Ibid, at para 4.42.
213 Ibid, at paras. 4.212-4.220.
214 Ibid at paras. 7.39, 7.41, 7.53.

and purpose of the WTO Agreement and the Enabling Clause, the Appellate Body upheld the Panel's finding.[215] The Appellate Body however emphasized the special status of the Enabling Clause as being more than a mere exception in the sense of GATT Article XX, for instance.

A further argument of India in the *EC-Tariff Preference* Case which is of significance to this thesis is that, when read together, paragraph 2(a) and footnote 3 of the Enabling Clause only justify GSP schemes that do not discriminate between different developing countries.[216] This argument essentially raises the issue of whether paragraph 2(a) of the Enabling Clause which enshrines the requirement of non-discrimination in GSP schemes is modified by paragraph 3(c) of the Clause which requires such GSP schemes to respond positively to the needs of developing countries.[217] India argued that the drug arrangements discriminate between developing countries because they are not extended to all developing countries. India insisted that 'non-discriminatory' means treatment that does not make a distinction between different categories of developing countries and to the extent that the drug arrangement was limited to a named group of developing countries, it discriminated between developing countries.[218] The EC counter-argued that the non-discriminatory requirement in paragraph 2(a) together with footnote 3 does not imply that all_developing countries must be granted identical preferences and they do not prevent developed countries from treating developing countries differently, as long as they have different development needs, according to objective criteria.[219] Explaining that the named group of developing countries under the drug arrangement was objectively selected, the EC further argued that different treatment may even be necessary to avoid indirect discrimination and to also comply with the requirement in paragraph 3(c) of the Enabling Clause and that preferences must respond positively to the development needs of developing countries.[220] Adopting a contextual approach to the reading of relevant provisions of the Enabling Clause and relying on the drafting history of the GSP system under UNCTAD, the Panel ruled that paragraph 3(c) only allows for differentiation between developing countries and LDCs.[221] No other differentiation among developing countries is allowed.[222]

Ruling on the meaning of 'non-discriminatory' in footnote 3 to paragraph 2(a), the Appellate Body, on its part, noted that the different views of India and the EC were covered by the ordinary meaning of the term.[223] It found that both parties agreed that only differential treatment among similarly-situated beneficiaries is prohibited as

215 *EC-Tariff Preferences*, Appellate Body Report, above n 207 at paras 90-103.
216 *EC-Tariff Preferences*, Panel Report, above n 207 at para 4.31.
217 See Rolland, S. E., (2012), Development at the WTO, above n 70 at 158.
218 *EC-Tariff Preferences*, Panel Report, above n 207 at para 4.33.
219 Ibid, at para. 4.47, 4.64.
220 Ibid, at 4.64.
221 Ibid, at 7.80-7.115.
222 Ibid, at 7.116.
223 *EC-Tariff Preferences*, Appellate Body Report, above n 207 at paras. 151, 152.

discriminatory.[224] The only point of disagreement was on what constituted the basis of similarly-situated. The rest of the Appellate Body's decision centred on the meaning of 'similarly-situated'. While it held India's argument to mean that all GSP beneficiaries were similarly-situated, it read the EC's argument to mean that only GSP beneficiaries with similar development needs were similarly-situated, as distinct from GSP beneficiaries with different development needs. The Appellate Body concluded its reasoning in this respect by ruling that from the ordinary meanings of 'non-discriminatory', developed countries (or indeed, all preference-granting countries) are required to treat all similarly-situated beneficiaries in an identical way.[225] Further, examining the immediate context of the term 'non-discrimination', the Appellate Body, rejected the Panel's position that Paragraph 3 of the Enabling Clause could not have meant 'the needs of individual developing countries'. It ruled that paragraph 3(c) authorizes preference-granting countries to 'respond positively' to 'needs' that are not necessarily common or shared by all developing countries. Responding to the 'needs of developing countries may thus entail treating different developing-country beneficiaries differently.[226]

In supporting its endorsement of differentiation as a response to addressing the changing needs of individual developing countries, the Appellate Body referred to relevant provisions of the Enabling Clause,[227] the preamble to the WTO Agreement, and the general objectives of the WTO Agreement.[228] The Appellate Body however emphasized that its reading of paragraph 3(c) did not mean that any kind of differentiation will qualify, as only differentiation linked to the 'development, financial or trade needs' of developing countries will be acceptable. In its view, a 'need' cannot be characterized as one of the specified 'needs of developing countries' in the sense of paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, when a claim of inconsistency with paragraph 3(c) is made, the existence of a 'development, financial [or] trade need' must be assessed according to an objective standard. It added that broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as a standard.[229] Clearly, the Appellate Body suggests that while developing countries' needs are wide and varied, they must however be limited to 'development, financial and trade needs.' However, it has long been settled that WTO members can look beyond the WTO for guidance in the determination of such development needs, including in respect of indicators for determining them.[230]

224 Ibid at paras. 153.
225 Ibid at 154.
226 Ibid at 162.
227 Enabling Clause, para. 7.
228 *EC-Tariff Preferences*, Appellate Body Report, above n 207 at para. 160-162.
229 Ibid, at 163.
230 McKenzie, M. (2005). European communities-conditions for the granting of tariff preferences to developing countries. *Melb. J. Int'l L.*, *6*, 118.

2.4.3.2 Determining development, financial or trade Needs

Despite settling the question of differentiation between developing countries, the issue remains as to whether the 'particular need' of a developing country is to be understood in relation to a trade-led development need or if it is open to a broader interpretation. Paragraph 3(c) of the Enabling Clause merely specifies that a 'need' must be linked to 'development, financial or trade need'. 'Development, financial or trade need', in itself, is a very broad term that could fit just about any 'need'. Since the Appellate Body's analysis of Paragraph 3 of the Enabling Clause was limited to providing an understanding of the content of paragraph 2(a), it never determined whether the drug arrangements met the requirement of Paragraph 3, nor did it have the opportunity to analyse how the objective of the EU in fighting drug problems could be assessed as corresponding to a legitimate need. While it may appear that the Appellate Body's decision does not draw a link between 'positive response to development need and positive outcome of the response', it seems logical to conclude that conditionality of preferences should ordinarily make a positive contribution to the trade of beneficiaries.[231] However, we would need to decide whether this requires an aggregate assessment across the three dimensions of 'development' 'financial' or 'trade' needs or within each dimension. Addressing the issue, Schwartz emphasizes that such assessment must encompass issues that reflect 'development, financial and trade needs of developing countries' in the conjunctive and not as separate and distinct analysis of these objectives as alternatives. He further underscores that the conjunctive approach would effectively limit the interpretation of development to where it has trade financial and development implications, rather than an all-encompassing development framework.[232]

Still, on the determination of 'needs', Rolland notes that it remains to be determined how the 'development, financial, and trade needs' of developing members will be defined, and particularly whether this is to be done on an economy-wide basis or a sector–by–sector basis within each country.[233] While the Appellate Body may not have made an explicit statement in this regard, a textual reading of its reference to the 'trade, development, financial needs' of developing countries is most probably referring to the economy as a whole. If it intended a sector-based consideration, it could have made some mention of 'the needs of sectors of economies' in its reference to the 'trade, development, financial needs' of developing countries. In the Australian Waiver case (cited by Rolland, 2012), developing countries had argued that the concept of 'infant economies' should be preferred to that of 'infant industries' in the determination of which developing countries should benefit from preferences.[234] Implicit in that argument

231 Schwartz, P. (2009). Development in world trade law. *J. Int'l Com. Law & Technology*, *4*, 50-60 at 55. See also Borchert, I., Conconi, P., Di Ubaldo, M., & Herghelegiu, C. (2020). The pursuit of non-trade policy objectives in EU Trade Policy. World Trade Review, 1-25.

232 Schwartz, P. (2009). Development in world trade law above, n 231.

233 See Rolland, S. E., (2012), Development at the WTO, above n 70 at 161.

234 GATT, Report of the Working Party on the Australian Request to Grant Tariff Preferences to Less-Developed Countries. (GATT, L/2527, 23 December 1965), para. 17.

is the suggestion that developed countries should be able to differentiate in favour of a developing country based on the latter's economy as a whole, despite it having some economically advanced sectors. Adopting an economy-wide criterion does make sense to the extent that it is consistent with the notion of comparative advantage. The overall impact of the gains from trade on the economy of members should remain the priority concern of the WTO.

2.4.3.3 Impact of non-reciprocity

The underlying objective of non-reciprocity was that developing countries are relieved from the obligation of making reciprocal concessions as a prerequisite for benefiting on an MFN basis, for tariff and other concessions made by other GATT contracting parties.[235] The reality however was that the doctrine of non-reciprocity had rather legitimized the opting out from active negotiation by most developing countries.[236] Putting this in perspective, Srinivasan contended that the relentless but misguided pursuit of non-reciprocity as a development strategy by developing countries meant in effect that they had 'opted out' of the GATT– instead of participating "fully, vigorously, and on equal terms with the developed countries".[237]

As a result of their being exempted from making reciprocal concessions, developing countries preferred to absent themselves from active negotiations, as they generally believed that they had nothing to give in return, and yet they were guaranteed benefits from the trading system on an MFN basis. Such attitude by the developing countries, which to this day has not completely changed, consequently marginalized their contribution and participation in the multilateral trading system.[238] This runs contrary to the spirit and intent of the GATT as enshrined in its then newly instituted Part IV, which primarily provides for special rights to be accorded developing countries in order to help grow their infant industries, secure favourable conditions of access to industrialized markets and enhance their participation in the multilateral trading system. Developing countries, therefore, subsequently reasoned that if the existing non-reciprocal form of SDT had failed to reverse their marginalization in the multilateral trading system, then it was probably time to consider narrowing its scope by limiting the application of the principle of non-reciprocity itself and begin to give concessions as may be necessary to advance their trading interests.[239] As Walley explained, the new consciousness stemmed from a growing realization that the liberalization of trade policies could be more conducive to development and also from an increasing appreciation of reciprocity in

235 Hegde, V., & Wouters, J. (2021). Special and Differential Treatment under the World Trade Organization, above, n 190.

236 See Simo, R. Y. (2020). Developing Countries and Special and Differential Treatment, above n 164 at 235.

237 Srinivasan, T. N. (1999). Developing countries in the World Trading System: from GATT, 1947, to the Third Ministerial Meeting of WTO, 1999. *The World Economy*, *22*(8), 1047-1064 at 1052. For an alternative view of the participation of developing countries in the multilateral trading system, see Wilkinson, R., & Scott, J. (2008). Developing country participation in the GATT, above n 169 at 236.

238 Simo, R. Y. (2020). Developing Countries and Special and Differential Treatment, above n 164 at 235.

239 Ibid.

trade relations as a means of securing greater market access.[240] Accordingly, the modified concept of 'less than full reciprocity' evolved.

2.4.4 From non-reciprocity to 'less than full reciprocity'

Earlier GATT negotiating rounds prior to the Kennedy Round had seen concessions on market access negotiated according to the bilateral request-and-offer method, with each developing country able to decide for which product and how much it wanted to reduce the tariff against a concession by the negotiating partner country.[241] The tariff concession made to a main supplier of the product, then becomes available to all parties on MFN basis. However, the Kennedy Round introduced an alternative approach to tariff reduction. Apart from the established bilateral product-by-product negotiations, tariff reduction was to be achieved through a fixed target reduction mark or a formula, applying to a wide range of product groups.[242] Tariff negotiations following this new approach was required to take into account the needs of LDCs for a more flexible use of tariff protection.[243] The Kennedy Round adopted a plan of substantial linear tariff reductions, which saw developed countries reduced their industrial tariffs by 50 percent across-the-board.[244] On the other hand, developing countries were allowed the flexibility to unilaterally determine how much tariff concession they were prepared to make on a product-by-product.[245] As the Round was ending in 1967, developing countries realised the result was not to their advantage. The tariff cuts generally fell into categories that excluded developing countries' strong export sectors. This was because many export products of developing countries were excluded from the list to be negotiated or tariffs reduced less than requested by the global target.[246]

So, it was no surprise that by the time of the Tokyo Round, some developing countries were already moving towards a more liberal trade policy that was more open to imports and without policy bias to exports.[247] 'Less than full reciprocity' was a direct fall-out of developing countries' dissatisfaction with the sub-optimal result of non-reciprocity. Hence, they began to reason that giving something in return for trade concessions by trading partners could be

240 Whalley, J. (1999). Special and differential treatment in the millennium round. *The World Economy*, *22*(8), 1065–1065, 1070.

241 See Koul, A. K. (2018). Developing Countries in the GATT/WTO, above 166; Srinivasan, T. N. (2019). *Developing countries and the multilateral trading system*, above n 185.

242 See Article XXVIII (bis) of GATT. Apart from the selective product-by-product basis, the provision permitted 'the application of such multilateral procedures as may be accepted by the contracting parties concerned', as far as future tariff negotiations are concerned.

243 Ibid.

244 GATT, (1987). Tariff negotiations in the Kennedy and Tokyo Rounds. Negotiating Group on Tariffs, MTN. GNG/NG1/W/1. Indeed, the principal industrialized countries made tariff reductions on up to 70 percent of their dutiable imports but due to the many exceptions introduced in the offers, the Kennedy Round negotiations resulted in an effective reduction of just 35 percent on industrial products in industrialized countries.

245 Ibid.

246 Meyer, M., & Lunenborg, P. (2012). The evolution of special and differential treatment and aid for trade. *The Ashgate Research Companion to International Trade Policy*, available at https://www.researchgate.net/publication/289393669. Accessed 4 April 2022.

247 Keck, A., & Low, P. (2005). Special and differential treatment in the WTO: Why, when, and how?, available at DOI:10.2139/ssrn.901629. Accessed 18 October 2021.

more beneficial to them. As far back as the 1980s, this new sentiment had gained weight within the GATT/WTO system, providing an insight into how SDT may be made more effective to promote trade and development. The 1985 GATT–sponsored Leutwiler Report reflected these sentiments in concluding inter alia that:

> Developing countries receive special treatment in the GATT rules. But such special treatment is of limited value. Far greater emphasis should be placed on permitting and encouraging developing countries to take advantage of their competitive strengths and on integrating them more fully into the trading system, with all the appropriate rights and responsibilities.[248]

Significantly, the Tokyo Round saw developing countries agree to some limited market access commitments and a few tariff bindings.[249]

By the time the Uruguay Round kicked off in 1986, developing countries generally agreed on the need to participate more actively in the negotiations through the exchange of reciprocal tariff concessions, albeit not to the fullest extent.[250] The Uruguay Round marked a clear departure from the traditional approach to SDT as developing countries accepted to be bound by nearly the same set of rules and obligations as developed countries.[251] The 'single undertaking' of the Uruguay Round, as opposed to the code undertaking of the Tokyo Round, meant that all WTO members had to accept the same agreements – with developing countries, thereby, assuming a much higher level of commitments than ever before.[252] Rather than how to exempt developing countries from the rules, the focus of the contracting parties had turned to issues of technical assistance and more flexible implementation timeframes.[253] As Whalley puts it, by the Uruguay Round, SDT had "changed from a focus on preferential access and special rights to protect, to one of responding to special adjustment difficulties in developing countries stemming from the implementation of WTO decisions".[254] The objective was to see developing countries eventually take on the same obligations as developed countries after legitimate transition periods. Single undertaking did not however, dissuade SDT demands as they continue to feature in developing countries' requests in trade negotiations.[255]

Hence, despite some considerable achievements of the Round, including the establishment of a strengthened dispute settlement mechanism and the abolition of

248 The Leutwiler Report, GATT 1985: 44.
249 See Simo, R. Y. (2020). Developing Countries and Special and Differential Treatment, above n 164 at 250.
250 Ibid, at 5. The Uruguay Round was conducted within the framework of the GATT, spanning from 1986 to 1993 and embracing 123 countries as 'contracting parties'. The Round led to the creation of the World Trade Organization (as from 1 January 1995), with GATT remaining as an integral part of the WTO agreements.
251 Keck, A., & Low, P. (2005). Special and differential treatment in the WTO, above n 247 at 5.
252 The only exceptions were the plurilateral agreements on government procurement, trade in civil aircraft and dairy and meat products.
253 Simo, R. Y. (2020). Developing Countries and Special and Differential Treatment, above n 164 at 253.
254 Whalley, J. (1999). Special and differential treatment in the millennium round, above n 240 at 1073.
255 Simo, R. Y. (2020). Developing Countries and Special and Differential Treatment, above n 164 at 253.

Voluntary Export Restraints (VERs), developing countries expressed the concern that a number of the new disciplines resulting from the Round did not sufficiently reflect their development interest.[256] For instance, asides from the mainly hortatory stipulations in the preamble of the newly agreed (General Agreement on Trade in Services), that the desire of WTO members is to 'facilitate the increasing participation of developing countries in trade in services and the expansion of their services exports', there was no concreate statement on how to achieve this. Article IV of the GATS which provides for mechanisms to increase the participation of developing countries in trade in services has been described as vague when compared to SDT provisions under the GATT, particularly, the Enabling Clause.[257] Another point of dissatisfaction among developing countries was the requirement under the TRIPS Agreement for them to adopt uniform standards to those of developed countries despite huge institutional weaknesses in the former.[258]

'Less than full reciprocity' remained an important feature in the Uruguay Round negotiations, albeit its effectiveness in furthering developing countries development interest was questionable. While all developed countries had to bind all tariffs and convert non-tariff barriers into tariff equivalents under the agriculture negotiations of the Round (developed countries reduced tariffs by an average of 36 percent over six years and developing countries reduced by 24 percent over ten years), their use of weight-based tariffs meant, in some instances, that the effective tariff reduction became smaller over time.[259] The tariff reduction by industrialised countries on non-agricultural goods was only slightly less on products which are mainly exported by developing countries (37 percent), than on imports from all countries (40 percent).[260] Rather than see this as reason to move away from 'less than full reciprocity' (to full reciprocity) as argued by some,[261] developing countries rather pushed that 'less than full reciprocity' be made more effective.[262]

Post Uruguay Round, developing countries mainly agitated for more clarity on SDT provisions. They argued that although, they were granted phase-in periods to meet their obligations under many of the new multilateral agreements from the Round, they were presented with a *fait accompli* as they were excluded from the discussions that would have allowed them to table their priorities.[263] Also, they expressed concern over a variety of

256 Ibid.
257 Ibid, at 253-254.
258 Michalopoulos, C. (2003). *Special and differential Treatment of developing Countries in TRIPS*. TRIPS Issues Papers No. 2, available at https://www.quno.org/sites/default/files/resources/Special-Differential-Treatment-in-TRIPS-English_0.pdf. Accessed 22 April 2022.
259 See Meyer, M., & Lunenborg, P. (2012). The evolution of special and differential treatment and aid for trade, above n 246 and Ingco, M. D. (1996). Tariffication in the Uruguay Round: How much liberalisation?. *World Economy*, *19*(4), 425-446.
260 Meyer, M., & Lunenborg, P. (2012). The evolution of special and differential treatment and aid for trade, above n 246.
261 See Laird, S. (1999). Multinational Approaches to Market Access Negotiations. In *Trade Rules in the Making: Challenges in Regional and Multilateral Trade Negotiations,* (pp. 205-234). Washington DC: Brookings Institution.
262 Ibid.
263 Simo, R. Y. (2020). Developing Countries and Special and Differential Treatment, above n 164 at 255.

implementation issues around the new agreements (both in terms of difficulties – financial, administrative and human capacity – and modifications of agreements' provisions in a more development-friendly way).[264] Hence, the Doha Development Round (2001-2007) was launched with a mandate that included clarifying issues emanating from provisions relating to SDT. There was a conscious attempt at the time by WTO members to link trade and development and acknowledge that the interests of developing countries could no longer be disregarded.[265] With development at its core, the Doha Round's agenda fundamentally aimed to improve the trading prospects of developing countries.[266] The programme of the Round was not only comprehensive in terms of agenda, it was also different from previous rounds in that the developmental concerns of the developing members were on the front burner.[267] It is with due regard to these concerns that Paragraph 51 of the Doha Declaration required that the WTO identifies and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected. This mandate attempts to implement WTO members' desire to ensure that the Doha Round trade negotiations promote the objective of sustainable development. Accordingly, developing countries have tabled several proposals addressing specific issues of interest to them, including: [268]

i. Flexibility in the multilateral rules, which reflect their concerns and constraints;
ii. Transitional arrangements linked to the achievement of developmental objectives;
iii. Simplifying existing procedures, including for enhanced flexibilities and extended transition periods, so as to provide a timely and effective response to particular concerns;
iv. Less than full reciprocity in the commitments undertaken by developing countries;
v. Enhanced and targeted technical assistance and capacity-building programmes that would assist countries to implement WTO rules;
vi. Measures that would provide additional and predictable market access for products of export interest to developing countries;
vii. Operationalisation of the decision to provide duty-free and quota-free market access to the LDCs;
viii. Making S&DT provisions mandatory, in keeping with the concern expressed by many developing countries that most of these provisions

264 Ibid.
265 Ibid, at 254-255.
266 See Paragraph 2 of the Doha Declaration.
267 Flowing from the Doha Declaration's mandate for negotiation on a wide range of issues, the round's work programme covered about 20 areas of trade, including agriculture, non-agricultural products market access, services, intellectual property, trade facilitation, trade and development, trade and environment, dispute settlement, rules.
268 WTO. (2010). Developmental Aspects of the Doha Round of Negotiations: Note by the Secretariat (28 October). WT/COMTD/W/143/Rev.5, paragraph 89.

are not couched in binding languages;

ix. Improved coherence arrangements to ensure that flexibilities provided in WTO rules are not diluted because of commitments mandated by other organisations.

The transmutation of non-reciprocity to 'less than full reciprocity' was legally recognized in the Paragraph 16 of the Doha Ministerial Declaration, which states that:

> The negotiations shall take fully into account the special needs and interests of developing and least developing country participants, … through less than full reciprocity in [the] reduction [of] commitments, in accordance with the relevant provisions of Article XXVIII bis of GATT 1994. As such, the Doha Declaration required that negotiations on tariff reductions take into account the special needs of developing countries, through the notion of 'less than full reciprocity.

Market access debates in the Doha Round remained sensitive and fraught with antagonism. The main issue of conflict was export subsidies and domestic support measures on agriculture by the US, the EU and other developed countries.[269] Developing countries insisted on substantial reduction and elimination of these measures and greater market access to them in return for non-agriculture market access in their countries.[270] The US, along with other developed countries were not willing to consent to the demand. Hence, market access issues were relegated during the Round. The main trend of SDT seemed to be all about technical assistance and capacity building.

Addressing the WTO's Trade Negotiations Committee (which he chaired) on 31 May 2011, the then Director-General of the WTO, Pascal Lamy suggested that the Doha Round as we know it, was dead.[271] Indeed, it seemingly ended in defeat back in 2008 when the Ministerial Conference for that year failed to hold.[272] The 10th WTO Ministerial Conference held in Nairobi, Kenya ('the Nairobi Ministerial') put a final nail to the coffin by mothering the demise of the single undertaking, and hence signalling 'a move towards plurilateralism to address negotiations paralysis'.[273] The consensus on

269 Uddin, F. (2012). The Fate of Doha Development Agenda. *Policy Perspectives*, 87-96.

270 Ibid, at 89.

271 Chairman's opening remarks, Trade Negotiations Committee: Informal Meeting, WTO: 2011 News Items (May 31, 2011), available at https://www.wto.org/english/news_e/news11_e/tnc_infstat_31may11_e.htm. Accessed 6 April 2022.

272 See WTO. (2008). Lamy recommends no ministerial meeting by the end this year. WTO News, available at https://www.wto.org/english/news_e/news08_e/tnc_dg_12dec08_e.htm. Accessed 6 April 2022. See also Martin, A., & Mercurio, B. (2017). Doha dead and buried in Nairobi: lessons for the WTO. *Journal of International Trade Law and Policy*. 16(1):49-66.

273 Simo, R. Y. (2020). Developing Countries and Special and Differential Treatment, above n 164 at 256.

how to conclude the Doha Round agenda no longer existed.[274] Since then, discussions around SDT have largely been limited to the level of the WTO's CTD. Members have recently sought to advance discussions on ten agreement-specific proposals by the ACP States, the African Group and the LDCs, (collectively known as the G90) which would operationalize existing SDT provisions and make them more precise and effective.[275]

2.5 Conclusion

With the majority of WTO members being developing countries and a significant proportion of that number still classed as poor nations, the task of ensuring that international trade supports development becomes even more critical for global trade governance. Although traditional development concerns like GDP or per capita income have been on the front burner of the global trade agenda, there has been much less attention paid to the broader issues of sustainable development, namely, how much such cold indices of growth improve the overall well-being of the individual. As we have shown in this chapter, development is a broad concept covering all facets of human development, including socio-economic and cultural. The WTO is however limited by its available tool of trade liberalization to the pursuit of economic development. This has resulted in developing countries decrying the apparent failure of trade liberalization and indeed, the broad spectrum of trade rules to adequately address their multi-faceted development needs or reflect their peculiar priorities. At its best, trade liberalization ought to create opportunities for poor countries, in particular, to benefit from and lift their populations out of poverty. Whether the current spectrum of trade rules and the system itself support poor countries to take advantage of such opportunities created underlies the question of development in the WTO.

SDT was adopted in the WTO to ensure the system responds to the peculiar development needs of developing countries. Despite being touted as a development policy that will best further the integration of developing countries into world trade, the existing approach to the application of SDT (based on exemptions and opt-outs from rule discipline) denies developing countries the opportunity to restructure their economies under a competitive environment.[276] Inadvertently, the approach excludes developing countries from the major source of gains from trade liberalization, that is,

274 Ibid. See also Martin, A., & Mercurio, B. (2017). Doha dead and buried in Nairobi, above n 272 at 55. The Nairobi Ministerial Declaration acknowledged this much in stating as follows: "We recognize that many Members reaffirm the Doha Development Agenda, and the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then, and reaffirm their full commitment to conclude the DDA on that basis. Other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations." Paragraph 30, Nairobi Ministerial Declaration Part I (19 December 2015) WT/MIN (15).

275 See WTO (2021). Future of special treatment for developing countries talks lies in members' hands — chair. News Item, available at https://www.wto.org/english/news_e/news21_e/XX_27apr21_e.htm. Accessed 6 April 2022.

276 Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law, above n 205 at 788. See also Hoekman, B. M., Michalopoulos, C., & Winters, L. A. (2003). *More favorable and differential treatment of developing countries: Toward a new approach in the World Trade Organization* (Vol. 3107). World Bank Publications; Srinivasan, T. N. (2019). *Developing countries and the multilateral trading system* above, n 185; Bronckers, M. (2020). Trade Conflicts: whither the WTO?. *Legal Issues of Economic Integration*, *47*(3).

the reform of their policies.[277]

277 Ibid.

3

Chapter 3

Realizing the goals of special and differential treatment

3.1 Introduction

A fundamental principle of international law is the sovereign equality of States– all States are deemed to have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.[1] Implicit in this principle is the notion of formal equality, which posits that all subjects of the law should be treated in a similar fashion.[2] Rules would usually be adjudged as just if they apply to all without discrimination.[3] No account is taken of existing social, economic or other inequalities in the community. This is generally acceptable as a just manner of treatment. The principle underscores the long-established nexus between justice and equality.[4] However to the extent that formal equality failed to recognize the huge and widening gap that exists between States in the economic and social sphere, it resulted in injustice in a number of cases.[5] Accordingly, even in a rules-based society, in which the weak and the strong are treated equally, and where they all have the opportunity to benefit from a free, market-based global economy, the least favoured will continue to be disadvantaged.[6] International law was thus, faced with finding some new principle which will treat States not only equally, but also equitably to achieve substantive justice. This underscored the need for a philosophy that encapsulates the principle of distributive justice, which implies that relevant dissimilarities between subjects of the law not only warrant but get special attention or special treatment.[7] Put differently, the need was to have a system in place that could take into account the disparities in resources and capabilities between countries that affect how they benefit from a given regime– with a view to bring about substantively equal outcomes. It was such alternative conception of justice that Judge Tanaka had in mind when he held that '[t]o treat unequal matter differently according to their inequality is not only permitted but required'.[8] 'Differential treatment' emerged to fill this gap– to the extent that it sought to take into account existing differences (including in terms of resources and capabilities) among states in determining their treaty obligations.[9] The rationale is to create a temporary legal inequality to wipe out an inequality, rather than providing

1 See United Nations, *Charter of the United Nations*, Article 2(1), 24 October 1945, 1 UNTS XVI. See also Klein, R. (2019). *Sovereign equality among states*. University of Toronto Press.

2 Johnson, B., & Jordan, R. (2018). Should Like Cases Be Decided Alike?: A Formal Analysis of Four Theories of Justice, available at SSRN: https://ssrn.com/abstract=3127737. Accessed 5 November 2021. Cullet, P. (1999). Differential treatment in international law: towards a new paradigm of inter-state relations. *European Journal of International Law*, 10(3), 549-582, 553.

3 See Bayefsky, A. F. (2017). The Principle of Equality Ornon-Discrimination in International Law. In *Equality and Non-Discrimination under International Law* (pp. 71-104). Routledge; Acemoglu, D., & Wolitzky, A. (2021). A theory of equality before the law. *The Economic Journal*, *131*(636), 1429-1465.

4 See Von Leyden, W. (1985). *Aristotle on equality and justice: His political argument*. Springer.

5 See Lyons, D. (1966). The weakness of formal equality. *Ethics*, *76*(2), 146-148.

6 Cullet, P. (1999). Differential treatment in international law: towards a new paradigm of inter-state relations, above n 2 at 554.

7 Ibid, at 555.

8 *South West Africa Cases* (Diss. Op. Tanaka), *(Ethiopia v. South Africa; Liberia v. South Africa); Second Phase*, Judgement, ICJ Reports (1966), at 306.

9 Cullet, P. (1999). Differential treatment in international law, above n 6.

a permanent exception from rules.[10] Accordingly, it constitutes a departure from the principle of formal equality of States.[11]

3.1.1 Differential treatment in the WTO

The UN Resolution on Permanent Sovereignty over Natural Resources (PSNR)[12] and the Declaration on the Establishment of a New International Economic Order (NIEO)[13] are the precursors of what is today known as SDT in international trade law.[14] Differential treatment was used as leverage for inducing developing countries to participate in areas like international trade, exploration of natural resources and international environmental law– areas where the convergence of interests between both developed and developing countries were seen as a *sine qua non* for the minimal functioning of an international regime.[15] The WTO recognizes developing countries and LDCs as requiring special assistance to gainfully participate in international trade and thus be able to reap the benefits from trade liberalization.[16] Accordingly, WTO agreements contain provisions which give developing countries special rights, permitting them to enjoy certain benefits like taking longer time periods for implementing agreements and the binding commitments, less stringent reporting and notification requirements for them and measures to increase trading opportunities for them.[17] However, by the current rules, any WTO member can designate itself as a developing country and avail itself of these benefits hence, defeating the logic behind this gesture– that the developing economies are at a low level of development compared to the developed ones. This leaves us with the question of how to define and designate (and graduate) a developing country in trying to accommodate different levels of development in the rules. Instructively, this is a reflection of the thesis's principal research question on how the WTO can determine access to SDT, while maintaining an appropriate balance of the rights and obligations of its members and accounting for divergent levels of development.

Having regard to the differences in the socio-economic development statuses of developed and developing countries, how should international trade rules be designed? Should the differences in the special vulnerability of developing countries be taken into account in designing trade rules? As Ewelukwa puts it, should the obligations of developing

10 Ibid, at 557.

11 Sieber-Gasser, C. (2017). II. 5 Special and Differential Treatment (SDT). In *Elgar Encyclopedia of International Economic Law* (pp. 176-177). Edward Elgar Publishing.

12 United Nations General Assembly, Permanent sovereignty over natural resources, 17 December 1973, A/RES/3171, available at: https://www.refworld.org/docid/3b00f1c64.html. Accessed 2 November 2021.

13 United Nations General Assembly, 3201 (S-VI). Declaration on the Establishment of a New International Economic Order, 1 May 1994, A/RES/3201(S-VI), available at: https://www.refworld.org/docid/3b00f1e048.html. Accessed 2 November 2021.

14 Babu, R. (2003). Special and Differential Treatment Under WTO Agreements: A Study. *Asian-African Legal Consultative Organization*, p. 3, available at http://ssrn.com/abstract=887860. Accessed 3 November 2021.

15 Ibid, at 8.

16 See Preamble to the WTO Agreement. See also Poensgen, I., & Inan, C. (2020). Reforming the WTO, part 5: how should the burden be shared?. *LSE Brexit*, available at http://eprints.lse.ac.uk/104753/. Accessed 18 December 2021.

17 Poensgen, I., & Inan, C. (2020). Reforming the WTO, part 5, above n 16.

countries differ from those of developed countries on the basis of their lower levels of development?[18] Again, if such distinction is to be made, how do we balance it against the non-discriminatory requirement of the multilateral trading system? Indeed, the WTO does distinguish between its developed and developing country members and recognizes the special vulnerability of the latter as a result of their lower level of development. It is in acknowledgement of this fact that the WTO calls for 'positive efforts' by all members to further the integration of developing countries into the multilateral trading system.[19] Apart from such rhetoric, it would seem that the trading system evolved over the years with no concrete action on fashioning both procedural and substantive rules that respond to the peculiar situation of poor countries. Global trade rules had a tendency towards exclusivity rather than inclusiveness.[20] Thus, WTO members are faced with the need to redesign trade rules and appropriate policies that would particularly respond to the situation of poor countries and ensure their integration into the global economy.[21] As a result, SDT in the WTO is presented as encapsulating the totality of responses to the development concerns within the trading system, including the inequitable distribution of wealth among members.[22] The emergence of the WTO itself is in realization of the fact that developing countries are at very different stages of economic, financial and technological development and therefore have entirely different capacities in taking on international trade obligations when compared to developed countries.[23]

In attempting to balance these differences between developing and developed countries, SDT was designed to traditionally provide:[24]

a. Better market access for exports from developing countries,
b. Lower levels of obligations for developing countries, and,
c. Broad exemptions from various GATT agreements.

This chapter of the thesis looks at the rules of the multilateral trading system and in particular, how they are shaped to address the special needs of poor countries in practice. In doing so, it reviews the extent to which exemptions, opt-outs and non-reciprocal preferences, as reflections of SDT, have improved the trading prospects of ACP countries in particular. It calls for a re-balancing of the rules to better achieve

18 Ewelukwa, U. (2003). Special and Differential Treatment in International Trade Law: A Concept in Search of Content. *NDL Rev.*, *79*, 831.
19 See Preamble to the WTO Agreement.
20 Ewelukwa, U. (2003). Special and Differential Treatment in International Trade Law above, n 18 at 833.
21 See Bartels, L. (2019). WTO Reform Proposals: Implications for Developing Countries. *WTO Reform–Reshaping Global Trade Governance for 21st Century Challenges, London: Commonwealth Secretariat*, 61; Shaffer, G. (2019). Retooling trade agreements for social inclusion. *U. Ill. L. Rev.*, 1.
22 Ewelukwa, U. (2003). Special and Differential Treatment in International Trade Law above, n 18 at 833.
23 See WTO. (2001). *Preparations for the Fourth Session of the Ministerial Conference: Proposal for a Framework Agreement on Special and Differential Treatment,* para. 1, WT/GC/W/442. 19 September. See also Hegde, V., & Wouters, J. (2021). Special and Differential Treatment Under the World Trade Organization: A Legal Typology. *Journal of International Economic Law*, 24(3), 551-571.
24 WTO. (2001). *Preparations for the Fourth Session of the Ministerial Conference* above, at para. 5.

the goals of SDT and offers suggestions for that purpose. Accordingly, section 3.2 interrogates the goals of SDT, with significant attention paid to the extent to which the goals have been achieved in the case of ACP countries. Section 3.3 x-rays the main reasons why SDT has largely failed to realize its goals, including integrating developing countries into the global economy. Section 3.4 makes a case for re-balancing of the rules to better achieve the objective of SDT, including the integration of developing countries into the global economy. It emphasizes a change in focus of SDT rules from providing permanent exemption from rule obligations to enabling countries to take on their treaty obligations to the fullest extent. Using a case study method, Section 3.5 reviews how China made the most of differential treatment provisions in the Montreal Protocol to successful implement the agreement.[25] Section 3.6 builds on this to draw lessons for the WTO on how SDT could be redirected to better address the special needs of developing countries by enabling them to beneficially take on their trade treaty obligations. Section 3.7 sums up the chapter.

3.2 Defining the goals of special and differential treatment

The cases for and against SDT are often couched in developmental terms; for instance, should lower levels of development warrant special treatment for a country or should they rather make the adoption of 'standard' rules by that country even more desirable?[26] One argument entail that from a development perspective, it is undesirable for lower-level countries to follow certain policies that ordinarily make sense for industrialized countries. The WTO Agreement on Agriculture, for instance, has as a major objective: removing distortions that have led to higher agricultural output than can be justified economically.[27] While this is clearly the case with many developed countries, poor developing countries rather suffer abysmally low production levels as a result of poor practices and neglect.[28] Often times, efforts that could be expended in trying to increase support to agriculture in these poor countries are rather expended in trying to curb excessive subsidy to agriculture in developed countries.[29] The other argument is that while trade reforms are developmentally desirable, the implementation cost to many poor countries, in terms of finance, human and institutional resources, etc., is too high,

25 Differential treatment under the Montreal Protocol is reflected in terms of the adoption and implementation of differing commitments for different countries while taking into account their varied circumstances and capacities, their historical contributions to CO_2 emission and their specific development needs. See Nyekwere, E. H., & Ole, N. C. (2021). Understanding the principle of common but differentiated responsibilities and its manifestations in multilateral environmental agreements (MEAS). *Nnamdi Azikiwe University, Awka Journal of Public and Private Law*, *11*, at 270-271.

26 See Stevens, C. (2002). *The Future of Special and Differential (SDT) for Developing Countries in the WTO*, IDS Working Paper 163, available at https://www.ids.ac.uk/publications/the-future-of-special-and-differential-treatment-sdt-for-developing-countries-in-the-wto/. Accessed 18 December 2021.

27 Agreement on Agriculture, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

28 See Sharma, S. K., Lahiri, T., Neogi, S., & Akhter, R. (2021). Revisiting domestic support to agriculture at the WTO: ensuring a level playing field. The Journal of International Trade & Economic Development, 1-17.

29 Ibid.

at least when compared against the effect of non-compliance on the multilateral trading system.[30]

The aim of SDT is thus viewed differently across country divides. A number of developing countries believe that SDT should aim to address and rebalance existing inequalities in developed-developing country relations and assist developing countries and LDCs in undertaking any adjustments in the course of performing their obligations as set out in various WTO agreements.[31] It is this group of developing countries that push the view that assuming the same types and levels of obligations as developed countries has limited their ability to address their development challenges and gainfully participate in the multilateral trading system. Other developing countries see SDT as an instrument that should help them secure market access that will facilitate their economic development.[32] Still yet is the group of developing countries who believe that the aim of SDT provisions should be to allow them some flexibility with the rules, in other words, some policy space to pursue their national development priorities.[33] Developed countries on the other hand, arguably hold a unanimous view in ascribing the aim of SDT to be the further integration of developing and least-developed countries into the multilateral trading system. It is thought that directing resources to support developing countries in their trade performance and stronger participation in the global trading system, including undertaking necessary reforms at the national level, will lead to their development. [34]

Whichever way one looks at it, a common point is that WTO members agree on the need for SDT in efforts to fully integrate developing countries into international trade and thereby secure their overall economic development. Differences seem to lie only in approaches to securing that overall objective. In this chapter, the thesis distils two broad objectives of SDT (a. introducing equity into the trading system, and b. improving market access for developing countries), having regard to the object and purpose of the WTO Agreement.

3.2.1 Introduction of equity into the trading system

There is some significant convergence in trade circles that the WTO system of rights and obligations would be inequitable if it did not allow for differentiation among members.[35] In other words, if the rules of the WTO are thought of as being inequitable,

30 Atkin, D., & Khandelwal, A. K. (2020). How distortions alter the impacts of international trade in developing countries. *Annual Review of Economics*, *12*, 213-238.

31 See Surono, A., & Hidayati, M. N. (2019). Special and differential treatment in the WTO agreement on agriculture and the benefits for developing countries. Academic Journal of Interdisciplinary Studies, 8(4), 132-132, 134.

32 Ibid. See also Sharma, S. K., Lahiri, T., Neogi, S., & Akhter, R. (2021). Revisiting domestic support to agriculture at the WTO, above n 28.

33 See Kuhlmann, K., & Agutu, A. L. (2019). The African Continental Free Trade Area: Toward a new legal model for trade and development. Geo. J. Int'l L., 51, 753.

34 See Mazur, G. (2021). Aid for Trade (AfT): Leveraging Trade as a Booster for Economic Growth and Structural Changes in Developing Countries. Decent Work and Economic Growth, 1-13.

35 Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO: Why, When and How?* p. 8, Staff Working Paper ERSD-2004-03, available at http://www.wto.org/english/res_e/reser_e/ersd200403_e.htm. Accessed 18 December 2021. See also Arneson, R. (2018). Four conceptions of equal opportunity. The Economic Journal, 128(612), F152-F173.

the legitimacy of the system is called into question.[36] What then is equity or more pointedly, what system of rights could be described as equitable? Keck and Low note that there is no one view on this. While some take the view that equity requires equal outcomes, others say it is about equality of opportunity.[37]

Equality of opportunity is the idea that people ought to be able to compete on equal terms, or on a 'level playing field', for advantages or possess equal access to those advantages at some point in time.[38] It refers to the fairness of processes through which individuals with different backgrounds or from different social groups reach particular outcomes.[39] On the other hand, equality of outcomes (also referred to as equality of results or equality of conditions requires that individuals have some share of the advantages, not merely a chance or opportunity to obtain them without the hindrance of some obstacles.[40] Instead of just focusing on the opportunities people are offered, equality of outcome is concerned with where people actually end up. Its underlying assumption is that material success is not something only the 'deserving' are entitled to, it is rather something to be equally distributed, since people do not have the same starting point.[41] It is about overseeing results with a view to achieving substantial equality.[42] Substantive equality aims to influence context to achieve outcomes that are considered desirable whilst also internalizing various collective or societal dimensions along the way.[43] It moves away from individual merit-based comparison to account for the broader context that affects personal merit.[44]

Traditionally, equity seeks to influence results, arising from the application of a given rule, which is deemed undesirable according to some broader justice, moral or social concerns.[45] Recognizing that the fulfilment of formal equality may not bring about substantive equality, equity aims to provide for remedial measures to the harshness of the application of a rule to all in a similar way. Also acknowledging that inequalities among countries influence their capacity to benefit from the application of a given rule, equity allows for differential treatment by taking into account such inequalities just to bring about substantively equal outcomes. As earlier indicated, the rationale is not to create permanent exceptions from the rule but a temporary legal inequality to wipe

36 Keck, A., & Low, P. (2005). Special and differential treatment in the WTO, above n 35 at 31.
37 Roemer, J. E., & Trannoy, A. (2016). Equality of opportunity: Theory and measurement. Journal of Economic Literature, 54(4), 1288-1332. See also Cullet, P. (1999). Differential treatment in international law, above n 6.
38 Mason, A. (2019). equal opportunity. Encyclopedia Britannica. https://www.britannica.com/topic/equal-opportunity;
39 "Equality of Opportunity." Encyclopedia of Sociology, available at https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/equality-opportunity. Accessed 14 April 2022.
40 Equality of outcome'. Stanford Equality of Opportunity and Education, available at https://edeq.stanford.edu/sections/equality-outcome. Accessed 14 April 2022.
41 See Dworkin, R. (2018). What is equality? Part 1: Equality of welfare. In The notion of equality (pp. 81-142). Routledge.
42 De Vos, M. (2020). The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law. *International Journal of Discrimination and the Law*, *20*(1), 62-87.
43 Ibid, at 64.
44 Ibid.
45 Cullet, P. (1999). Differential treatment in international law, above n 6 at 557.

out a factual inequality. Substantive equality can only be realized if existing inequalities in fact, are acknowledged and taken into account.[46] It is in this sense that this thesis conceives the notion of equity and how it corresponds to equality.

In prohibiting discriminatory treatment between like products from member countries, the WTO seeks to establish a competitive environment for trading opportunities.[47] Through its MFN and national treatment rules, the WTO tries to guarantee equal treatment of like products regardless of member country status.[48] While the MFN rule requires members to accord the most favourable tariff and regulatory treatment given to the product of any one member at the time of import or export of 'like product' to all other members, the national treatment rule requires that members treat imported and locally-produced goods in their markets equally. For the members, these rules, in principle, guarantee access or equality of opportunity to access each other's markets. While this may seem the fairest allocation among equal partners, the reality is different when the members do not have the same economic capacity to access markets, as is the case with the current system. In such case, it would be more equitable to single out those members which on account of differences that affect their capacity, are unable to enjoy the rights established by the rules. Such disadvantaged members could then be justifiably offered special treatment to afford them the capacity to compete.

With the WTO currently lacking the desired balancing mechanism, the strict application of these rules (the MFN and national treatment rules) has introduced certain inequities into the WTO system. A practical example is the pervading inequality among WTO member countries in their levels of engagement in international trade. According to UNCTAD, while developing countries accounted for about 37 percent of world merchandize exports and imports in 2007, most of that trade was conducted by a mere 14 developing countries,[49] with the remaining 149 developing countries sharing only 7 percent.[50] On the other hand, about 60 percent of world merchandise trade in 2007 was conducted by just 33 industrialized countries. The trend was not any much different by 2018 when developing countries had a 44 percent share in world merchandise trade.[51]

46 See Fredman, S. (2016). Substantive equality revisited. *International Journal of Constitutional Law*, *14*(3), 712-738.

47 See World Trade Organization. Principles of the Trading System, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm. Accessed on 5 November 2021. See also Shaffer, G. (2019). Retooling trade agreements for social inclusion, above n 21; Dawar, K. (2020). Official export credit support: Competition and compliance issues. Journal of World Trade, 54(3).

48 Van den Bossche, P., & Zdouc, W. (2021). The Law and Policy of the World Trade Organization: Text, Cases, and Materials. Cambridge University Press.

49 China/Hong Kong, Korea, Singapore, Mexico, Taiwan, Brazil, India, Saudi Arabia, Malaysia, United Arab Emirates, Thailand, Indonesia, Turkey and Iran.

50 UNCTAD (2008), Handbook of Statistics 2008, available at https://unctad.org/webflyer/unctad-handbook-statistics-2008, Accessed 15 December 2021.

51 See WTO (2019). World Trade Statistical Review 2019. Following the 2008 global financial crisis, and the global downturn in trade between 2014 and 2016, developing countries recovered well since 2017 only to be knocked back by the economic impact of the Covid-19 pandemic in 2020. Merchandise trade decreased at an annual rate of 2.4 per cent in 2019 and by 6.1 per cent in 2020. See UNCTAD (2021). Global merchandise and services trade nowcast. UNCTAD/GDS/DSI/MISC/2021/4.

Tracing the performance of developing countries in world merchandise trade over nearly four decades reveals that such inequality is deep-seated, not just between developed and developing countries but among developing countries *inter se*.[52]

Offering an explanation for the unequal balance in developing country trade, Moon explains that "developing countries experience lower levels of skills, industrialization and access to capital; they have less developed infrastructure and institutional capacity; they have smaller markets, with less scope for economies of scale and they face a distorted global market in which they are hampered in many sectors of greatest export interest to them".[53] This means that their production is usually less efficient, their export capacity is more limited, the export openings for them are more confined and they are less able to compete with industrialized countries in the global economy.[54] It is this type of inequality in international trade relations that SDT aims to bring to an end. Moon surmises that SDT aims to reduce the unequal capacity of developing countries to participate on a proportionately beneficial basis in international trade, by going beyond formal guarantees of equality and authorizing positive steps to promote developing countries' capacities.[55]

The principle of reciprocity is also a mechanism through which the WTO promotes equality.[56] The requirement of reciprocity is essentially one of equality of commitment: members are not allowed to cherry-pick among WTO obligations but must comply with all WTO agreements.[57] However, it is also the case that gaps in social and economic development significantly influence the capacity of countries to effectively implement [trade] treaties and present relevant factors for consideration in the search for substantive equality among WTO members. In its analysis of developing countries implementation of the WTO's customs valuation agreement, Chapter 6 of the thesis deals with these issues in some depth.

In practical terms, SDT introduces unequal treatment on the basis of member countries' different capacities to take advantage of the opportunities offered by international trade. Underscoring the point that achieving equality between unequal countries will require more than mere guarantees of equal treatment, former Director-General of the WTO, Lamy explains that "as in the case of domestic laws, where social legislation is an essential corollary to equal dignity of men and women, … adaptation of applicable [WTO] rules to the real situation of States is a way of ensuring more genuine equality".[58] He identifies SDT as the WTO's own mechanism for achieving

52 Michalopoulos, C., & Ng, F. (2013). Trends in developing country trade 1980-2010. *World Bank Policy Research Working Paper*. (6334), available at www.sciepub.com/reference/47617. Accessed 15 December 2021. See also WTO (2019). World Trade Statistical Review 2019. Trends in world trade, 2008-2018, Chapters 2 and 3. World Trade Organization, 2019.

53 Moon, G. (2009). Trade and Equality: A relationship to discover. *Journal of International Economic Law*, 12(3), 617-642, 618.

54 Ibid.

55 Ibid.

56 Ibid.

57 Kumar, M. (2018). Negotiation Dynamics of the WTO: An Insider's Account. Springer Verlag, Singapor.

58 Lamy, P. (2006). The Place of the WTO and its Law in the International Legal Order. The European Journal of International Law, 17(5), 969-984, 973.

genuine equality as opposed to formal equality.[59] The point here is that SDT should be able to go beyond equality of treatment *simpliciter* to offer differential treatment with a view to achieving substantial equality. Hence, the principle of equal treatment should not stop any beneficiary for instance, from maintaining or adopting measures providing for specific advantages in order help it overcome or compensate for any capacity constraint impeding its effective participation in international trade. SDT is a recognition of the point that merely opening up the opportunity for equal engagement in trade through formally equal treatment of the like products of countries does not take account of the unequal 'starting points' of developed and developing countries.[60] Equality of opportunity goes beyond equal treatment in its recognition that because of previous disadvantage affected groups are not in a position to compete on equal terms with others.[61] Indeed, part of the function of equality is to equalize the starting point, even if this might necessitate special measures for the disadvantaged group.

In his analysis of the former Director-General's views, Moon describes it as being conterminous with the view or approach to equality under human rights law known as 'effective equality' or, more commonly, 'substantive equality', in which it is accepted that merely prohibiting discrimination is not likely to reduce inequality where all are not equal in their capacity to utilize opportunities.[62] He cites the case with minorities under employment law as illustrative. Minorities are generally unable to take up employment opportunities because of their lack of capacity to utilize such opportunities. In rather focusing on 'equal or uniform treatment' under the law, formal equality and prohibitions of discrimination fail to take account of relevant differences that operate to incapacitate minorities. It is without gainsaying that once incapacity or inequality has become engrained, formally equal treatment will only tend to deepen and perpetuate, rather than ameliorate, inequality.[63] It is only through a substantive equality approach like taking conscious 'positive action' to single out disadvantaged groups to assist them become better able to utilize the opportunities available to all that inequality can be reduced. For the purpose of this research, inequality is referred to in terms of countries' opportunities to take advantage of trading opportunities. It does not necessarily mean the absence of factual inequality in trade balances between countries as a country could be well integrated into the global trading system but still have a negative trade balance vis-à-vis another WTO member.

3.2.2 Improving market access for developing countries

The WTO is essentially a platform for negotiating market access among member countries in furtherance of its principal development instrument – trade liberalization. Through

59 Ibid, at 973 and 974.
60 Fredman, S. (2011). *Discrimination law*, p. 242. Oxford University Press.
61 Ibid.
62 Moon, G. (2009). Trade and Equality, above n 53 at 622.
63 Ibid.

their trading relations, the WTO expects that members, particularly developing country members, will witness an improvement in socio-economic indicators like standard of living, employment ratio, income level and purchasing power.[64] A major strategy to achieving this is by giving firms and households access to world markets for goods and services; lowering prices and increasing quality and variety of consumption goods, as well as fostering the specialization of economic activity into areas where countries have a comparative advantage.[65] Measures, such as the agricultural support policies of developed countries restrict developing countries exports by forcing them to lower the prices of their exports in the international market. Hence, making investments unattractive in those export sectors and undermining the growth of their economy as a whole.[66]

The agriculture support policies of many developed countries, particularly, increase world price volatility and make it difficult for developing countries products to compete in the international market.[67] In such instance, SDT could take the form of non-reciprocal preferential access to developed country markets for developing countries' products. While preferential schemes and agreements like the GSPs, the EU's Everything But Arms (EBA) initiative, the Cotonou Agreement and the US's Africa Growth Opportunity Act (AGOA) offer beneficiary developing countries better market access than other competing developing countries, the evidence indicates a low utilization rate by the beneficiaries.[68] In terms of effectiveness of such non-reciprocal preferences, available empirical evidence is lacking. While some scholars contend that they have a large and positive effect on the exports of beneficiaries, others say that they have a large but negative effect.[69] In an attempt to clear the ambiguity, Ornelas and Ritel analysed data between 1950 and 2015 on the aggregate effects of non-reciprocal trade preferences on exports of beneficiary countries and concluded that such preferences do not have a clear, uniform effect on the average exports of those countries.[70] They found that non-reciprocal preferences increase the exports of LDC beneficiaries but only if they are members of the WTO. Non-LDCs that receive non-reciprocal preferences, are also able to increase exports, but only if they are not WTO members. For all others, the average export effect of non-reciprocal trade preferences is essentially mute, even though positive effects were observed for them until the 1980s.

64 See Preamble to the WTO Agreement.

65 Hoekman, B. M., Michalopoulos, C., & Winters, L. A. (2003). More favorable and differential treatment of developing countries: Toward a new approach in the World Trade Organization. (Vol. 3107). World Bank Publications. See also Morris, M., & Staritz, C. (2019). Industrialization paths and industrial policy for developing countries in global value chains. In Handbook on global value chains. Edward Elgar Publishing.

66 See generally Evenett, S. J. (2020). COVID-19 and trade policy: Why turning inward won't work. CEPR Press.

67 Uduji, J. I., Okolo-Obasi, E. N., & Asongu, S. A. (2021). Analysis of farmers' food price volatility and Nigeria's growth enhancement support scheme. African Journal of Science, Technology, Innovation and Development, 13(4), 463-478.

68 See Pomfret, R. (2021). 'Regionalism'and the global trade system. The World Economy, 44(9), 2496-2514; Cipollina, M., & Demaria, F. (2020). The Trade Effect of the EU's Preference Margins and Non-Tariff Barriers. Journal of Risk and Financial Management, 13(9), 203.

69 Ornelas, E., & Ritel, M. (2020). The not-so-generalised effects of the Generalized System of Preferences. *The World Economy*, *43*(7), 1809-1840.

70 Ibid.

The findings reflect interesting linkages between the export benefits from involvement in the WTO (where tariff concessions are negotiated multilaterally and are non-discriminatory) and the benefits from non-reciprocal, preferential tariff concessions. The findings for non-LDCs indicate that non-reciprocal preferences help if the country does not have secure access to developed country markets through the MFN tariffs. Once such secure access exists (often resulting from a contractual basis), the extra [non-contractual] market access through non-reciprocal preferences becomes less important. For LDCs, on the other hand, non-reciprocal preferences complement the market access gains that they accrue from participating in the WTO. Suggestive evidence indicate that institutions are central to explain the effectiveness of non-reciprocal preferences for LDCs.[71] Hence, Ornelas and Ritel contend that the institutional reform that results from WTO membership allow resources to flow to comparative advantage sectors more easily, hence enabling LDC members to effectively take advantage of the preferences.[72]

Huge supply-side incapacities and inability to comply with administrative/documentary requirements, including rules of origin requirements have often seen developing countries generally unable to take advantage of non-reciprocal trade preferences.[73] Even if we were without doubt that non-reciprocal trade preferences boosted exports for some groups of countries, it is only one, albeit an important consideration in the assessment of its desirability. On the one hand, its theoretical basis run contrary to the cornerstone principles of the multilateral trading system– reciprocity and non-discrimination. Also, since preferences often lie at the instance of the 'donor' countries, the continuity of the improved market access is uncertain. Such uncertainty can undermine the effectiveness of preferential market access.[74] The case of ACP countries' utilization of EU trade preferences over three decades will next be reviewed to illustrate some of the points made.[75] The ACP states have also been entitled to preferential access to EU markets under the EU GSP since 1971.

3.2.2.1 EU trade preferences for ACP States

For over thirty-five years the ACP countries and EU enjoyed a warm Trade and Economic Cooperation, with the EU extending unilateral preferential access to ACP countries under the successive Lomé Conventions.[76] Over the period, the EU-ACP trade relationship was based on the extension of an enhanced market access to ACP

71 Ibid, at 1826-1827.
72 Ibid.
73 Ibid. See also Akinmade, B., Khorana, S., & Adedoyin, F. F. (2020). An assessment of United Kingdom's trade with developing countries under the generalised system of preferences. Journal of Public Affairs, e2308.
74 Limao, N. (2016). Preferential trade agreements. In *Handbook of Commercial Policy,* Bagwell, K. & Staiger, R. W. (Eds.). Vol. 1B, pp. 279-367.
75 Ibid.
76 See Drieghe, L. (2020). The first Lomé Convention between the EEC and ACP group revisited: bringing geopolitics back in. Journal of European Integration, 42(6), 783-798. The Conventions were named after the city where they were signed: Lome I signed on 28 Feb. 1975 (1975-80, Lome II, signed on 31 Oct 1979 (1980-85), Lome II, signed on 8 Dec 1984 (1985-90), Lome IV, signed on 15 Dec. 1989 (1990-200), available at http://www.acpsec.org/en/treaties.htm. Accessed 6 November 2021.

countries. As much as 85 percent of agricultural products and virtually, all industrial products from the ACP enjoyed duty free and quota free treatment on the EU market.[77] A number of ACP countries under the special commodity agreements had tariff quotas on products like bananas, sugar, beef and rum.[78] The banana agreement gave duty-free entry for specific quotas of bananas into the EU market. Under the sugar agreement, the EU annually bought a fixed quantity of sugar from ACP producers at its internal sugar price.[79] The agreement on sugar was distinctive in comparison with other agreements, to the extent that its existence was for an indefinite duration and the price guaranteed. Over the years, ACP sugar enjoyed tariff free access into the EU but has more recently faced a series of challenges in maintaining the volume and value of that access. The supply of ACP/LDC sugar to Europe had increased steadily reaching a peak of 2.26 million metric tons in 2012/2013. Exports have fallen between 2015/2016 and 2018/2019 due to a combination of weather events (a cyclone in Fiji and a severe drought affecting Southern Africa) as well as poor trading conditions in the EU.[80] Under the beef and veal agreement, the EU refunds 90 percent of tax normally paid on beef imports from several ACP countries.[81] This duty free and quota free benefits for all these products gave ACP exporters an edge in terms of competition with other exporters.

For instance, it was noted that tariffs applying on Textile and Clothing from third countries into the EU market are up to 12 percent on the average when compared against the margin of preference for similar imports from ACP countries.[82] This indicated a clear competitive advantage for ACP imports going into the EU market. However, following the declaration of the EU preferences under the Lomé Convention as being in violation of the non-discriminatory principle in the GATT, the EU and ACP states

77 See Townsend, I. (2009). Economic Partnership Agreements (EPAs) between the EU & African, Caribbean & Pacific Countries, Standard Note: SN/EP/3370. House of Commons Library. 13 March, available at https://researchbriefings.files.parliament.uk/documents/SN03370/SN03370.pdf. Accessed 8 November 2021; UNCTAD (2003). The Cotonou Agreement and the value of preferences in agricultural markets for African ACP states. *Trade Negotiation Issues in the Cotonou Agreement: Agriculture and Economic Partnership* Agreements. pp. 45 – 63. UNCTAD/DITC/TNCD/2003/2, available at https://unctad.org/system/files/official-document/ditctncd20032_en.pdf. Accessed 8 November 2021; The Lomé Convention, available at http://www.acp.int/content/lome-convention. Accessed 8 November 2021

78 See Desta, M. G. (2006). EC-ACP economic partnership agreements and WTO compatibility: An experiment in North-South inter-regional agreements. *Common Market L. Rev.*, *43*, 1343.

79 Drieghe, L. (2020). The first Lomé Convention between the EEC and ACP group revisited, above n 76.

80 See ACP and LDC Sugar in the European Market, available at https://acpsugar.org/statistic-on-acpeu-trade. Accessed 8 November 2021. The following changes within the EU sugar regime have also contributed to threaten and devalue this trade: the reform of the EU sugar regime from 1st October 2017 and the removal of domestic quotas fundamentally affected the value of the trade in sugar from ACP and LDC countries. The removal of quotas initially saw a surge in EU production and a dramatic fall in imports and prices; Voluntary Coupled Support (VCS) is currently paid to farmers on 31% of the EU's beet area. It is estimated that this sustains between 3 to 4 million tonnes of domestic beet sugar production. It is calculated that, so far, this has cost ACP-LDC suppliers at least €300 million in lost revenue; the recently negotiated EU/Mercosur agreement contained a provision reducing tariffs to zero on 190,000 tons of sugar. This will lead to an equivalent loss of ACP-LDC market share.

81 The Lomé Convention, available at http://www.acp.int/content/lome-convention. Accessed 8 November 2021.

82 See Tanaka, K. (2021). The European Union's reform in rules of origin and international trade: Evidence from Cambodia. The World Economy, 44(10), 3025-3050.

signed the Cotonou Agreement in 2000 as a successor to the Lomé Convention.[83] By virtue of a WTO-authorized waiver, the Cotonou Agreement maintained non-reciprocal trade preferences for ACP exports until December 2007, by which time the parties were committed to conclude new WTO-compatible economic partnership agreements, removing progressively barriers to trade between them.[84]

Despite benefitting from such preferential trade scheme, ACP countries were unable to successfully take advantage of their preferential status and actually performed worse off than other competing developing countries.[85] Available data shows that by the year 2000, the share of world exports of ACP countries had fallen to 1.9 percent from a 3.4 percent mark in 1976 and their share in developing countries exports had fallen to 3.7 percent from 13.3 percent over the same period.[86] This also mirrored in their trade with the EU as the share of EU imports from ACP countries in total EU imports fell from 6.7 percent in 1976 to 3.11 percent in 2002 and the share of imports from ACP countries in total imports from developing countries (excluding countries in transition) fell to 6.3 percent in 2000 from a 14.8 percent mark in 1976.[87] Davenport *et al* note that despite the increase in the number of ACP countries benefitting from the preferences under the Lomé Conventions over the period 1975 to 1992, the share of ACP non-oil exports in EU imports declined from 6.1 percent to 2.9 percent.[88] The deterioration in ACP performance is more evident when compared to other developing countries with less preferential access to the EU. In section 3.3 below, the thesis discusses some of the design issues in the preferential arrangements that limited ACP countries' preference utilization.

3.2.2.2 The EU GSP Schemes

ACP countries did not fare any better in the face of GSP preferences to which they were also entitled even while benefiting from the Lomé preferences. The EU GSP scheme provides developing countries in general with non-reciprocal preferences in terms of lower tariffs or duty free access for imports into the EU market.[89] The GSP typically had three separate types of arrangements: the general arrangement which was open to all

83 In two rounds of GATT dispute, some Latin American countries challenged the Banana Protocol of the Lomé Convention as discriminating in favour of suppliers from ACP states. See GATT Panel Report, *EEC – Member States' Import Regimes for Bananas (EEC – Bananas I)*, DS32/R, 3 June 1993, unadopted; GATT Panel Report, *EEC – Import Regime for Bananas (EEC – Bananas II*), DS38/R, 11 February 1994, unadopted.

84 Persson, M., & Wilhelmsson, F. (2016). EU trade preferences and export diversification. *The World Economy*, 39(1), 16-53.

85 See Manchin, M. (2006). Preference utilisation and tariff reduction in EU imports from ACP countries. *World Economy*, 29(9), 1243-1266.

86 Manchin, M. (2005). Preference utilization and tariff reduction in European Union imports from African, Caribbean, and Pacific countries. *World Bank Policy Research Working Paper*, (3688).

87 Ibid.

88 Ibid. See also Davenport, M., Hewitt, A., & Koning, A. (1995). *Europe's preferred partners? The Lomé countries in world trade*. Overseas Development Institute (ODI).

89 Manchin, M. (2006). Preference utilisation and tariff reduction in EU imports from ACP countries, above n 85 at 1246. See also Borchert, I., Conconi, P., Di Ubaldo, M., & Herghelegiu, C. (2018). *Trade Conditionality in the EU and WTO legal regimes*. RESPECT working paper, December 2018, available at http://respect.eui.eu/wp-content/uploads/sites/6/2019/02/EU_conditionality_D2.2.pdf. Accessed 16 December 2021.

developing countries, the special incentive arrangement for sustainable development and good governance, known as GSP+ and open only to a subset of developing countries, and the special arrangement for least developed countries, available to countries classified by the United Nations as least developed.[90] The general arrangement covered about 7000 products of which 3250 are classified as non-sensitive and 3750 as sensitive products.[91] Non-sensitive products enjoy duty free access to the EU market, while sensitive products benefitted from lowered tariffs. A 3.5 percent reduction of MFN *ad valorem* duties is provided across the board, with the exception of the textile and clothing sector that enjoys a 20 percent reduction.[92] For specific duties, a 30 percent reduction is the general rule.

As of December 2015, the European Commission describes the three schemes under the EU GSP as: first, the standard GSP which grants low and lower-middle income countries duty reductions for 66 percent of all EU tariff lines; second, the special incentive arrangement for sustainable development and good governance, the so-called 'GSP+' which grants duty-free access in the same 66 percent tariff lines as the standard GSP for countries with vulnerable economic structures; and, third, the EBA initiative which was introduced in 2001 to grant LDCs duty-free and quota-free access for all tariff lines except for arms and ammunition.[93] The EBA initiative is more generous in terms of duty reduction than the Cotonou scheme. However, the cumulation rules in the latter are less generous.

Using trade data from Eurostat on EU member states imports eligible for preferences under the Cotonou Agreement for the year 2001 (in respect of non-least developed ACP countries), Manchin showed that while the value of the imports had been increasing during the period, the share of imports from these countries in total EU imports had been decreasing.[94] Distilling her analysis in terms of which export schemes or trade preferences were utilized by which countries she notes that GSP preferences were requested only by a few countries (mainly by South Africa, Swaziland, and Namibia) and only to a limited extent.[95] The share of exports that requested GSP preferences in total exports for the country group was around 6 percent. Contrastingly, the share of exports that requested preferences in total exports of Lomé/Cotonou preferences was close to 50 percent. The high utilization rate of the latter indicated a predilection by ACP countries to use Lomé/Cotonou preferences rather than GSP preferences.[96] However, it is instructive to note that

90 See Persson, M., & Wilhelmsson, F. (2016). EU trade preferences and export diversification, above n 84.
91 Manchin, M. (2005). Preference utilization and tariff reduction in European Union imports from African, Caribbean, and Pacific countries, above n 86 at 6 & 7.
92 Ibid, at 7.
93 European Commission. (2016). Report on the generalized scheme of preferences covering the period 2014–2015. COM(2016) 29 final. See also Tanaka, K. (2021). The European Union's reform in rules of origin and international trade, above n 82.
94 Manchin, M. (2005). Preference utilization and tariff reduction in European Union imports from African, Caribbean, and Pacific countries, above n 86 at 6.
95 Ibid.
96 Ibid, at 8.

important differences existed in the utilization rate of the Lomé/Cononou preferences. The trend revealed a high utilization rate for countries like Botswana, Cameroon, Dominica, Senegal and Seychelles while others like Antigua and Barbuda, Barbados and South Africa had low utilization rates. (See Table 3.1 below).

Table 3.1: Share of exports requested preferences as a percentage of total trade by countries in 2000.

Countries	**Cotonou**	**GSP**
Antigua & Barbuda	25.0%	0.0%
Bahamas	87.6%	0.0%
Barbados	33.2%	0.1%
Belize	76.0%	0.2%
Botswana	87.7%	0.1%
Cameroon	89.2%	0.1%
Congo	41.0%	0.0%
Dominica	96.0%	0.0%
Dominican Republic	55.3%	0.5%
Federation of Micronesia States	0.0%	0.0%
Fiji	79.0%	0.4%
Gabon	78.9%	0.0%
Ghana	57.2%	0.2%
Grenada	79.0%	0.6%
Guyana	64.5%	0.0%
Ivory Coast	70.2%	0.3%
Jamaica	72.7%	0.1%
Kenya	55.6%	0.7%
Marshall Is.	0.0%	0.0%
Mauritius	85.0%	0.4%
Namibia	87.2%	2.7%
Nigeria	56.3%	0.5%
Palau	0.0%	0.0%
Papua New Guinea	81.6%	0.5%
Senegal	88.6%	0.4%
Seychelles	88.6%	2.3%
South Africa	21.2%	4.4%
St Lucia	98.5%	0.0%
St Vincent	58.1%	0.0%
St Kitts &Nevis	66.8%	0.3%
Surinam	64.9%	0.3%
Swaziland	53.6%	3.0%
Tonga	37.5%	0.8%
Trinidad & Tobago	48.9%	0.8%
Zimbabwe	68.9%	0.6%
Total	**49.4%**	**6.2%**

Source: Manchin (2005)

The low figures on preferences required under the GSP raise the question whether the GSP meets the requirement of the Enabling Clause in regard to such waiver schemes making a positive contribution to developing countries development, financial and trade needs.[97] If the uptake of GSP preference vis-à-vis Cotonou preferences by virtually all the countries in Table 3.1 above is 0, could such factual element be evidence of the fact that the GSP does not make a positive contribution to the needs of developing countries? In other words, is 'positive contribution' a question of design of the scheme

97 See para. 3(c) of the Enabling Clause.

or intent or of actual effects that ought to be realised for which uptake may serve as a proxy? An examination of the literal provision of the Clause may be helpful in arriving at a position. Paragraph 3(c) of the Enabling Clause reads that:

> Any differential and more favourable treatment provided under this clause shall in the case of such treatment accorded by developed contracting parties to developing countries **be designed and, if necessary, modified,** to respond positively to the development, financial and trade needs of developing countries. (**Emphasis added).**

From the phraseology of the provision, the intent of the drafters was that the design of such schemes is the defining consideration on whether the GSP contributes positively to developing countries. It suffices that the design of a GSP scheme does not sustain inequalities (resulting from stringent rules of origin or supply-side constraints for example), in terms of beneficiaries' opportunities to take advantage of trading opportunities. Instructively, developing countries eligible for preferences under both the US GSP and AGOA mainly claim AGOA preferences (that is, there is a higher utilization of AGOA preferences than under the GSP).[98] This suggests that there is something about the design of the AGOA that prompts beneficiaries to choose AGOA preferences over GSP preferences.

The design of the GSP schemes itself is an acknowledgement of the various disadvantages suffered by developing countries and is one of the special measures by the trading system to eliminate those disadvantages and help improve their participation in international trade. Accordingly, any design of a GSP may be modified from time to time to ensure the objective of making a 'positive contribution' to developing countries and indeed, bringing about substantively equal result in terms of their participation in international trade.

Manchin explains the significant differences in the utilization rate of Cotonou and GSP preferences as resulting from the fact that the Cotonou scheme actually offered better market access for most products exported by the ACP countries.[99] Generally, the ability to take advantage of market access under any scheme is much dependent on the restrictiveness or otherwise of the applicable rules of origin.[100] The level of restrictiveness of rules of origin is itself determined by the method used for defining the origin of a good, that is, the method used to determine whether a product qualifies to be accorded preferential access.[101] Drawing an important difference between the Lomé/Cotonou and the GSP rules of origin, Manchin notes that in its determination of origin, the Cotonou

98 Keck, A., & Lendle, A. (2012). New evidence on preference utilization. *World Trade Organization Staff Working Paper No. ERSD-2012-12*, available at https://www.wto.org/english/res_e/reser_e/ersd201212_e.pdf. Accessed 17 April 2022.

99 Ibid at 7.

100 See Conconi, P., García-Santana, M., Puccio, L., & Venturini, R. (2018). From final goods to inputs: the protectionist effect of rules of origin. *American Economic Review*, 108(8), 2335-65.

101 Ibid.

Agreement allowed for full cumulation while the GSP scheme only allowed for a stricter diagonal cumulation within only four regions.[102] Full cumulation allows any processing (even if it does not confer origin) carried out in any participating country to be carried on to another partner country for final processing and the entire processing will be counted as if it were undertaken in the country of final processing.[103] Diagonal cumulation on the other hand allows qualifying materials from any participating country to be used in the processing in another participating country and counted as if it were done in the country of final processing. The first distinction of note is that under the diagonal cumulation the input used from another participating country has to be qualifying, in other words it has to meet the rules of origin requirements. This is not the case with full cumulation where non-originating input can well be used in final processing. Next is that the GSP scheme limits diagonal cumulation within only four regions; the Association of Southeast Asian Nations (ASEAN), Central American Common Market (CACM), the Andean Community and the South Asian Association for Regional Cooperation (SAARC), none of which has non-least developed ACP countries as members.[104] In effect, these ACP countries are not eligible to benefit from diagonal cumulation under the GSP scheme. Another factor that contributed to the higher utilization rate of Lomé/ Cotonou preferences was the higher tolerance level under the Cotonou Agreement that allowed non-originating materials up to a total value of 15 percent of the ex-works price to be used in processing, while the value was capped at 10 percent of the ex-works price of the product under the GSP scheme.[105]

As already noted, a core requirement of the GSP under the Enabling Clause is that it makes a positive contribution to the development, financial and trade needs of developing countries. An important consideration would be whether the rules of origin in the GSP is effective or could be made more effective in promoting development– a point implicit in the full cumulation versus diagonal cumulation debate. The thesis takes the view that development would be better promoted with the modification of cumulation rules to allow cumulation of all goods that would otherwise enter the grantor country duty free. To do otherwise limits the value of the preferences for both the producer of the final good who is precluded from using one possible source of material inputs, and the producer of those inputs who loses a potential customer. To

102 Cumulation is actually a facilitation of the core criteria of the rules of origin. It allows a preference-benefiting country to use otherwise non-originating materials from a third country together with originating material in a production process without the final product losing originating status.

103 Manchin, M. (2005). Preference utilization and tariff reduction in European Union imports from African, Caribbean, and Pacific countries, above n 86 at 7 & 8.

104 The Andean Community is a free trade area with the objective of creating a customs union comprising the South American countries of Bolivia, Colombia, Ecuador, and Peru.

105 Ex works (EXW) is an Incoterms (International Commercial Terms) which describes when a seller makes a product available at a designated location, but the buyer has to pay the transport costs. Once the goods are delivered at the location, the buyer is responsible for other risks, such as loading the goods onto trucks, transferring them to a ship or plane, and meeting customs regulations. See Thompson, B. (2020). Incoterms® 2020 Explained-The Complete Guide, available at https://incodocs.com/blog/incoterms-2020-explained-the-complete-guide/. Accessed 10 November 2021.

illustrate this point, why should Nigeria, a GSP beneficiary, be forbidden to cumulate material inputs originating in India (also a GSP beneficiary) when these materials would enter the EU duty-free if exported directly from India under the GSP? This logic could be extended to cover material inputs originating in a third country FTA partner of the grantor country. Provided that the final product, if it were originating under the FTA involving the grantor country, would enter the grantor country on the same term as under the GSP. Producers in any GSP beneficiary country should be allowed to deem materials originating in any other beneficiary country as if they originated in the country of the final producer.[106] This contrasts with the provision for diagonal cumulation within otherwise limited regional groupings of mainly LDC states in the current EU GSP. Limiting originating materials in such way could negatively hamper the development needs of beneficiaries as they might not be able to get the inputs, they need from the other similarly situated LDCs. While it makes sense that a producer in an economically integrated regional bloc will first look for inputs among partner countries, there is no obvious trade-related or development-related reason that a GSP grantor should limit explicit preference to such bloc. Doing so is unduly restrictive and limits the participation of beneficiaries in global value chain (GVC).[107] The goal of the GSP is to promote development in developing countries generally and not to specific beneficiaries. The modification of cumulation discussed above could be included as an amendment to the Enabling Clause that established the framework for the GSP programs, directing its inclusion in all GSP programs

Following wide criticism of the rules of origin in the EU GSP as being too complex and restrictive to fit global manufacturing processes, the EC set the general principles of simplification and development-friendliness as a basis for the reform of the rules of origin in 2005.[108] On 18 November 2010, the EC adopted a new regulation on the rules of origin for the EU GSP, effective 1 January 2011.[109] Three major changes were introduced in the new regulation. First, product-specific origin requirements were relaxed for a number of products, with more lenient treatment for LDCs than developing beneficiary countries. The tolerance rule was relaxed with an increase from 10 percent to 15 percent for agricultural products in terms of weight and for manufacture products in terms of ex- works price. Second, rules of cumulation included Mercosur, and the allocation rule of origin among regional partners was relaxed.[110] Extended cumulation was applied to EU free trade agreement (FTA) partner countries under certain conditions. Third, the system

106 See generally Harris, J. T. (2009). *Rules of origin for development: from GSP to global free trade* (No. IDB-WP-135). IDB Working Paper Series.

107 Thang, D. N., Ha, L. T., Dung, H. P., & Long, T. Q. (2021). On the relationship between rules of origin and global value chains. The Journal of International Trade & Economic Development, 30(4), 549-573.

108 Tanaka, K. (2021). The European Union's reform in rules of origin and international trade, above n 82 at 3028.

109 See Commission Regulation (EU) No. 1063/2010 of 18 November 2010 amending Regulation (EEC) No. 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code.

110 Mercosur is a South American trade bloc consisting of Argentina, Brazil, Paraguay, and Uruguay. Venezuela was suspended indefinitely in 2016.

of registered exporters and self- certification was introduced.[111] However, given the due expiry of the current GSP regime in 2023, the EU unveiled its newly proposed GSP for the period 2024-2034 in September 2021.[112] The new proposal preserves the three-tier GSP architecture – standard GSP, GSP+, EBA – while focusing attention on improving the efficiency and efficacy of the current regulation. Some of the proposed changes are:

1) Graduation threshold: lowering by 10 percent the share of imports in a specific sector beyond which a Standard GSP country loses preferences from 57 percent currently to 47 percent in the new scheme so as to decrease competition from large industrial producers.
2) Adding several international conventions to the list of conventions which GSP+ countries have to ratify and other GSP beneficiaries have to generally respect without necessarily ratifying: Convention on the Rights of Persons with Disabilities (UN, 2007), Convention on the Rights of the Child (UN, 1989), Convention on Tripartite Consultations No 144 (ILO, 1976), Convention on Labour Inspection No 81 (ILO, 1947), United Nations Convention against Transnational Organised Crime (UN, 2000), The Paris Agreement on Climate Change (2015). Moreover, compliance with the principles of all included environmental and good governance conventions becomes now mandatory for all GSP beneficiaries. Should they not comply, the benefits can be withdrawn.
3) Improving compliance with these international norms for GSP+ beneficiaries, which will have a transition period of two years to ratify newly added conventions and will have to submit a detailed implementation plan for all conventions included in the system. The proposal provides for an urgency procedure for the rapid withdrawal of preferences in case of violations of the principles of these conventions. The Commission will have to conduct an assessment of the socio-economic effects, particularly on vulnerable populations, of any withdrawal.
4) Excluding the application of product graduation to the beneficiaries of the GSP+ and EBA, which share a very similar economic profile rendering them vulnerable because of a low, non-diversified export base. This is, however, subject to safeguard mechanism under the rules

111 Tanaka, K. (2021). The European Union's reform in rules of origin and international trade, above n 82 at 3028; Inama, S. (2011). The Reform of the EC GSP Rules of Origin: Per aspera ad astra?. Journal of World Trade, 45(3).
112 European Commission. Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council. COM (2021) 579 final, available at https://trade.ec.europa.eu/doclib/docs/2021/september/tradoc_159803.pdf. Accessed 18 April 2022.

in case of sudden and significant rises of importations.113

3.3 Problems with special and differential treatment

In the preceding section, the thesis identified two primary goals of SDT as the introduction of equity into the trading system and improving market access for developing countries. While the former is largely about the rules of the trading system, the latter is about the opportunities created by the rules. Despite the presence of over one hundred SDT provisions embedded in different WTO agreements,[114] there is continuing discontent in developing countries over the utility of these provisions in enhancing their trading prospects and integrating them into the global economy.[115] Even when opportunities are created on the basis of the rules (as in the case of non-reciprocal EU trade preferences offered to ACP States), many developing countries are often unable to maximise the benefits of such opportunities.[116] In the 1990s, the EU itself implicitly admitted the failure of its Lomé preferences, acknowledging that these have not sufficiently benefitted the ACP countries.[117] At best, SDT has only had a marginal effect on the economic performance of developing countries. This calls into question the effectiveness of these provisions in assisting the poorest countries to participate and derive significant benefits from the multilateral trading system.[118]

In 2000, Ganesan attempted to set out developing countries' concerns with the system as follows:

i. Developing countries perceive the system as becoming less fair and more inequitable as the needs and concerns of developing countries failed to receive the attention they deserve;
ii. Developing countries are concerned that the trade agenda is being expanded to incorporate only issues in which developed countries are interested;

113 European Parliament. Review of the Generalised Scheme of Preferences (GSP) Regulation /After 2021-9, available at https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-new-gsp-regulation. Accessed 18 April 2022.

114 See WTO. (2021). Special and Differential Treatment Provisions in WTO Agreements and Decisions—Note by the Secretariat, WT/COMTD/W/258, 2 March.

115 See WTO. (2019). The continued relevance of special and differential treatment in favour of developing members to promote development and ensure inclusiveness, Communication from China, India, South Africa and the Bolivarian Republic of Venezuela WT/GC/W/765, WTO, Geneva, 28 February.

116 Manchin, M. (2006). Preference utilisation and tariff reduction in EU imports from ACP countries, above n 85. See also Persson, M., & Wilhelmsson, F. (2006). *Assessing the Effects of EU Trade Preferences for Developing Countries. Lund University, Department of Economics*. Working Paper 2006: 4, available at https://econpapers.repec.org/paper/hhslunewp/2006_5f004.htm. Accessed 24 December 2021.

117 See European Commission (1996), 'Green Paper on Relations between the European Union and the ACP Countries on the Eve of the 21st Century: Challenges and Options for a New Partnership', European Commission Green Papers, COM (96)570.

118 See Cipollina, M., & Demaria, F. (2020). The Trade Effect of the EU's Preference Margins and Non-Tariff Barriers, above n 66. The authors suggest that since the 1970s, non-reciprocal preferential regimes (a reflection of special and differential treatment) have been thought to be effective in promoting world trade integration and economic growth in developing countries.

iii. Developing countries believe that the rules governing the multilateral trading system are increasingly becoming a codification of developed country policies, laws and regulations.[119]

Although these concerns are debatable, the legitimacy of the WTO lies, to a great extent, in how it addresses the needs and concerns of its majority developing country members. What is certain is that SDT provisions leave much to be desired in terms of their operationalization and implementation.[120] Hence, the thesis next highlights a few of such developing countries' concerns.

3.3.1 Insecurity of preferences

Examining the operationalization of GSP schemes reveals a serious problem with the current SDT provisions in the WTO. Developed countries usually grant GSPs on a voluntary and unilateral, non-binding basis.[121] Accordingly, the preference givers reserve the right to amend the schemes at any time, including in terms of product coverage, eligibility criteria and graduation from the schemes.[122] The erosion of the preferences themselves as a result of tariff reductions following negotiations at the multilateral level is another facet to the problem with GSP schemes. The insecurity and uncertainty felt by the target beneficiaries of several GSP schemes undermines the value of the preferences offered by those schemes. Accordingly, the main concerns of developing countries as far as preferential schemes are concerned have stemmed from the erosion of preference margins, product coverage, and rules of origin.[123]

3.3.1.1 Preference margins

The term 'preference margin' refers to the difference between a preferential tariff rate and the MFN rate. It is computed as the quantity exported multiplied by the absolute difference between the MFN tariff and the preferential tariff given to preference beneficiaries.[124] The larger the preferential margin, the higher the gain expected from preferences.[125] The problem here is that with increased liberalization at the multilateral level and consequent lowering of MFN tariffs, preference margins are continually being eroded.[126] Without an accompanying reduction in the preferential rate, the size of the

119 Ganesan, A. V. (2000). Seattle and Beyond: Developing-Country Perspectives. In *The WTO after Seattle.* (Ed. Schott, J. J.). Washington DC: Institute for International Economics: S, 85-91.
120 See Hannah, E., & Scott, J. (2017). From Palais de Nations to Centre William Rappard: Raúl Prebisch and UNCTAD as sources of ideas in the GATT/WTO. In *The Global Political Economy of Raúl Prebisch* (pp. 116-134). Routledge.
121 See also Borchert, I., Conconi, P., Di Ubaldo, M., & Herghelegiu, C. (2018). *Trade Conditionality in the EU and WTO legal regimes*, above n 89.
122 Ibid.
123 Akinmade, B., Khorana, S., & Adedoyin, F. F. (2020). An assessment of United Kingdom's trade with developing countries under the generalised system of preferences, above n 73.
124 Ibid, at 3.
125 Ibid. See also Cipollina, M., & Salvatici, L. (2019). The Trade Impact of EU Tariff Margins: An Empirical Assessment. *Social Sciences*, *8*(9), 261.
126 Ibid.

margin and invariably the value of preferences will reduce. Francois *et al* found that the minimum preferential tariff should be 4 to 5 percent lower than MFN tariffs to be worth the while for any importer or exporter to spend resources applying for them.[127]

Manchin underscores the relationship between the utilization of preferences and the value of preferences offered when she affirms that a higher utilization of preferences does correspond to higher rate of preferential duty reduction.[128] (See Table 3.2 below). However, she also finds what she describes as a 'clear structural break' in the relationship between the rate of utilization and the value of the preferences involved when the difference between MFN and ACP preferential tariff is 3 to 4 percent. (See Table 3.2 below). She however explains the high preference utilization at this level as due to some exogenous factors and insists that for preferences to have value, they must correspond to a preferential tariff that is at least 4 percent to 4.5 percent lower than MFN tariffs.[129]

Table 3.2: Utilization rate of Cotonou preferences by difference between MFN and preferential duty (for eligible products)

ACP duty (in %)	Utilization rate
0-2	30%
2-3	22%
3-4	63%
4-5	49%
5-6	43%
6-7	57%
7-8	60%
8-9	26%
9-10	20%
10-11	49%
11-12	80%
12-13	77%
13-16	58%
16-20	88%
20-	85%

Source: Manchin (2005)

3.3.1.2 Products coverage

Inadequate product coverage is a major issue that may undermine the utility value of preferences.[130] Disregarding products with their MFN tariff at zero, the more products covered by a preference scheme, the more valuable the scheme would be to its beneficiaries. In her analysis of ACP countries' share of total exports to the EU in

127 Francois, J., Hoekman, B., & Manchin, M. (2006). Preference erosion and multilateral trade liberalization. *The World Bank Economic Review*, *20*(2), 197-216.

128 Manchin, M. (2005). Preference utilization and tariff reduction in European Union imports from African, Caribbean, and Pacific countries, above n 86 at 11.

129 Ibid, at 16

130 See Akinmade, B., Khorana, S., & Adedoyin, F. F. (2020). An assessment of United Kingdom's trade with developing countries under the generalised system of preferences, above n 73.

2001, Manchin notes that around 64 percent of their exports entered into the EU with zero MFN tariffs. Implicitly, trade preferences provided by the EU offered only limited benefits for several of these countries. See Table 3.3 below.

Table 3.3: Coverage of preferences

Countries	Total exports to the EU (Eur 1000)	Exports of products with zero MFN tariffs (%)	Exports not eligible for preferences (%)	Exports eligible for preferences (%)
Antigua & Barbuda	351387	99	0	1
Bahamas	608919	35	0	65
Barbados	85112	48	31	21
Belize	81037	8	36	56
Botswana	1159120	91	0	9
Cameroon	1735020	79	0	21
Congo	384645	96	0	4
Dominica	256221	0	0	90
Dominican Republic	313795	44	0	56
Federation of Micronesia States	57	96	0	2
Fiji	103679	3	92	5
Gabon	1170255	94	0	6
Ghana	1058739	56	0	44
Grenada	33881	94	0	6
Guyana	103679	26	67	6
Ivory Coast	1170255	62	1	37
Jamaica	1058739	2	14	84
Kenya	920723	42	5	53
Marshall Island	114954	100	0	0
Mauritius	1287726	10	23	67
Namibia	746864	49	0	51
Nigeria	6371696	95	0	5
Palau	64	100	0	0
Papua New Guinea	284574	55	0	45
Senegal	450001	27	0	73
Seychelles	189410	14	0	86
South Africa	15377512	61	4	35
St Lucia	48128	45	0	55
St Vincent	153671	75	0	25
St. Kitts & Nevis	14057	2	81	18
Surinam	153576	3	7	89
Swaziland	148741	2	73	25
Tonga	720	66	1	33
Trinidad & Tobago	408025	24	6	69
Zimbabwe	778498	26	5	69
TOTAL	**37388365**	**64**	**4**	**31**

Source: Manchin (2005)

Column 3 of the table shows that about 4 percent of exports were not eligible for preferences in 2001. This, however, was with substantial differences between countries. For instance, 92 percent of Fiji's exports were excluded from preferences. In the case of Botswana, no exports were excluded from the preferences. Column 4 records the share of exports eligible for preferences, with a total of 31 percent for the entire ACP group. Manchin surmised that although the preferential scheme seems to be significant

for several countries, some countries trade mainly in products where the MFN tariffs were already reduced to zero, thus limiting the impact of Cotonou preferences on these countries' trade.[131]

3.3.1.3 Certainty of access

Whether preferences are given on a contractual basis or unilaterally goes a long way in determining the stability and certainty of the improved market access offered by preferential arrangements.[132] As earlier discussed, unilateral preferences may be withdrawn or modified at any time at the instance of the preference giver. The insecurity of preferences or uncertainty of market access arising from such a situation reduces the incentive for investors to pool their resources with the intention of utilizing the preferential market access, particularly in new export sectors.[133]

Although relatively more certain, it is not to say that preferential market access secured on a contractual basis is without any risk that could impact on investments in potential export sectors. For instance, a preferential market access given for a few years offers less certainty than one with an unlimited time frame. However, this is not to suggest that preferences given for an unlimited time will offer 'certain' benefits over the entire time as such preferences are also susceptible to preference erosion due to MFN liberalization.[134] This suggests that preferential schemes under the Enabling Clause will have to provide tariff preferences that match the minimum tariff rate per MFN liberalised products for such schemes to stand the chance of being utilized by intended beneficiaries. Otherwise, it throws into doubt the trade- and development-related benefits of such schemes as it would be difficult to show how such schemes make a 'positive contribution' to developing countries.

3.3.1.4 Rules of origin

The preceding subsection already explained the situation under the non-reciprocal EU-ACP preferential trade relations and showed how administrative requirements including, strict rules of origin requirements hinder the ACP beneficiaries from being able to utilize available preferences. Indeed, complicated and restrictive rules of origin are often a major reason why developing countries are unable to beneficially utilize preferences.[135] The administrative cost of applying for most rules of origin, including cost of providing necessary documentation to show compliance is one that several developing countries are unable to bear. Cadot *et al* estimate that this cost could be as high as 6.8 percent of

131 Manchin, M. (2006). Preference utilisation and tariff reduction in EU imports from ACP countries, above n 85 at 1248.
132 See Borchert, I., Conconi, P., Di Ubaldo, M., & Herghelegiu, C. (2018). *Trade Conditionality in the EU and WTO legal regimes*, above n 89.
133 Persson, M. (2011). From trade preferences to trade facilitation: Taking stock of the issues. *Economics: The Open-Access, Open-Assessment E-Journal*, *6*, 2012-17.
134 Akinmade, B., Khorana, S., & Adedoyin, F. F. (2020). An assessment of United Kingdom's trade with developing countries under the generalised system of preferences, above n 73 at 2.
135 See Cipollina, M., & Salvatici, L. (2019). The Trade Impact of EU Tariff Margins, above n 125 at 2.

the value of the traded good. The implication here again is that if preference margins are not wide enough to cover this cost, there will be no incentive for an exporter to apply for preferential treatment.[136]

3.3.2 The non-bindingness of SDT provisions

The WTO Secretariat classifies SDT provisions as either mandatory or non-mandatory and classifies the mandatory provisions as either obligations of conduct (requiring members to follow a certain course of conduct) or obligations of result (requiring members to achieve a certain result).[137] Generally, formulations containing the word 'should' are considered non-mandatory, while those containing the word 'shall' are considered mandatory.[138] Notwithstanding this categorization, formulations containing 'shall', which are theoretically mandatory, can be rather limited in their binding character since they may allow considerable flexibility in their implementation. In this light, the South Centre argued that a linguistic trigger such as the word 'shall' was not sufficient to identify a binding obligation, since the content and beneficiaries of the obligation might still be unclear.[139] In acknowledgement of this, the Secretariat has come to note that a mandatory SDT provision might not necessarily be effective.[140] Illustratively, Article 10.1 of the SPS Agreement provides that, "[i]n the preparation and application of sanitary or phytosanitary measures, members shall take into account the special needs of developing country members, and in particular of the least-developed country members." It could be argued that this provision obliges developed country members to consider the possible effects of their intended sanitary or phytosanitary measures on developing countries, but it does not however require them to change those measures even if it were the case that they could negatively impact developing countries. In other words, such provision only places an obligation of conduct rather than an obligation of result on developed countries.[141]

In *EC-Approval and Marketing of Biotech Products*,[142] a WTO Panel examined a claim by Argentina that by adopting and applying a general *de facto* moratorium on approvals of applications to place genetically modified organisms on the market, the EC had breached Article 10.1. The Panel held that Article 10.1 does not prescribe a

136 See Cadot, O., Carrère, C., De Melo, J., & Tumurchudur, B. (2006). Product-specific rules of origin in EU and US preferential trading arrangements: an assessment. *World Trade Review*, *5*(2), 199-224.

137 WTO. (2001). *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions: A Review of Mandatory Special and Differential Treatment Provisions*, WT/COMTD/W/77/Rev.1/Add.2, 21 December 2001 at 4.

138 Ibid.

139 South Centre (2002), *Review of the Existing Special and Differential Treatment Provisions: Implementing the Doha Mandate*, paras.11, 12. South Centre Analytical Note SC/TADP/AN/SDT/1, May 2002.

140 WTO (2002), Non-*Mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions*, p.2. WT/COMTD/W/77/Rev.1/Add.3, 4 February 2002.

141 For an exposition on the two kinds of international obligations, namely obligation of conduct and obligation of result, see Wolfrum, R. (2011). Obligation of result versus obligation of conduct: some thoughts about the implementation of international obligations. In *Looking to the Future* (pp. 363-383). Brill Nijhoff.

142 *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, WT/DS292, WT/DS293, Panel Report circulated on Sep. 29, 2006.

specific result to be achieved and that merely because a developed country member did not afford SDT to a developing country member does not establish a *prima facie* case that the former is in breach of Article 10.1. At best, the obligation of developed countries under Article 10.1 is to consider developing countries' interests along with other legitimate interests, including those of its own consumers, its environment etc., before reaching a decision on their regulations.[143] Implicitly, the denial of SDT to a developing country in a particular instance is not sufficient proof that a developed country breached its obligation under Article 10.1. The developed country only has to merely affirm that it did give the required consideration to counter any such claim. In the absence of a monitoring or reporting obligation placed on members to adopt the required conduct, it would be virtually impossible for a developing country to prove that a developed country failed to consider the effects its measures may have on her (the developing country) before implementing such measures. If on the other hand, there was a requirement for the developed country to justify its application of the measure, notwithstanding the special circumstances of the developing country, such justification may then constitute the basis to review the conduct that was required. Linking this with the requirement of the Enabling Clause that treatment accorded by developed countries to developing countries should contribute positively to the development, financial and trade needs of developing countries, an impact assessment of such measure taken may be necessary to determine whether the conduct is one that makes or is consistent with making a 'positive contribution.

Article 12.3 of the Agreement on Technical Barriers to Trade (TBT)[144] is another SDT provision phrased using the mandatory word 'shall'. It provides as follow:

> Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Member with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

The language here seems to institute a mandatory obligation on developed countries to give due consideration to developing countries in designing their standards and conformity assessment procedures. The important question, however, is whether a developing country can successfully challenge a developed country on the basis that the latter failed to consider the effects that its measures may have on her (the developing country) before implementing such measures. In the absence of a mandatory requirement requiring the developed country to detail its justification for implementing such measures, a simple rebuttal suffices to counter any such claim by a developing country.

143 Ibid at 7.1620-7.1621.
144 1868 U.N.T.S. 120.

Indeed, the developed country only has to affirm that it did take into account the special interests of developing countries in the preparation of any challenged measures and that the measures were necessary to fulfil a legitimate objective within the meaning of Article 12.3 of the TBT Agreement.

Also considered is the SDT provision of Article 9.1 of the Agreement on Safeguards which provides that:

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 percent, provided that developing country Members with less than 3 percent import share collectively account for not more than 9 per cent of total imports of the product concerned.

In the *US-Line Pipe* case, both the WTO Panel and Appellate Body ruled that Article 9.1 of the Safeguards Agreement creates a legally enforceable obligation, and even went on to find that the US had acted inconsistently by not exempting the required amount of Korea's exports from the application of its safeguard measure.[145] Nevertheless, even in such situation where a dispute settlement body finds a clear breach of an obligatory provision, (that is, even where 'shall' is read to place a mandatory obligation on a developed country and that country is in breach), actual remedy for breach is limited under Article 19 of the WTO Dispute Settlement Understanding (DSU).[146] A Panel or the Appellate Body may only recommend that: "the Member concerned bring the measure into conformity with that Agreement." The Panel in the *US–Line Pipe* case held that it did not have to tell the US, who was in breach, how to do so.[147] Since in most of the cases the measure at stake may already be in conformity with the principal WTO Agreement, the default resort is for a Panel to recommend that the developed country make a mutually satisfactory adjustment.[148]

Such reading by the Panel in *US–Line Pipe* underscores a major weakness of SDT provisions in WTO agreements. Not even the use of the word 'shall' in the phrasing of these provisions can be interpreted in such a way as to hold developed countries legally obligated to act in a particular way so as to achieve a particular result. At best, 'shall' merely creates an 'obligation to consider'. Even if all the SDT provisions in the WTO were to be re-phrased using 'shall' or even 'must', it is doubtful that such language would make any real difference since the 'obligation to consider' is an obligation of conduct

145 See Panel Report, *United States – Definitive Safeguard Measures on Import of Circular Welded Carbon Quality Line Pipe from Korea*, para 7.181 - 7.182, WT/DS202/R, adopted 8 March 2002, modified by Appellate Body Report WT/DS202/AB/R; Appellate Body Report*, United States – Definitive Safeguard Measures on Import of Circular Welded Carbon Quality Line Pipe from Korea* AB Report, para 129 – 133, WT/DS202/AB/R, adopted 8 March 2002.

146 The Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401.

147 Panel Report, *US – Line Pipe* Case, above n 145 at para. 8.6

148 See Article 26.1 of DSU on non-violation complaints.

and not one of result. However, an impact assessment of effects of a developed country's conduct on developing countries may give fodder for an argument that an obligation to act in a particular way has been breached.[149]

3.3.3 Unrealistic transition periods

Generally, transitional periods in the WTO allow members needed time to bring themself into full compliance with the obligations of an agreement. While the use of transitional periods under various WTO agreements is not limited to developing countries,[150] transition periods are identified as an important component of SDT in favour of developing countries.[151] The WTO refers to such special provisions in favour of developing countries as "[p]rovisions allowing longer transitional periods to developing countries".[152] The defining phrase is the 'longer period' that is invariably granted to developing countries and LDCs in comparison to their developed counterparts. Some WTO agreements provide for transitional periods as SDT provisions only. For instance, the CVA gave developing countries that were not parties to the Tokyo Round Code on customs valuation five years to comply with their obligations under the Agreement.[153] Developing countries were also given the possibility of delaying the application of the 'computed value' method of valuation for an additional three years.[154]

The experience is however that despite the expiration of several transition periods, developing countries have been unable to successfully implement these agreements. If we consider the TRIPS Agreement, under which developing countries agreed to implement broad reforms in their Intellectual Property (IP) regimes, we find that many developing

149 See Herwig, A. (2015). Competition, Not Regulation–or Regulated Competition?: No Regulatory Purpose Test Under the Less Favourable Treatment Standard of GATT Article III: 4 Following EC–Seal Products. *European Journal of Risk Regulation*, *6*(3), 405-417. Note the author's argument in respect of a breach of Article 2.1 (or 2.2 TBT or similar provisions) – especially if one interprets national treatment provision in GATT Article III:4 and GATT Article XX like provisions to be aimed at social regulation and distributive fairness respectively.

150 For instance, Article 5.2 of the Agreement on Trade-Related Investment Measures (TRIMs) requires developing country Members to eliminate all TRIMs notified under Article 5.1 within 5 years and the least developed country members within 7 years as against 2 years for developed country members and Article 65.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) allows developed country members a period of one year following the entry into force of the agreement to conform with its provisions, while allowing developed countries and LDCs much more flexibility. Under Art. 65.4 of the TRIPS, if in a developed country Member product patent production is not extended with respect to any areas of technology (chemicals and pharmaceuticals, for example) on the date of general application of the Agreement, the Member is entitled to delay the application of the provision on product patents to such areas of technology for an additional period of five years. Indeed, in the case of the Agreement on Textiles and Clothing, it is the developed countries that are in effect entitled to a transition period of 10 years for the elimination of quotas.

151 Lee, Y. S. (2006). *Reclaiming development in the world trading system*, p. 39. Cambridge University Press.

152 See WTO (2021). Examples of provisions for differential and more favourable treatment of developing countries, available at https://www.wto.org/english/tratop_e/devel_e/teccop_e/s_and_d_eg_e.htm. Accessed 18 December 2021. See also WTO. (2021). Special and Differential Treatment Provisions in WTO Agreements and Decisions, above n 114.

153 See Annex II of the customs valuation agreement, earlier known as the Uruguay Round Agreement on the Implementation of Article VII of General Agreement on Tariffs and Trade 1994. The Tokyo Round Code refers to the preceding and first Agreement on the Implementation of Article VII of the GATT that was negotiated at the Tokyo Round of Trade Negotiations between 1973 and 1979.

154 Article 20.2 of the CVA. For a detailed analysis of the special and differential treatment provisions of the CVA, see chapter 6 of the thesis.

countries are yet to acclimatize their IP regimes with the Agreement's minimum standards.[155] This is long after the expiration of the transition period in 2000.[156] Why is this the case? Generally, prior to the Agreement's entry into force, developing countries did not have any legislation in several of the IP areas it covers.[157] Most of these countries had no specific provision for the protection of geographical indications and plant varieties.[158] The few developing countries that have made some progress in the reform of IP regimes not only faced the arduous task of designing appropriate legislations and pushing them through parliament, but also face huge implementation challenges after the legislations are adopted.[159] The adjustment and budget cost of aligning several national laws with the agreement in areas such as civil and criminal procedures in courts and administrative procedures is huge and must be undertaken if rights under the agreement are to be enforced.[160] These challenges remain in several developing countries, denying them the capacity to be able to implement the TRIPS Agreement.

Transition periods, as they exist today, are generally subjective, unrealistic and devoid of much needed complementary capacity building that should assist developing countries acquire implementation capacity.[161] They are set without any serious analysis of the time and resources needed by a country to acquire the capacity required to implement a particular WTO agreement.[162] A realistic approach to setting transition time frame for the implementation of a particular agreement would require, at a minimum, a capacity audit to determine existing implementation capacity levels of countries, a needs assessment to enable the design of appropriate technical assistance programmes, and an implementation plan for delivery of such technical assistance programmes. An objective transition time frame can then be set reflecting the time needed for the delivery of the required technical assistance. As even developing countries are at different capacity levels (reflecting their different development levels), it should be expected that with the commencement of the delivery of targeted technical assistance, countries would arrive at the required implementation capacity level at different times – some, well before the

155 Adebola, T. (2020). Patent Games in the Global South: Pharmaceutical Patent Law-Making in Brazil, India and Nigeria, *Journal of International Economic Law*, 23(4), 1041–1047. The author/reviewer also underscores the point that the requirement of the TRIPS for minimum patent standards by WTO members does not preclude variations in national IPR laws. See also Adebola, T. (2019). Examining plant variety protection in Nigeria: Realities, obligations and prospects. *The Journal of World Intellectual Property*, *22*(1-2), 36-58, 39.

156 For LDCs, the transition period has continued to be extended by members, first in 2005, then 2013 and only recently in June 2021, was further extended from 1 July 2021 to 1 July 2034.

157 Athreye, S., Piscitello, L., & Shadlen, K. C. (2020). Twenty-five years since TRIPS: Patent policy and international business. *Journal of International Business Policy*, *3*(4), 315-328.

158 Wijesinghe Arachchilage, S. S. W. (2015). The protection of geographical indications in developing countries: The case of Ceylon tea. *BALANCE (A Bricolage for Legal Augmentation to Navigate Comprehensive Experimentation) International Multidisciplinary Law Journal*, *1*(1), 7-25.

159 See generally Papageorgiadis, N., & McDonald, F. (2019). Defining and measuring the institutional context of national intellectual property systems in a post-TRIPS world. *Journal of International Management*, *25*(1), 3-18.

160 See generally, Michalopoulos, C. (2003). *Special and differential Treatment of developing Countries in TRIPS*. TRIPS Issues Papers No. 2, available at https://www.quno.org/sites/default/files/resources/Special-Differential-Treatment-in-TRIPS-English_0.pdf. Accessed 22 April 2022.

161 WTO Committee on Trade and Development, Special Session, Special and Differential Treatment Provisions Joint Communication from the African Group, para 6 (c), TN/CTD/W/3/Rev.2, 17 July 2002.

162 See Michalopoulos, C. (2003). *Special and differential Treatment of developing Countries in TRIPS*, above n 160 at 12.

end of the transition time frame and some others, closer to the end or even right at the end of the transition time period. In practical terms, developing countries would see themselves being called upon to take up new or additional uniform rules at different but nevertheless appropriate times, as far as each of them is concerned. No matter how long a transition period is, it makes no sense if the intended beneficiary does not acquire the requisite implementation capacity at the end of the period.

3.4 Re-balancing trade rules to support development

A key debate around SDT in the WTO is how to ensure that WTO rules support development. Some WTO rules like the prohibition on non-tariff barriers to trade (except in some well-defined circumstances relating to security and the protection of the environment), seems to make sense from a development perspective. By contrast, other rules like those in the Agreement on Agriculture, including those that allow for domestic support and export subsidies, require a rebalancing to reflect developing countries' interests.[163] As is currently the case, the rules on agriculture are less demanding about such distortionary policies like the use of agricultural subsidies and domestic farm support by developed countries or the permissible use of import quotas on textile products, which in principle is prohibited by GATT rules. It is the rules of the trading system that inform member countries' trade policies, and a country's trade policy in turn affects its access into other countries markets. Thus, achieving a fair and equitable rules system is at the heart of instituting equality in the trading system.

As far as the re-balancing of rules is concerned, the thesis takes the view that SDT should be about the provision of assistance to developing countries to enable them to implement WTO disciplines and undertake greater membership obligations as opposed to avoiding disciplines. Temporary exemptions from disciplines could be necessary in appropriate cases though. The WTO Agreement itself contemplates exempting developing countries from certain disciplines. In most cases, it provides for long transition periods for the implementation of such disciplines as is the case with the rules on customs valuation, the requirement to eliminate trade-restrictive investment measures, and the implementation of harmonized protection of intellectual property rights under the TRIPS Agreement, or permanent exemption as in the case under Article XVIII GATT.[164] Keck and Low, however, argue that SDT should not be a basis for the avoidance of rules that do not support development.[165] While acknowledging that good rules can and probably, must contain elements of SDT, they argue that SDT should never be a basis for permanent exemption from rules. Permanently exempting themselves from the application of WTO disciplines denies developing countries the

163 Nguema, I. E. (2020). A necessary reform of agriculture market access rules. Journal of International Trade Law and Policy, Vol. 19 No. 2, pp. 101-120.

164 Article XVIII GATT recognizes the position of developing countries and their need for derogations from some trade measures with respect to the GATT Articles, including the support of Infant Industries and remedying Balance of Payments problems

165 Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO: Why, When and How?*, above n 35 at 8.

opportunity to influence trade rules during negotiating rounds in such a way that could support their pursuit of beneficial trade reforms and also guarantee better access to export markets for them.[166] It is against this backdrop that Hoekman *et al* distinguished between core WTO rules[167] and others, and made a case for universal application of the former to all members without discrimination.[168] According to them, core WTO trade policy rules are those rules from which developing countries can clearly derive a positive net benefit from their implementation. These should apply uniformly to all WTO members. On the other hand, they describe resource intensive rules as those rules that require significant upfront investment of resources to establish or strengthen institutions. For the latter, a uniform approach to implementation may not be ideal. We will have to take into consideration the development priorities of countries in deciding whether to push for compliance. For instance, some small developing countries may be faced with implementing a particular agreement which requires the establishment of some unduly costly regulatory institutions.

With most of these poor countries often having to choose between directing scarce resources to fund such reform or using the same resources to fund poverty alleviation programmes for their teeming populace, it becomes necessary to weigh the costs and benefits of each of those options against the national development priorities of the countries. This raises the need to differentiate among developing countries in determining the reach of resources-intensive rules. Which countries have the capacity to immediately undertake such rules, and which will require some capacity building before they can effectively undertake such rules? Hoekman *et al* identified four possible options for such differentiation:[169]

a. Total flexibility for developing countries as long as other WTO members are not harmed, that is to say, as long as the negative externality for others is negligible.[170]
b. An agreement-specific approach involving country-based criteria that are applied on an agreement-by-agreement basis to determine when agreements should be implemented.[171]
c. A country-based approach that places trade reform priorities in the context of national development plans like Poverty Reduction Strategy Papers (PRSP) and would employ multilateral surveillance

166 Ibid.

167 Like the MFN rule, national treatment rule, and rules on the prohibition on the use of quantitative restrictions.

168 See Hoekman, B., Michalopoulos, C., & Winter, L. A. (2004). Special and differential treatment of developing countries in the WTO: Moving forward after Cancun. *World Economy*, *27*(4), 481-506 at 490.

169 Ibid, at 492 to 493. See also Hoekman, B. (2005). Operationalizing the concept of policy space in the WTO: Beyond special and differential treatment. *Journal of International Economic Law*, 8(2), 405-424 at 412.

170 See Stevens, C. (2002). The future of Special and Differential Treatment (SDT) for developing countries in the WTO, above n 26.

171 Wang, Z., and Winters, L., Putting "*Humpty" Together Again: Including Developing Countries in a Consensus for the WTO,* CEPR Policy Paper No. 4. (2000); Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO: Why, When and How?*, above n 35.

and monitoring to establish a cooperative framework under which countries are assisted in gradually adopting WTO norms as part of a more general programme of trade-related reforms.[172]

d. A rule-of-thumb approach that would allow opt-outs for all countries satisfying broad threshold criteria such as per capita income, size or institutional capacity. A particular resource-intensive rule becomes applicable to countries over time as they overcome initial limitations and surpass thresholds.

A common issue with all these approaches is the determination of developing country status in the WTO. WTO law does not define 'developing country', hence is without any specific criteria or procedure for determining whether a country qualifies as 'developing' or not.[173] The trend is for countries with very diverse levels of capacity (characteristics, size, or GDP) to self-declare as developing countries and on the other hand, for developed country members, through a mix of unilateral actions and bargaining, to accept such self-declaration or not.[174] However, the large number and diversity of developing countries in the WTO underscores the sheer diversity of their needs and interests, thus the need for differentiation among them in order to best address the needs of each. The determination of which developing country is ready to undertake a resource-intensive rule and which is not, is one that will necessarily require differentiation among developing countries. This ordinarily would require the use of some objective criteria in order to be effective. The issue of differentiation remains controversial in the WTO with several developing countries despite its endorsement by the Appellate Body in the *EC-Tariff Preferences* case.[175] Hoekman notes that country classifications invariably raise tensions between WTO members as to which country should be counted as entitled to SDT and which should not.[176]

The thesis will now briefly expatiate on Hoekman *et al*'s proposal on approaches to differentiation. On the option of total flexibility for developing countries in their use of SDT as long as other WTO members are not harmed, the thesis takes the view that harm is to be understood in terms of any trade practice (whether trade restrictive or trade promoting) that results in a pecuniary and quantifiable cost or injury to another WTO member. What harm could be caused by a particular developing country to another WTO member would depend on that country's share of world trade. If it holds a significant share, then it can reasonably be expected that any inconsistent GATT advantage it enjoys would disadvantage and cause significant harm to another

172 Prowse, S., *The Role of International and National Agencies in Trade-Related Capacity Building*, 25(9) World Economy (2002) 1235–61.

173 Bacchus, J., & Manak, I. (2021). The Development Dimension: Special and Differential Treatment in Trade (1st ed.). Routledge.

174 Rolland, S. E. (2012). *Development at the WTO*, p. 80. Oxford University Press. The WTO however adopts the UN's categorization of LDCs. See Article XI:2 of the Marrakesh Agreement Establishing the WTO.

175 Ibid, at 297.

176 Hoekman, B. (2005). Operationalizing the concept of policy space in the WTO, above n 169 at 413.

competing WTO member. Such rationale was at the heart of the challenge by mainly Latin American countries to the special tariff preferences offered by the EU to ACP states under its erstwhile Banana regimes.[177]

The agreement-by-agreement approach would require a prior definition of what resource-intensive rules are and to what extent specific agreement will give rise to implementation costs. These are questions that would need to be answered on a country-by-country basis. Such exercise would pose huge cost implications for developing countries as implementation audits of each WTO agreement would be required. Hoekman however notes that reaching a consensus in the WTO on an agreement-specific set of criteria for determining the applicability of resource-intensive rule is possible.[178] He cites the per capita income threshold criteria in the SCM Agreement and the net food importer group in the Agreement on Agriculture, as examples.[179] Arguably, the most consistent with local ownership of development, the country-specific approach, has the particular down side of basing the application of WTO discipline on national priorities. Sometimes, national priorities may be in contradiction to much needed reforms required to spur economic growth in a country. Hence a country which takes to some protectionists policy as a matter of national priority limits any benefits from reforms even if contained in its PRSP.

Whatever approach to differentiation that may be adopted by the WTO, the aim should be to provide assistance to developing countries with justifiable need, to implement their trade treaty obligations and hence, reap the benefits therefrom.[180] The next section demonstrates how differentiation can be applied to meet the specific development needs of poor countries in the WTO while also ensuring a balance of rights and responsibilities among members.

3.5 Reviewing China's compliance with the Montreal Protocol[181]

As suggested earlier, this section of the thesis uses a case study method in reviewing how China took advantage of differential treatment in the Montreal Protocol to achieve compliance with its phase-out obligations under the Protocol and in record time. Essentially, the case study demonstrates how developing countries could take advantage of or benefit from differential treatment provisions in a multilateral agreement to facilitate their compliance with their treaty obligations.

The rationale for deferring to the Montreal Protocol for a case study lies in the

177 See *EC-Bananas III - Panel Reports*, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU *(Ecuador)* / WT/DS27/R/GTM, WT/DS27/R/HND *(Guatemala and Honduras)* / WT/DS27/R/MEX *(Mexico)* / WT/DS27/R/USA *(US)*, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 695 to DSR 1997:III, p. 1085 .

178 Hoekman, B. (2005). Operationalizing the concept of policy space in the WTO, above n. 169 at 414.

179 Ibid.

180 The thesis extensively discusses suggested approaches to differentiation in chapter 5 and makes a definite proposal for reform.

181 The Montreal Protocol on Substances that Deplete the Ozone Layer (as either adjusted and/or amended) (otherwise referred to as the Montreal Protocol) 32 I.L.M. 874 (1993), available at https://ozone.unep.org/treaties/montreal-protocol. Accessed 18 December 2021.

fact that the Protocol has successfully applied differential treatment (or the idea of differentiation) to balance the rights and obligations of the parties concerning their Protocol obligations of phasing out ozone depleting substances (ODS). This was achieved by taking into account the parties' historical responsibilities and present contributions to emissions, while also considering the differential vulnerability and financial and technological capacities of States.[182] The Protocol provides some good examples of fruitful strategies to facilitate compliance by parties at different levels of development. The strategies also demonstrate how to build confidence among such parties, using a calibrated combination of management and enforcement approaches, in pursuing some specific objectives of a regime. These hold important lessons for how SDT in the WTO could be redirected to improve members compliance with their trade treaty obligations while also better responding to the needs of its poorest members.

A good starting point for such study would be to clearly articulate the problem with SDT. Is the problem with provisions calling for special consideration of the needs of developing countries by developed countries in the WTO really the fact that those provisions are not mandatory?[183] Would rephrasing such provisions to stipulate that developed countries 'must' consider the needs of developing countries make any difference? Or is the problem about the vagueness of the obligations rather than about the language in which these obligations are phrased? Is there evidence from other legal regimes where special provisions, including longer transition periods in favour of developing countries, have achieved their purpose? And if so, do we know why they have worked? Does this have to do with the specific purpose those regimes are meant to achieve or with the fact that the longer transition periods were accompanied by other obligations such as reporting, monitoring and review? To answer these questions, the thesis draws comparisons with China's implementation of the Montreal Protocol, arguably the most successful international environmental agreement today– measuring by compliance levels and attainment of its goals.[184] The thesis examines how a developing country like China, with special needs, has overcome initial limitations to effectively

182 Shapovalova, D. (2021). In defence of the principle of common but differentiated responsibilities and respective capabilities. In B. Mayer & A. Zahar (Eds.), *Debating Climate Law* (pp. 63-75). Cambridge: Cambridge University Press.

183 This seems to be the suggestion by member governments as the Doha Ministerial Declaration (together with the Decision on Implementation-Related Issues and Concerns) mandates the Committee on Trade and Development (CTD) to identify which of those special and differential treatment provisions are mandatory, and to consider the legal and practical implications of making mandatory those which are currently non-binding. See paras. 12 and 44 of the Doha Ministerial Declaration, and WTO. (2001). Decision on Implementation-Related Issues and Concerns, WT/MIN(01)/17, para. 12(1)(i), 20 November.

184 See Bufundo, N. E. (2005). Compliance with the ozone treaty: weak states and the principle of common but differentiated responsibility. *Am. U. Int'l L. Rev.*, *21*, 461; Nyekwere, E. H., & Ole, N. C. (2021). Understanding the principle of common but differentiated responsibilities and its manifestations in multilateral environmental agreements, above n 25; Barnes, P. W., Bornman, J. F., Pandey, K. K., Bernhard, G. H., Bais, A. F., Neale, R. E., ... & Robinson, S. A. (2021). The success of the Montreal Protocol in mitigating interactive effects of stratospheric ozone depletion and climate change on the environment. *Global Change Biology*, *27*(22), 5681-5683; Goyal, R., England, M. H., Gupta, A. S., & Jucker, M. (2019). Reduction in surface climate change achieved by the 1987 Montreal Protocol. *Environmental Research Letters*, *14*(12), 124041.

comply with the Protocol and, why special provisions in the Protocol for developing countries worked in aiding China's compliance.

3.5.1 About the Montreal Protocol

The Montreal Protocol was designed to reduce the production and consumption of ODS in the atmosphere, and thereby protect the earth's fragile ozone layer.[185] The Protocol was signed on 16 September 1987 and entered into force on 1 January 1989. The Protocol was a direct response to scientific findings that certain man-made substances like chlorofluorocarbons (CFCs), which are used in the production of refrigerators, air conditioning and aerosols; halon, which is used in fire extinguishing; carbon tetrachloride (CTC) and methyl chloroform which are used in industrial cleaning; and methyl bromide, which is used in fumigation, were contributing to the depletion of the ozone layer. Accordingly, the Protocol seeks to phase out all the major ODS, including CFCs, halons and less damaging transitional chemicals such as hydrochlorofluorocarbons (HCFCs) by setting binding progressive phase out obligations for developed and developing countries.[186] It is widely considered the most successful multilateral environment agreement (MEA) because it boasts near universal participation, and scientific evidence show that it has contributed to the recovery of the ozone layer.[187]

Signed by 197 countries, the Montreal Protocol is the first treaty in the history of the United Nations to achieve universal ratification and scientific studies show that it has contributed to the recovery of the ozone layer. Barely fifteen years after its entry into force, the Ozone Secretariat reported that implementation of the Protocol has reduced the consumption of ODS by more than 90 percent.[188] By the end of 2002, industrialized countries had already reduced their ODS consumption by more than 99 percent and developing countries by slightly more than 50 percent.[189] Its mandatory timetable for the phase out of ODS by countries is reviewed regularly, with target dates fast-tracked as may be dictated by scientific understanding and technological advances. Six amendments have been made to the Protocol which have brought forward phase out schedules and added new substances to the list of

Chapter 3

185 See Montreal Protocol on Substances that Deplete the Ozone Layer - DAWE. Accessed 15 December 2021;

186 Ibid. See also Barnes, P. W. *et al.* (2021). The success of the Montreal Protocol in mitigating interactive effects of stratospheric ozone depletion and climate change on the environment, above n 184; Goyal, R. *et al.* (2019). Reduction in surface climate change achieved by the 1987 Montreal Protocol, above n 184.

187 Bufundo, N. E. (2005). Compliance with the ozone treaty: weak states and the principle of common but differentiated responsibility, above n 184. See also Nyekwere, E. H., & Ole, N. C. (2021). Understanding the principle of common but differentiated responsibilities and its manifestations in multilateral environmental agreements, above n 25.

188 UNEP (2004). Implementation Committee under the non-compliance procedure for the Montreal Protocol, Geneva 17–19 July 2003, UNEP/OzL.Pro/ImpCom/32/3).

189 Ibid.

controlled substances under the Montreal Protocol.[190]

Without specifically referring to 'common but differentiated responsibility',[191] the Montreal Protocol is the first MEA to incorporate the principle into its provisions – by administering different obligations for developed and developing countries.[192] In recognition of the special needs of developing countries to meet their obligations under the Protocol, it adopts, for the first time in international environmental law history, three mechanisms that take into account the special situation of developing countries in formulating their obligations: different phase out period for developing countries with a grace period of ten years to phase out controlled substances;[193] establishment of a

190 The six amendments are: the amendment to the Montreal Protocol agreed by the Second Meeting of the Parties (London, 27-29 June 1990) (The London Amendment); the amendment to the Montreal Protocol agreed by the Fourth Meeting of the Parties (Copenhagen, 23-25 November 1992) (The Copenhagen Amendment); the adjustments to the Montreal Protocol agreed to by the Seventh Meeting of the Parties (Vienna, 5 to 7 December 1995) (The Vienna Amendment); the amendment to the Montreal Protocol agreed by the Ninth Meeting of the Parties (Montreal, 15-17 September 1997) (The Montreal Amendment); the amendment to the Montreal Protocol agreed by the Eleventh Meeting of the Parties (Beijing, 29 November - 3 December 1999) (The Beijing Amendment); the amendment to the Montreal Protocol agreed by the Twenty-Eighth Meeting of the Parties (Kigali, 10-15 October 2016) (The Kigali Amendment). All are available at the website of the Ozone Secretariat: https://ozone.unep.org/treaties/montreal-protocol. Accessed 18 December 2021. See Annexes A-F of the Montreal Protocol for a list of controlled substances.

191 The principle of 'common but differentiated responsibility' seeks to achieve equity, justice, and fairness in international environmental relations by balancing nations' responsibilities to redress transboundary and global environmental problems with their right to develop. (Craig, R. K. (2017). Climate change and common but differentiated responsibilities for the ocean. *Carbon & Climate Law Review*, *11*(4), 325-334). While acknowledging that all countries are responsible for global environmental problems, it underscores that countries' differentiated degrees of responsibility for causing these problems and their divergent capacities to redress them – developed industrialized countries have contributed more to environmental degradation, they share a greater burden for finding solutions. (Stone, C. D. (2004). Common but differentiated responsibilities in international law. *American Journal of International Law*, *98*(2), 276-301 at 277 – Stone notes that because richer countries have contributed more to environmental degradation than poor countries, they share a greater burden for finding solutions). The principle requires all countries to play their part in global environmental protection based on the different contributions of developed and developing countries to global environmental problems. (See Rajamani, L. (2006). *Differential treatment in international environmental law*. Oxford University Press.). See generally, Nyekwere, E. H., & Ole, N. C. (2021). Understanding the principle of common but differentiated responsibilities and its manifestations in multilateral environmental agreements, above n 25. See also Bufundo, N. E. (2005). Compliance with the ozone treaty, above n 184 at 463-464.

192 See Nyekwere, E. H., & Ole, N. C. (2021). Understanding the principle of common but differentiated responsibilities and its manifestations in multilateral environmental agreements, above n 25. See also Bufundo, N. E. (2005). Compliance with the ozone treaty, above n 184 at 463-464. Article 5 of the Protocol defines a developing country as a party whose annual level of consumption of the prohibited controlled substances is less than 0.3 kilograms per capita and granting these countries the right to delay for ten years compliance with certain ODS reduction target.

193 A simple summary of the differentiated phase out responsibilities for countries per controlled substances indicate as follows – Chlorofluorocarbons (CFCs): developing countries/phased out end of 2010, developed countries/ phased out end of 1995; Halons: developing countries/phased out end of 2010, developed countries/ phased out end of 1993; CCl_4 (Carbon tetrachloride): developing countries/phased out end of 2010, developed countries/ phased out end of 1995; CH_3CCl_3 (Methyl chloroform): developing countries/phased out end of 2015, developed countries/ phased out end of 1995; Hydrochlorofluorocarbons (HCFCs): developing countries/freeze in 2013 at a defined base level-10% reduction by 2015-35% reduction by 2020-67.5% reduction by 2025-total phase out by 2030, developed countries/freeze from beginning of 1996-35% reduction by 2004-75% reduction by 2010-90% reduction by 2015-total phase out by 2020; Hydrobromofluorocarbons (HBFCs): developing countries/phased out end of 1995, developed countries/phased out end of 1995; Methyl bromide (CH_3Br)(horticultural uses): developing countries/phased out end of 2015, developed countries/phased out end of 2005; Bromochloromethane (CH_2BrCl): developing countries/phased out end of 2002, developed countries/phased out end of 2002; Hydrofluorocarbons (HFCs): developing countries/ Freeze in 2024-10% reduction by 2029-30% reduction by 2035-50% reduction by 2040-80% reduction by 2045, developed countries/10% reduction by 2019-30% reduction by 2024-70% reduction by 2029-80% reduction by 2034-85% reduction by 2036.

fund to help developing countries receive financial and technical assistance to meet their obligations under the Protocol; and transfer of technology including facilitating access to environmentally safe alternative substances and technology.[194]

In recognition of the special situation of developing countries, Article 5 of the Montreal Protocol grants a ten-year grace period within which they may delay compliance with the Montreal Protocol's control measures of ODS.[195] Article 10 of the Protocol stipulates that developed states must help developing states comply with the protocol through technical assistance and a sophisticated funding mechanism called the Multilateral Fund for the Implementation of the Montreal Protocol (MLF).[196]

The Multilateral Fund

The London Amendment[197] established the MLF, which provides a financial mechanism by mainly developed countries to assist Article 5 countries, (which are defined as signatory developing countries that have an annual consumption of ODS lower than 0.3 kg per capita) to cover the incremental costs of complying with the Protocol's provisions.[198] It also provides technical assistance to these countries, including the transfer of technology. Most of the reduction in ODS consumption in developing countries is attributable to projects implemented by the four multilateral implementing agencies (UNDP, UNEP, UNIDO and the World Bank) of the MLF.[199] To receive support from the MLF, a country works with one or more of the implementing agencies to develop a country program (CP) for ODS phase out.[200] The country program must include a strategic plan for phasing out ODS in the country. Owning such a country program is in principle a prerequisite for investment support from the MLF.[201] Developing countries must also submit action plans, including a prospective regulatory framework and legislation supporting ODS phase-out before they can receive support from the MLF.[202] In setting these conditions, including annual reporting requirements of progress on the implementation of the country program, the MLF makes clear its intent to have funding eligibility linked to some objective procedural requirements.[203]

194 Nyekwere, E. H., & Ole, N. C. (2021). Understanding the principle of common but differentiated responsibilities and its manifestations in multilateral environmental agreements, above n 25.
195 Ibid.
196 Ibid.
197 See n 190 above.
198 See Article 10 of the Montreal Protocol (as amended). See also Luken, R., & Grof, T. (2006). The Montreal Protocol's multilateral fund and sustainable development. *Ecological Economics*, *56*(2), 241-255 at 244. Incremental costs included incremental capital costs and incremental raw material and component costs for a limited period of time (usually 6 months for refrigeration projects). It is the additional costs incurred when a company switches from an ODS technology to a non-ODS technology. See Zhao, J. (2002). The Multilateral fund and China's compliance with the Montreal Protocol. *The Journal of Environment & Development*, *11*(4), 331-354 at 337.
199 Kelly, L. (2004). *The Multilateral Fund for the implementation of the Montreal Protocol: addressing challenges of globalization-an independent evaluation of the World Bank's approach to global programs-case study* (No. 32914, pp. 1-69). The World Bank.
200 Ibid, at 7.
201 Ibid.
202 Ibid.
203 See Zhao, J. (2002). The Multilateral fund and China's compliance with the Montreal Protocol, above n 198.

In 1997, the Multilateral Fund adopted a sector approach to reducing ODS, with funding linked to achieving compliance and sustainable ODS reduction.[204] The sector approach is a departure from an earlier complicated and costly project-by-project approach to funding that required individual projects to go through an application and approval procedure in order to obtain funds from the Fund. The sector approach contrastingly approves funds for sector-wide ODS reduction strategies contingent on evidence of continuous progress. It requires a strong national government commitment to meeting annual ODS reduction targets and as long as targets are met, funds continued to stream to the government.[205]

3.5.2 China and the Montreal Protocol

At the time of the making of the Montreal Protocol, China was the largest producer and consumer of CFC, so its membership of the Protocol was key to meeting the ODS reduction targets set in the Protocol. With the benefit of the Multilateral Fund, China has recorded tremendous success in implementing a national plan for the phasing out of ODS. In a demonstration of its government's commitment to the protection of the environment, China has implemented scores of domestic policies and regulations to control the production, consumption, import and export of ODS. It remarkably shut down all its production plants for CFCs well ahead of the schedule set by the Montreal Protocol.[206]

3.5.2.1 Compliance with ODS reduction targets

China's 1993 Country Program set more ambitious reduction targets than the targets set in the Protocol. Under the Country Program, China aimed to reduce ODS production and consumption levels by 1996 to less than or equal to its 1991 levels. The Protocol however required that China freezes consumption and production levels of CFCs and halons at 1995-1997 levels by 1999 and 2002. Although China failed to meet ODS production and consumption levels set out in its country paper as they exceeded targets by about 94 percent and 65 percent respectively, it met the Protocol's targets for halons and CFCs by 1998 and 1999, respectively.[207] Indeed, by 1998, halons production and consumption levels in China were already 32 and 35 percent lower than the average 1995-1997 levels, respectively. This feat was recorded a whole four years ahead of the Protocol's freeze targets for 2002. By 2002, China had reduced halon production and consumption by 84 percent, three years ahead of the Protocol's 50 percent freeze target for 2005. CFCs consumption in the aerosol sector had earlier in 1993 been phased out

204 Ibid, at 345.
205 Ibid, at 345 and 347.
206 Ibid, at 332. See also Zhao, J. (2005). Implementing international environmental treaties in developing countries: China's compliance with the Montreal Protocol. *Global Environmental Politics*, *5*(1), 58-81 at 64.
207 See Zhao, J., & Ortolano, L. (2003). The Chinese government's role in implementing multilateral environmental agreements: the case of the Montreal Protocol. *The China Quarterly*, *175*, 708-725 at 714 and 718; Zhao, J. (2005). Implementing international environmental treaties in developing countries, above n 206 at 62 and 66.

(except for essential use) and in the automobile sector by 2001. By 2001, the production and consumption of CTC had been reduced by 89 percent and 94 percent, respectively. This was achieved three years ahead of the Protocol's 85 percent reduction target. The Protocol's freeze targets for methyl bromide were met by 2002, as production and consumption were 4 and 1 percent lower than the targeted average levels from 1995 to 1998. Records indicate that by July 2003, China had phased out 53,932 ozone depletion potential tons of production and 87,584 tons of consumption.[208] Through a multi-stakeholder effort, including government, consumers and industries, China successfully terminated the production and imports of two main kinds of ODS in 2007, two and a half years before the Protocol deadline. By 2008 China had phased out 100,000 tons of ODS production and 110,000 tons of ODS consumption, ahead of the Protocol's 2010 deadline. This accounted for about 50 percent of the total ODS phase out in developing countries. In furtherance of its commitment to the Protocol goals, China ratified the Montreal and Beijing Amendments to the Montreal Protocol in 2010, reiterating its commitment to phasing out HCFCs, the interim alternatives to CFCs. HCFCs are interim alternatives because they have a high global-warming potential (GWP) and are thus ozone depleting, albeit at a slower rate than CFCs.

3.5.2.2 Factors that spurred China's compliance

Why has China been so successful in its implementation of the Montreal Protocol, particularly in complying with the Protocol's ODS reduction targets? What are the key factors that allowed China's government to be so successful in its progress towards the global goal of protecting the ozone layer? The literature indicates that a number of reasons, including the Chinese government's resolve to gain the status of a responsible global citizen by cooperating with other countries, its desire to acquire modern technology, and to access funding from the Multilateral Fund, were major motivations. However, through assessing the country's efficient implementation process over the years, the thesis identified three major factors that are responsible for the huge success of China's compliance with the substantive requirements (ODS reduction targets) of the Protocol. Those factors are prior compliance with procedural requirements of the Protocol, the establishment of the Multilateral Fund, and the Multilateral Fund's adoption of a sector approach to funding. These factors are reviewed below.

a. Compliance with procedural requirements of the Protocol

To facilitate developing countries' implementation of the Montreal Protocol, they are expected to meet four procedural requirements, including establishing an institutional framework; a country program; a policy framework, and a data reporting

208 Ibid.

system.[209] This is distinct from the substantive requirement of the Protocol for signatories to phase out consumption of ODS by certain dates. While procedural compliance does not necessarily guarantee substantive compliance, it provides the required legal and institutional framework for satisfying substantive requirements in a sustainable manner.[210] Significantly too, the procedural requirements were also necessary for Article 5 countries to access funds from the MLF.

i. Establishment of an institutional framework: In compliance with the Protocol, China established a national administrative structure to coordinate its stakeholders' work towards complying with ODS reduction targets. The National Leading Group for Ozone Layer Protection, which is composed of 18 ministries and commissions and coordinated by the State Environmental Protection Administration (SEPA), leads the coalition. The Leading Group is responsible for making all decisions on China's implementation of the Protocol. In 1991, a Project Management Office (PMO) was established within SEPA to coordinate the implementation of policies and programs approved by the Leading Group.
ii. Establishment of a country program: As indicated above, the Multilateral Fund requires developing countries to develop a country program for ODS phase out. A country program is a strategic plan for phasing out ODS in the country. It details the strategy and the action plan that the country should follow to eliminate the ODS consumption and production according to the Montreal Protocol schedules. Such plan is usually based on an assessment of the country's ODS production and consumption habits and includes an analysis of the country's ODS industry structure, a technical and economic assessment of alternative technologies, and an analysis of alternative technology and phase-out schedules.[211] It is in principle a precondition for investment support from the Multilateral Fund. China's Country Program for phasing-out ODS under the Montreal Protocol was first issued in 1993, for a 5-year period and was subsequently reviewed periodically.[212]
iii. Establishment of a policy framework: Under the Protocol, developing countries are required to submit action plans, including a prospective regulatory framework and legislation supporting ODS phase-out.[213] This is also a precondition for receiving support from the Multilateral

209 Zhao, J. (2005). Implementing international environmental treaties in developing countries, above n 206 at 61.
210 Ibid, at 60.
211 See Kelly, L. (2004). *The Multilateral Fund for the implementation of the Montreal Protocol,* above n 199.
212 Zhao, J. (2002). The Multilateral fund and China's compliance with the Montreal Protocol, above n 198.
213 Kelly, L. (2004). *The Multilateral Fund for the implementation of the Montreal Protocol,* above n 199.

Fund. The Chinese government formulated several national policies and regulations to limit ODS consumption and production in industrial enterprises. As far back as 1997 and 1999, the government had put in place a halon sector reduction plan and CFC production plan, respectively. Within these plans, the government established a national halon and CFC production quota systems along with other regulations, and an incentive scheme in the form of a national auction and bidding system that have all worked to ensure the country's compliance with the Protocol's ODS reduction goals.[214] Instructively, a net reduction of 6,000 tonnes of halon 1211 and 5,000 tonnes of CFCs by 1999 enabled China to meet the Protocol's goal to freeze production and consumption of CFCs and halons.[215]

iv. Establishment of a data reporting system: The requirement for developing countries to report their annual ODS consumption and production figures to the Ozone Secretariat and also to the Multilateral Fund's Secretariat is a key factor in helping these countries keep focus on the Protocol targets. Indeed, for the Multilateral Fund to continue to finance a Country Program projects and activities, the beneficiary country must present information annually to the Executive Committee on progress being made in the implementation of the Country Program, in accordance with the decision of the Executive Committee on implementation of country program. The Secretariat uses these data when analysing the status of compliance of Article 5 countries. China has been in compliance with its reporting responsibility under the Protocol. The Chinese government consistently provided data on the production, export, and import of ODS to the Ozone Secretariat and the Multilateral Fund Secretariat. Zhao notes that there were problems with data quality initially, but with the assistance of international agencies, China's State Environmental Protection Administration and other agencies improved data quality steadily through fifteen years of hard work with individual factories.[216]

b. Establishment of the multilateral fund

The establishment of the MLF was critical to China's successful compliance with the Protocol's ODS reduction targets, as it would not otherwise have had the technical

214 Zhao, J., & Ortolano, L. (2003). The Chinese government's role in implementing multilateral environmental agreements, above n 207 at 723-724; Zhao, J. (2005). Implementing international environmental treaties in developing countries, above n 206 at 69.

215 Ibid.

216 Zhao, J. (2005). Implementing international environmental treaties in developing countries, above n 206 at 61.

and financial means necessary to phase out ODS. This point is underscored by one of the underlying reasons behind China's failure to meet its own reduction target set out in its 1993 Country Program. Due to some disagreement with the manager of the MLF in 1994 over China's ODS consumption and production levels at the time, the manager of the MLF refused to pay for the closure of a factory producing halon 1211, as previously agreed, even though this factory had achieved a permanent 1,200-ton reduction. The MLF's Executive Committee insisted that the goal was to see an overall reduction in ODS consumption and production rather than such feat being recorded by a single project – while overall levels continue to rise.

According to Zhao, by the end of 1996, China had received only US$126 million from the Fund, or 28 percent of the funding it estimated as required to reach the voluntary reduction targets set out in its 1993 Country Program.[217] In contrast, by the late 1990s and on the heels of China's adoption of the sector approach, funding was increased. As of July 2003, China had received US$470 million through 403 different projects including nine sector plans. At the time, the total funding that was approved for release to China by 2010 was US$740 million, including funds approved over multiple years under the sector approach.

A critical aspect of the success of the Protocol is that modern and environmentally friendly technologies be expeditiously transferred to developing countries under the most favourable and fair conditions. China faced huge challenges in its bid to phase out ODS and lacked the finances to support the development of substitute technology and products at the time.[218] Several industrialised countries were unwilling to relinquish their control over the manufacturing of ODS substitutes and China's poor record on IP rights protection did not help matters.[219] The Multilateral Fund was also unable to reach an agreement with China on support for domestic production of CFC substitutes, despite endorsing the country's sector plan for the closure of CFC production facilities in 1999. The failure of the MLF to support the development of substitute technology domestically was a huge barrier to the rapid reduction of ODS for some sectors and a challenge to China's complete phasing out of ODS. China thus heavily relied on imported substitutes for ODS reduction. This slowed the pace of reduction in some sectors and posed a challenge to the complete phasing out of ODS.[220] The MLF eventually allowed China to use some of the funds that support the closure of CFC production facilities to build facilities producing CFC substitutes.[221] A direct result of this concession was China's establishment in 2002 of an Environmental Protection Industrial Park for Compliance with International Agreements to serve as a home for enterprises developing and producing substitutes for ODS.[222] This immediately spurred

217 Ibid, at 69.
218 Ibid, at 71.
219 Ibid.
220 Ibid.
221 Ibid.
222 Ibid.

research domestically for substitute materials used in tobacco production, refrigerators, aerosol propellants and fire extinguishers.

It is also instructive to note that funding from the MLF was also utilized by China to build human and administrative capacity that was needed to aid its implementation of the Protocol. Prior to this time, insufficient resources and lack of experience limited China's progress in meeting even its own ODS reduction targets, as evidenced by its failure to meet the 1996 target set in its 1993 Country Program.[223] Through training and other technical assistance from the Multilateral Fund, China was able to build the necessary capacity, including management, knowledge and information used by government agencies to design and implement policies.

c. Sector approach to MLF funding

Even more important to China's successful implementation of the Protocol was the shift from a project-by-project approach to a sector approach to funding under the Multilateral Fund. As noted earlier, while the sector approach permits the MLF to approve a phase out plan for an entire sector, including the incremental cost of the sector phase out package, the project-by-project approach was limiting to the extent that each project was required to go through an application and approval procedure to get funding.[224] In effect, a country could no longer receive funding on the basis of a single project achieving ODS reduction targets. The assessment for funding eligibility is made on a sector-wide basis. Thus, aggregate ODS production and consumption must be assessed as having reduced in line with the Protocol targets for any Article 5 country to get funding.

This formed the basis for the MLF's refusal to pay China for the closure of an ODS producing workshop in 1994 despite the fact that the workshop had reached a permanent reduction of 1,200 ton of halon 1211. Despite the reduction, China's total halon production continued to rise.[225] Accordingly, the MLF insisted that the goal was to achieve an overall reduction in ODS production rather than by a particular entity.[226] Thus, even where funds are already earmarked for phase out programs, the MLF's Executive Committee will only release funds to a national government based on evidence that phase out targets have been met in a sector plan. This unique approach that links fund eligibility and ODS phase outs through a performance-based disbursement system is the biggest singular determinant of China's progress in reducing ODS.[227] Plausibly, linking fund eligibility in this way motivated China to move against deep-seated economic and political interests to adopt the sector approach and put an end

223 Ibid, at 73.
224 Ibid, at 67-68.
225 Ibid, at 68.
226 Ibid. See also UNEP. (2005). Report of the Eighteenth Meeting of the Executive Committee of the Multilateral Fund for the Implementation of the Montreal Protocol, p. 8, UNEP/Ozl.Pro/ExCom/18/75.
227 Zhao, J. (2005). Implementing international environmental treaties in developing countries, above n 206 at 68.

to the mere shifting of ODS production and consumption from enterprises with MLF projects to other enterprises.

3.6 Lessons for the WTO

The successful implementation of WTO agreements in several developing countries, including their taking advantage of the several SDT provisions in such agreements could be facilitated by these countries' prior compliance with procedural requirements of those agreements. The WTO Agreement provides that each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations under the covered agreements.[228] Developing countries were given five years from the entry into force of the WTO to achieve this. This included complying with provisions of national constitutions that would allow the application of WTO agreements in members' domestic jurisdictions.[229]

As international treaties are not self-executing in a number of these countries, to be legally applicable in such jurisdictions, they must be specifically incorporated into local law through a process of domestication.[230] A single WTO Implementation Bill may suffice to domesticate WTO agreements in such countries. For several WTO developing country members, this is even more exigent as they look to undertake necessary institutional and regulatory reforms that will guarantee their successful implementation of WTO agreements and full integration in the multilateral trading system. After domestication is achieved, the tortuous and costly process of reviewing the general domestic laws can then properly commence. Such law review is one that may stretch limited administrative and institutional capacities in a number of developing countries, in addition to the problem of lack of adequate financial resources to fund such activity.

For several developing countries, the task of successfully implementing WTO agreements requires that both institutional and human resources be strengthened, national development policies are appropriately sequenced in line with each countries' WTO commitments and improved coordination among relevant stakeholders in order to cope with the various requirements for effective participation in the WTO.[231] Ideally, this requires these countries to have in place a multi-stakeholder partnership to coordinate

228 Article XVI(4) of the Final Act Establishing the WTO.

229 The applicability of a treaty in national jurisdictions of Members is regulated primarily by the national law of each country. While international law regulates the relations between states, municipal law regulates the relations between individuals and the state. For one to apply in the sphere of the other, tacit recognition of the one by the other is required. See Ukpe, A. I. (2017). Trade Integration in a Layered System of International Law. *African Journal of International and Comparative Law*, *25*(4), 561-578. See also Matsushita, M., Schoenbaum, T. J., Mavroidis, P. C., & Hahn, M. (2015). *The World Trade Organization: law, practice, and policy*. pp. 31-46. Oxford University Press. Crawford, J., & Brownlie, I. (2019). *Brownlie's principles of public international law*. p. 45. Oxford University Press, USA.

230 For an expose on self-executing and non-self-executing norms of international law, see Marochkin, S. Y. (2018). Self-executing and Non-self-executing Norms of IL. In *The Operation of International Law in the Russian Legal System* (pp. 227-238). Brill Nijhoff.

231 See Prowse, S. (2002). The role of international and national agencies in trade–related capacity building, above n 172 at 1241 and 1246.

the implementation of WTO agreements; develop agreement-specific strategies and action plans to achieve the goals of each agreement; and put in place a supportive legal and policy framework for actualising the objective of such agreements. The story of Uganda's successful implementation of both the SPS and the TBT Agreements in the East African Community region is instructive in this regard.[232]

Notwithstanding, limited financial and technical resources have often limited the extent to which developing countries are able to put in place the necessary regulatory and institutional reform environment required for the implementation of WTO agreements. It is at this point that international financial and technical assistance become necessary. Concerning this, the World Bank has noted that no country is starting from scratch—much donor support has already been provided and more is in the pipeline.[233] The problem is that over time, trade-related assistance has been delivered, frequently randomly, indiscriminately and more often than not on a stand-alone basis – often lacking in multi-stakeholder coordination.[234] Both financial and technical assistance should be geared at helping developing countries build the capacity to implement their WTO obligations. A starting point would be to first, assist these countries to better understand the complex WTO agreements; second, assist them to domesticate these agreements, and then assist them to implement the agreements, including strengthening necessary institutional and regulatory structures.

The experience of China with the Montreal Protocol demonstrates the value in linking international financial and technical assistance to a developing country's compliance with the procedural requirements of an agreement and its continuous compliance with its obligations under the agreement. Illustratively, a developing country receives financial and technical assistance to review its local laws towards complying with its obligations under an agreement, because it has previously complied with its national/ constitutional requirements to domesticate WTO agreements. Further assistance could then be made contingent on the developing country showing evidence of its improved implementation of that agreement. Such further assistance could be in respect of the agreement in issue or in respect of a different agreement.

When developed countries know that on acquiring necessary capacity, developing countries will undertake the same WTO responsibilities/obligations as them, they (developed countries) would be more disposed to according developing countries SDT. On the other hand, as developing countries under the Montreal Protocol are motivated

232 See Rudaheranwa, N. (2005). *Uganda's challenges in complying with the WTO Agreement* (No. 674-2016-46545), available at https://ideas.repec.org/p/ags/eprcop/93814.html. Accessed 22 April 2022.

233 See World Bank (2006). Needs, priorities and costs associated with technical assistance and capacity building for implementation of a WTO trade facilitation agreement: a comparative study based on a sample of six developing countries, https://documents.worldbank.org/en/publication/documents-reports/documentdetail/852991468179960487/needs-priorities-and-costs-associated-with-technical-assistance-and-capacity-building-for-implementation-of-a-wto-trade-facilitation-agreement-a-comparative-study-based-on-six-developing-countries. Accessed 14 May 2022.

234 See Prowse, S. (2002). The role of international and national agencies in trade–related capacity building, above 172 at 1239.

to take on their treaty obligations by the simple knowledge that financial assistance is available to cover their incremental costs, developing countries in the WTO will also be motivated to take on their WTO obligations, including consequential reforms, if they know that financial assistance is available to cover their adjustment costs. When both developed and developing country members of the WTO have this confidence, transition periods can truly then serve as adjustment or capacity building periods rather than as mere cushions for developing countries to avoid WTO obligations, as is commonly the case today.

Monitoring and Review

Even where necessary regulatory and institutional frameworks exist for the pursuit of a desired objective, the absence of a monitoring and review system could undermine attaining that objective. Underscoring the importance of reporting requirements in promoting accountability and the effectiveness of treaty obligations, Rolland surmises that they could be useful to monitor and improve compliance with obligations; gather information that may be used for reforming a particular rule or agreement; and assist in the design and delivery of effective capacity building support to deserving beneficiaries.[235]

Again, this thesis draws from China's experience with the implementation of the Montreal Protocol to propose the introduction of such a system in the implementation of SDT in the WTO. If developing countries have ten years as transitional period under an agreement to comply with its general provisions, there should be a mechanism to monitor and report their progress (a sort of capacity calibration) towards compliance within the ten-year period. The purpose of such mechanism will be to give an early warning sign if any developing country is not on course to take on a specific obligation at the end of the transition period. Once an early warning sign is given, the problem can then be tackled timeously. If it requires that on-going assistance be redirected or modified, that is done. Even in the event that an extension of the transition period becomes necessary to address the problem, such extension period will not be arbitrarily set but etched on an objective basis. In sum, continuous financial and technical assistance within a transition period should be linked to meeting certain benchmarks during a country's progress towards complying with treaty obligations. The reporting of such progress by the developing country itself could well be a mandatory requirement in a review process aimed at verifying such claim.

235 Rolland, S. E. (2012). *Development at the WTO,* above n 174 at128.

A review mechanism for SDT implementation in the WTO could indeed be fashioned after that in the Montreal Protocol.[236] A mechanism that monitors and reviews developed countries' compliance with SDT provisions in a peer review process coordinated by perhaps a dedicated sub-Committee of the WTO's Trade and Development Committee could be helpful in improving compliance.[237] The aggrieved developing country alleging denial of SDT and the developed country whose action is under review also attends the relevant meeting of the sub-Committee, with the latter required to provide justification on how the measure or action in question complied with the particular SDT provision. Indeed, the effectiveness of SDT provisions would be enhanced once developed countries are put under obligation to provide justification on how any contested measure or action of theirs is not in breach of their obligation to consider the 'special needs or situation of developing countries'. Once a decision is reached, one way or the other, the sub-Committee should aim to take a conciliatory approach as far as the parties are concerned. This could work best in assisting them to comply with their obligations as the evidence in the WTO indicates that there is no way to compel a member that has been found to violate its obligations to compensate the wronged partners, not even under the WTO Dispute Settlement Understanding.[238] Here again, the thesis draws from the experience of the successful implementation of the Montreal Protocol. The Protocol's compliance procedure was designed from the outset as a non-punitive procedure. It prioritized helping non-compliant countries back into compliance. Financial assistance was made available to developing countries to implement short-term action plans to get them back into compliance, as necessary.

3.7 Conclusion

It should be iterated that the reference to China's compliance with the Montreal Protocol as a case study in this thesis is essentially for the purpose of drawing lessons on how differential treatment could shape strategies to facilitate compliance to treaty obligations and strengthen the confidence of parties. The thesis does not concern itself with the various debates on why the Protocol implementation was so successful (most of which border on showing that compliance was made unduly easy by some external

236 Under the Montreal Protocol, an Implementation Committee monitors compliance by the Parties in a peer review process, with the Party under review participating in the relevant meeting of the Committee. The Parties agreed to their compliance with the Protocol's obligations being scrutinised by the Committee and that such scrutiny may be triggered by a Party or by the Secretariat. An Executive Committee of seven developed and seven developing countries, chosen by the parties on an annual basis, reviews the report of the Implementation Committee. See Szell, P. (1998). The Montreal Protocol: A New Legal Model for Compliance Control. In *Protecting the Ozone Layer* (pp. 91-98). Springer, Boston, MA.

237 Precedent for such peer-to-peer accountability in global governance also exist in the Universal Periodic Review (UPR) in human rights regimes and the novel face-to-face account-giving processes within the United Nations Framework Convention on Climate Change (UNFCCC), referred to as UNFCCC transparency arrangements (also known earlier as 'measuring, reporting and verification (MRV) systems'). See Gupta, A., Karlsson-Vinkhuyzen, S., Kamil, N., Ching, A., & Bernaz, N. (2021). Performing accountability: face-to-face account-giving in multilateral climate transparency processes. *Climate Policy*, *21*(5), 616-634.

238 Reich, A. (2018). The effectiveness of the WTO dispute settlement system: A statistical analysis. In *Transnational Commercial and Consumer Law* (pp. 1-43). Springer, Singapore.

factors such as changing market conditions for ODS and the availability of cheaper alternatives).[239] It however, acknowledges that the implementation of the Protocol offers important insights into how to overcome a number of compliance-related challenges that most multilateral regimes face, including how to promote compliance and manage non-compliance, how to strengthen commitments over time, how to make the costs of implementation affordable, and finally, how to promote the policy changes needed to achieve the goals the regimes were intended to achieve.[240]

China's experience with Montreal Protocol implementation demonstrates how developing countries could take advantage of differential treatment provisions in WTO agreements to facilitate their compliance with their treaty obligations, hence, reap the benefits of their participation. Rather than exemptions and opt-outs or merely throwing preferences at them, developing countries could be better assisted if SDT is designed in such a way as to support these countries to build necessary capacities to implement WTO agreements. The assumption is that developing countries, just like developed countries, enter into international trade agreements on the basis that the implementation of such agreements will yield them some benefits.[241] Going by this assumption, it is antithetical for SDT to be used under any guise, to shield these countries from their trade liberalization commitments as WTO members.

Admittedly, the capacities of developing countries to successfully implement trade agreements, does vary according to their levels of development. While some may lack basic understanding of the agreements, some other may lack the institutional or regulatory capacities to implement, yet others may face the challenge of aligning their international trade obligations with national legal frameworks or even their national development plans. SDT aimed at helping developing countries to benefit from implementing trade agreements will have to be directed at addressing the specific capacity needs of countries in other to be effective. Since capacity needs among developing countries differ according to their levels of development, further differentiation among them stands out as an approach to better identify those who need assistance or SDT and to ensure that only such ones get it.[242] As the case of China under the Montreal Protocol demonstrates, linking the provision of assistance (financial or technical) to a developing country's continuous improvement on its implementation of its trade treaty obligations offers a pragmatic approach to redesigning SDT delivery.

239 For details of the debate, see Albrecht, F., & Parker, C. F. (2019). Healing the ozone layer: The Montreal Protocol and the lessons and limits of a global governance success story. In *Great policy successes* (pp. 304-322). Oxford University Press.

240 Ibid.

241 See Wright, W. (2020). How trade openness can help to 'deliver the poor and needy'. *Economic Affairs*, *40*(1), 100-107.

242 Michalopoulos, C. (2000). The role of special and differential treatment for developing countries in GATT and the World Trade Organization, p. 34, available at https://ssrn.com/abstract=630760. Accessed 18 December 2021.

4

Chapter 4

Re-examining eligibility criteria for special and differential treatment in the WTO

4.1 Introduction

As this thesis has generally maintained in preceding chapters, SDT is the WTO's own tool to address the peculiar development needs of its developing country members.[1] However, since there are no agreed criteria among the membership for defining developing country status, self-designation became the established practice. The implication of this is that no basis exists for distinguishing among developing countries in terms of their varied levels of development or their development needs.[2]

Since SDT provisions are generally formulated as entitlements for developing countries, all members of the broad and ill-defined category of developing countries are invariably and automatically considered eligible for SDT, excluding in a few cases where SDT provisions contain eligibility criteria.[3] In such cases, only those developing countries that meet the eligibility criteria can access SDT. Such differentiation among developing countries suggests how the WTO could maintain an appropriate balance of rights and obligations among its members amidst efforts to increasingly link levels of development to depth of policy commitments.[4] However, its developing members, including influential economies like China, India and Brazil which account for significant shares of world trade, continue to defend self-designation as the most appropriate means of determining a country's development needs. On the other hand, the developed members insist they can no longer give the same concessions to members at different levels of development. In their view, self-designation is too chaotic, and an institutionalized graduation mechanism is indispensable if SDT is to achieve the objective of facilitating the integration of developing countries into the multilateral trading system.[5] This thesis aligns with the view that the combination of self-designation and largely unfettered access to SDT in a world where countries have significantly different development needs has proven not only to be politically unacceptable to WTO members, but it also undermines the ability of SDT to respond to the diverse development needs.[6] Hence, it is urgent to define access to SDT on a more objective basis.

It is against this background that this chapter of the thesis sets out to examine existing provisions, within and outside the WTO, which allow and limit access to

1 See Simo, R. Y. (2021). Developing Countries and Special and Differential Treatment. In International Economic Law: (Southern) African Perspectives and Priorities. 233-281. Kugler, K. & Sucker, F. (eds.). Juta & Co. Ltd.

2 Low, P. (2021). Special and differential treatment and developing country status: Can the two be separated?. In Hoekman, B., Xinquan, T., & Dong, W. (eds), *Rebooting Multilateral Trade Cooperation: Perspectives from China and Europe*, CEPR Press, London. See also Bacchus, J., & Manak, I. (2021). *The Development Dimension: Special and Differential Treatment in Trade*. Routledge.

3 Ibid.

4 Low, P. (2021). Special and differential treatment and developing country status, above n 2 at 77.

5 Poensgen, I., & Inan, C. (2020). Reforming the WTO, part 5: how should the burden be shared?. *LSE Brexit*, available at http://eprints.lse.ac.uk/104753/1/brexit_2020_05_18_reforming_the_wto_part_5_how_should_the_burden_be.pdf. Accessed on 6 January 2022.

6 See generally. Low, P. (2021). Special and differential treatment and developing country status, above n 2; Bacchus, J., & Manak, I. (2021). *The Development Dimension*, above n 2; Hoekman, B., & Wolfe, R. (2021). Reforming the World Trade Organization: Practitioner perspectives from China, the EU, and the US. *China & World Economy*, *29*(4), 1-34; Weinhardt, C., & Schöfer, T. (2021). Differential treatment for developing countries in the WTO: the unmaking of the North–South distinction in a multipolar world. *Third World Quarterly*, 1-20.

SDT or other reflection of differential treatment based on some predefined eligibility criteria. Essentially an interrogation into differentiation and the graduation mechanism as established in these provisions, the chapter reviews how flexibilities for developing countries in the WTO could be redirected away from open-ended exemptions toward a needs-driven and evidence-based approach that would ensure that SDT becomes as targeted as possible. Cottier admonishes that graduation should no longer just depict the classification or categorization of countries but should rather be about the progressive application of single and uniform rules in a manner that takes into account different levels of social and economic development as a matter inherent to the rule itself.[7] This guides the chapter endeavour, which is to gain insight into the design and use of SDT access criteria.

The rest of the chapter is structured as follows: Section 4.2 examines the use of eligibility criteria to define countries access to SDT in the Agreements on SCM, Safeguards, SPS and the TRIPS. All these Agreements effectively differentiate between developing countries on the basis of objective criteria. It also reviews the effectiveness of the graduation mechanism established in these Agreements. Section 4.3 examines the concept of differentiated responsibility between developed and developing countries under the Montreal Protocol, along-with the special situation of LDCs in the UN system to learn lessons on establishing a credible graduation mechanism, particularly, if and how social, economic and human indicators may be linked to the assumption of legal obligation in a manner that supports differentiation but precludes discrimination. Section 4.4 takes the next step in reviewing how to define thresholds for graduation using the example of 'widespread copying' of rental rights in the TRIPS Agreement. Drawing lessons from the various analyses in the chapter, section 4.5 sets out some general considerations for re-setting SDT access and graduation mechanisms in the WTO. Section 4.6 sums up the chapter.

4.2 Accessing SDT in selected WTO agreements

4.2.1 The agreement on subsidies and countervailing measures

In the absence of a preamble in the SCM Agreement, the thesis resorts to WTO jurisprudence to decipher the objective of this agreement. The WTO Appellate Body in *US-Lumber CVDs Final*[8] held that the object and purpose of the SCM Agreement is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while recognizing at the same time the right of members

7 Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law. *Journal of International Economic Law*, *9*(4), 779-821 at 794.

8 Appellate Body Report, *United States–Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (WT/DS257/AB/R, adopted on 17 January 2004).

to impose such measures under certain conditions.[9] Article 1 of the SCM Agreement deems a subsidy to exist upon a finding of the existence of two distinctive elements:

a. a financial contribution by a government or any form of income or price support in the form of GATT Article XVI;
b. the existence of either such financial contribution or income or price support in (a) confers a benefit.

Accordingly, for a subsidy to exist, a government must have transferred something of economic value to the advantage of a recipient.[10] The subsidy must also be specific for it to be actionable.[11] Article 1 merely defines the concept of subsidy without itself imposing any obligation with respect to subsidies. The Agreement does not ban all specific subsidies as it essentially aims at targeting those subsidies that are trade distortive. Article 3 of the Agreement targets two types of subsidies as being trade distortive:

a. subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance;
b. subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

The first, which is typically referred to as 'export subsidies' are subsidies contingent upon export performance including all practices identified in the Illustrative List attached to Annex 1 of the Agreement.[12] *De facto* export subsidies exist when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The second type which is usually referred to as 'import substitution subsidies' often take the form of local content requirements. Although the phrasing of Article 3.1(b) seems to limit the idea of local requirement to 'goods only', local content requirements often comprise not only goods, but also other costs items. The WTO Appellate Body in *Canada–Autos* has indeed affirmed that the provision of Article 3.1(b) covers both *de jure* and *de facto* variants.[13] In clear terms, WTO members are prohibited from maintaining these two types of subsidies.[14]

9 Ibid, at para. 64. The Appellate Body referred to its decision in *US–German Steel CVDs* that described the main object and purpose of the SCM Agreement as being: "to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures". See Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, (WT/DS213/AB/R, adopted on 19 December 2002), para. 73.

10 Appellate Body Report, *US–Lumber CVDs Final*, above n 8 at para. 51.

11 Article 1.2 of the SCM Agreement.

12 Annex I outline 11 types of export subsidies, including direct export subsidies to currency retention schemes, exemptions, remissions or deferrals of direct taxes on exports, excessive duty drawback, and provision of export credit guarantee or insurance programmes at premium rates or export credits below commercial rates.

13 Appellate Body Report, *Canada–Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 142.

14 Article 3.2 of the SCM Agreement.

In according SDT to developing countries, Article 27 of the SCM Agreement differentiates among developing countries– Annex VII countries, and 'other developing countries.' The Agreement excludes Annex VII countries, which by description are all LDCs and non-LDCs whose GNP per capita is yet to reach US$1000, from the application of the prohibition on export subsidies contained in Article 3.1(a). Other developing countries had the benefit of an 8-year transition period within which they were obligated to phase out their export subsidies in a progressive manner. However, if a developing country sought an extension of the 8-years period within which to phase out its subsidies, it was expected to enter consultations with the Subsidies Committee no later than 31 December 2001. The Committee would determine whether an extension of this period was justified, after examining all the relevant economic, financial and development needs of the developing country in question.[15] Interestingly, subsection 5 of Article 27 subjects Annex VII countries to the possibility of graduation out of that category on the basis of a criterion of 'export competitiveness'. It provides that:

> ***A developing country Member which has reached export competitive-ness in any given product shall phase out its export subsidies for such product(s) over a period of two years***. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years. *(**Emphasis added**)*.

The subsection makes clear that whenever an Annex VII country reaches export competitiveness in respect of any product or products, the obligation to phase out export subsidies in respect of such product or products arises, that is, kicks in at that time. Such Annex VII country has two years from that time to comply with the phase out obligation. Also instructive is subsection 5 of Article 27, on the point that other developing countries who are entitled to an 8-year transition period in the first instance, in order to phase out export subsidies, may be required to phase out subsidies earlier on the grounds that it reached export competitiveness in a given product in less than eight years. Illustratively, developing country A is ordinarily entitled to an 8-year transition period to phase out export subsidy in respect of its product XY. If it however reaches the export competitiveness threshold in respect of product XY within five years, then the obligation to phase out export subsidy within two years from that point will kick in, by virtue of the sub-section. In effect, the scenario would mean that such developing country will be expected to phase out its export subsidy within seven years.

Export competitiveness in a product exists if a developing country's exports of that product have reached a share of at least 3.25 percent in world trade of that product

15 Article 27.5 of the SCM Agreement.

for two consecutive calendar years.[16] Export competitiveness may be self-declared or determined on the basis of a computation by the WTO Secretariat upon the request of any member. In other words, while a developing country may self-declare such status, any other WTO member, whether developing or developed, reserves the right to request the WTO Secretariat to conduct an assessment with a view to determine export competitiveness in respect of a particular developing country.

4.2.1.1 Criteria for differentiation

The SCM Agreement clearly differentiates among developing countries in the WTO for purposes of SDT by categorizing them into two distinct groups – Annex VII and 'other developing countries' – on the basis of the GNP per capita criterion that can be objectively determined through mathematical computation.[17] While the earlier group is composed of those developing countries whose GNP per capita is yet to reach US$1000, the latter group is composed of those developing countries whose GNP per capita is at least US$1000. There is no room for any developing country to arbitrarily self-select which category it falls into.

Adopting such approach to the categorization of WTO membership can potentially reduce the political intrigues and costs associated with negotiations on accession to the WTO for countries designating as developing countries.[18] An instructive point here is that categorizing or differentiating among developing countries on the basis of objective criteria does not support pre-conceived or notional grouping of countries for SDT. All pre-qualifying countries, in this case all developing countries, whether otherwise described as LDCs, small and vulnerable economies (SVEs), economies in transition, low-income countries (LICs) etc., are potentially entitled to SDT. However, when it comes down to which countries should actually be allowed access to a specific SDT provision, it becomes pertinent to be able to objectively differentiate among them. The purpose is to identify those countries that justifiably need the SDT, not just based on their designation as developing countries, but on the existence of an identifiable development concern requiring attention. This could see countries that are otherwise categorized as LDCs fall in the same category as some non-LDCs as is the case with the Annex VII category. Keck and Low underscored this point when they suggested that while LDCs may form the core of a group eligible for SDT, we could also see the automatic admission of other countries with specific development needs into the same group.[19]

16 See Article 27.6 of the SCM Agreement.

17 The GNP per capita is a measure of the total output of a country that takes GDP and divides it by the number of people in the country.

18 See Hu, W. (2019). China as a WTO developing member, is it a problem?. *CEPS Policy Insights*, (2019/16), available at https://www.ceps.eu/wp-content/uploads/2019/11/PI2019_16_WH_China-as-a-WTO-developing-member.pdf. Accessed 6 January 2022.

19 See Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO: Why, When and How?* p. 8, Staff Working Paper ERSD-2004-03, available at http://www.wto.org/english/res_e/reser_e/ersd200403_e.htm. Accessed 18 December 2021. See also Rolland, S. E. (2012). *Development at the WTO*. p. 291. Oxford University Press.

4.2.1.2 Determining transitional time frames

a. Annex VII countries

It is worthy of note that Article 27 of the SCM Agreement, while excluding Article VII countries from the prohibition of export subsidies obligation, does not do so with finality. It acknowledges that Annex VII countries could in a matter of time gain the status of 'other developing country', at which point they would be expected to assume the same obligation as the 'other developing countries'– having acquired that status. This is very much in accordance with the WTO Appellate Body's endorsed principle of treating similarly-situated developing countries similarly.[20] More significant however, is the issue of how to determine the time it would take an Annex VII country to attain the status of 'other developing country'. Article 27 does not specify any number of years as sufficient to reach the determination that such change of status has been successful attained by an Annex VII country. Rather, the objective criterion of export competitiveness is adopted as a basis for reaching any such determination. Will a particular Annex VII country reach export competitiveness in respect of a product in three years, five years, eight years, ten years, or even less or more? A simple mathematical computation of a country's export share in world trade of that product, to determine whether such share reaches the benchmark of at least 3.25 percent in two consecutive calendar years, will give an answer to the question. Implicitly, the answer could be different from one Annex VII country to another and from product to product.

The significant point here is that the transition time frame at the end of which an Annex VII country is presumed to have met the criterion set for graduation is not pre-set. However, it can only be determined in reverse, that is, by a computation of the time it actually takes a country to meet the criterion of export competitiveness. Realistically, time frames would vary for countries on the basis of set criteria, possibly, countries with lower base capacities (invariably, at lower development levels) get longer time frames than those with higher base capacities (invariably, at higher development levels).[21] The availability or otherwise of appropriate technical assistance and capacity building to such lower-base capacity countries in bracing up to their obligations could also impact the length of time it takes them to reach a set threshold for graduation.[22]

b. 'Other developing countries'

The worthy approach of Article 27 to the determination of transition time frames as deduced above is in sharp contrast to the arbitrary way the time frame for 'other developing countries' is set. Without any measurable basis, an 8-year transition period

20 See WTO Appellate Body Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (7 April 2004), paras. 153-154.

21 Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO*, above n 19 at 27-28.

22 See Shaffer, G. (2005). Can WTO technical assistance and capacity-building serve developing countries. *Wis. Int'l LJ*, *23*, 643; Irish, M. (2019). The Trade Facilitation Agreement: Is the Doha Development Round Succeeding. *Trade L. & Dev.*, *11*, 38.

is set within which these countries are expected to phase out their export subsidies.[23]

Setting transition time frames in such subjective manner has the risk that the period is insufficient for developing countries to build the necessary capacity to take on additional or stricter obligations. Objectively speaking, if at the end of a transition period a country is yet to acquire the capacity envisage as necessary for the implementation of a rule, exposing such country to the rule, nevertheless, would only see such country in a perpetual breach of the rule. On the other hand, even when such subjectively set time frame is unduly long to be deemed sufficient, the absence of measurable criteria against which countries' progress towards reaching the graduation threshold can be evaluated, remains a gap. It means that there is no objective basis for determining whether necessary capacity was acquired by a country during the transition period and when exactly it was achieved, if that is the case.

4.2.2 The agreement on safeguards

The Agreement on Safeguards or the Safeguards Agreement sets forth the rules for application of safeguard measures pursuant to Article XIX of GATT 1994. The preamble of the Safeguards Agreement sets out its aim as being to:

(a) clarify and reinforce GATT disciplines, particularly those of Article XIX;
(b) re-establish multilateral control over safeguards and eliminate measures that escape such control, and;
(c) encourage structural adjustment on the part of industries adversely affected by increased imports, thereby enhancing competition in international market.

Article 1 of the Safeguards Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994. This implies that any measure for which the coverage of Article XIX (which allows suspension of GATT concessions and obligations under the defined 'emergency' circumstances) is invoked must be taken in accordance with the provisions of the Safeguards Agreement.[24] The Agreement is explicit on its non-application to measures taken pursuant to other provisions of GATT 1994, to other Annex 1A Multilateral Trade Agreements, or to protocols and agreements or arrangements concluded within the framework of GATT 1994.[25]

GATT Article XIX is the basic GATT provision dealing with emergency safeguards– "emergency action on imports of particular products". In practice, Article XIX has been

23 Article 27.2 of the SCM Agreement.
24 WTO Secretariat, Trade Topics – Technical information on safeguard measures, available at https://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm. Accessed 6 January 2022.
25 See Article 11.1(c) of the Safeguards Agreement.

used sparingly but is much abused.[26] For instance, it gave rise to such 'grey area' measures like voluntary export restraints, orderly marketing agreements and similar other measures. GATT Contracting Parties had been increasingly applying a variety of the so-called 'grey area' measures to limit imports of certain products. These measures were not imposed pursuant to Article XIX, and hence were not subject to multilateral discipline through the GATT, and the legality of such measures under the GATT was doubtful.[27]

Hence, the negotiation of the Safeguards Agreement during the 1986–1994 Uruguay Round was mainly driven by the need to re-establish multilateral control over safeguards and eliminate measures that escape such control. The Agreement clearly prohibits such 'grey area' measures, and contains specific provisions eliminating those that were in place at the entry into force of the WTO Agreement.[28] Safeguard measures are defined as 'emergency actions' with respect to increased imports of particular products, where such imports have caused or threaten to cause serious injury to the importing member's domestic industry.[29] In applying safeguard measures or in reaching a decision to do so, a WTO member must adhere to the following general principles of the Safeguards Agreement: such measures must be temporary, they may be imposed only when imports are found to cause or threaten serious injury to a competing domestic industry, they must be applied on a non-selective basis, they must be progressively liberalized while in effect, and, the member imposing them must pay compensation to the members whose trade is affected.[30]

Article 7.1 of the Safeguards Agreement obliges members to apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period will ordinarily not extend beyond four years. Under subsection 4 of Article 7, safeguard measures exceeding one year's duration must be progressively liberalized at regular intervals during the period of their application. Additionally, if the duration of the measure exceeds three years the member applying the measure must review the situation no later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. Under Article 10, measures that were in existence before the Agreement came into force must be terminated within five years of the entry into force. A combined reading of subsections 2 and 3 of the same Article 7 clearly suggest that the initial period of four years for the application of a measure may be extended to a total period not exceeding eight years, provided that:

a. such a measure continues to be necessary to prevent or remedy serious injury, and,
b. there is evidence that the domestic industry is adjusting.

26 WTO Secretariat, Trade Topics – Technical information on safeguard measures, above n 24.
27 Ibid.
28 See Articles 10 and 11 of the Safeguards Agreement.
29 WTO Secretariat, Trade Topics – Technical information on safeguard measures, above n 24.
30 See generally, Articles 4-8 of the Safeguards Agreement.

In setting the time frame for the use of a safeguard measure by a member, nothing on the face of the Safeguards Agreement, particularly Article 7, suggests an objective basis for establishing the initial period for a safeguard measure at a maximum of four years. Neither is there any such basis to justify the sufficiency nor otherwise of the 8-year cap that is set in the case that an extension is obtained after the initial period. However, it is interesting to note that the reference by sub-section 2 of Article 7 of the Agreement that *"the measure continues to be necessary to prevent or remedy serious injury"*, sets an objective basis for determining the justification for an extension. Arguably, resort must be had to economic data relating to the period subsequent to the initial imposition of the measure to be able to arrive at such conclusion. Also, the requirement by the same sub-section for existing *"evidence that the industry is adjusting"* is also one that is demonstrable by the use of economic data.

Notwithstanding, the flaw in setting time frames or basing an extension of a time frame in this manner will manifest in a situation where the analysis of economic data indicates that although an affected industry is adjusting, the safeguard measure used continues to be necessary to prevent or remedy serious injury, despite having been in place for eight years. At that point, we find that even when available evidence justifies the continuation of the measure, the strict provision of the Agreement limiting the total period for which a safeguard measure can be used to eight years makes any continuation unfeasible.[31] If a way were to be found around this, it would be through the subjective processes of informal negotiations and political horse trading.[32]

4.2.2.1 SDT for developing country members

Article 9 of the Safeguards Agreement accords developing countries SDT in two different respects: in respect to the application of other members' safeguard measures vis-à-vis developing countries, and in respect to the application of developing countries' own such measures. Safeguard measures shall not be applied against imports from a developing country member as long as its share of imports of the product concerned in the importing member does not exceed 3 percent, provided also that developing country members with less than 3 percent import share of the product collectively account for no more than 9 percent of total imports of the product concerned.

On the other hand, developing countries are allowed additional flexibility in terms of the duration of safeguard measures applied by them. They may extend the application of a safeguard measure for an extra two years beyond the maximum eight years permitted in Article 7.3. In effect, they are permitted to apply such measures for a total of up to ten years.[33]

31 This is without prejudice to Article 9.2 of the Safeguards Agreement which provides SDT in favour of developing countries – allowing them the use of a safeguard measure for a total of ten years in similar circumstances.

32 See Low, P. (2021). Special and differential treatment and developing country status, above n 2 at 85-86.

33 See Article 9.2 of the Safeguards Agreement.

4.2.2.2 Criteria for differentiation

As is the case with the SCM Agreement, the Safeguards Agreement differentiates among developing countries in its bid to provide SDT to those countries that need it most. On the one hand, are those developing countries whose individual share of the product concerned in an importing country does not exceed 3 percent or not more than 9 percent share when all the qualifying developing countries are taken collectively.[34] For the purpose of making a distinction, the thesis refers to these ones as Category A countries. Safeguard measures shall not be applied against a product originating in a Category A country.[35] On the other hand, are 'other developing countries' that do not meet the criteria for Category A countries, to the extent that they exceed 3 percent threshold mark for import, or 9 percent, if considered collectively. The thesis refer to these ones as Category B countries.

Instructively, economic data is used as criteria to differentiate among developing countries and implicitly, as criteria for graduation. When the share of a Category A country increases above the 3 percent mark, the country automatically loses the privilege of exemption from safeguards. Category B countries are not allowed to access SDT *ab initio* as their share of import is already above the given threshold mark. The use of economic criteria obviates any form of arbitrariness or volatility in making decision as to which country is eligible for SDT or which country has met the threshold mark and hence, should be graduated.

4.2.2.3 Determining transition time frame:

An intriguing question in respect to transitional time frames under the Safeguards Agreement is how can we determine when a Category A country ought to graduate to Category B? Put differently, how long would it take for such transition or evolution to happen? Instructively, Article 9 does not arbitrarily set a time frame. Rather, it sets a threshold mark which, whenever reached by a Category A country, would automatically signal its graduation into Category B, hence becoming subject to safeguard measures by other countries. The length of time it may take Category A countries to reach the threshold mark may differ from country to country depending on such factors as the base capacity or development level of each country, or even market access considerations.[36] Impliedly here, it is only when a Category A country has reached the threshold mark that we can now look back to determine the actual time frame it took to move from being a Category A country to reach the mark and consequently, be graduated into Category B.

It is in the additional flexibility given to developing countries in terms of the duration of safeguard measures applied by them that this thesis finds a lack of transparency and predictability. Article 9.2 of the Safeguards Agreement is emphatic that developing

34 See Article 9.1 of the Safeguards Agreement.

35 Ibid.

36 See Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law, above n 7.

countries *shall have the right* to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period of eight years permitted in Article 7.3. As discussed above under the general case with Article 7.3, there is no objective basis to justify as sufficient or otherwise the two additional years on the 8-year cap to extensions by developing countries in applying safeguards. Even the requirement of necessity of the measure which could serve as justification for the continued application of the measure seems to be absent in this case, having regard to the wording of the Article. It gives developing countries the right to extend the period of application of a safeguard measure without reference to the requirement in Article 7.3 that *"the measure continues to be necessary to prevent or remedy serious injury"* and to have demonstrable *"evidence that the industry is adjusting"*. The additional flexibility provided by Article 9.2 is susceptible to abuse as a country could easily hide under its cover to continue to apply safeguard measures even when there is evidence that it is no longer necessary.

4.2.3 The agreement on the application of sanitary and phytosanitary measures

The SPS Agreement regulates the conditions under which national regulatory authorities may set and enforce health and safety standards that directly or indirectly affect international trade. Article 1 of the Agreement makes it clear that it applies to any measure, regardless of the specific form it may take, which is adopted with the aim to protect consumers and animals from food and feed-borne risks and protect consumers, animals and plants from pest-related or disease-related risks.[37] In the case of food safety, for example, the SPS Agreement applies to risks deriving from additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.[38]

Article 2 of the Agreement recognizes the right of each country to adopt SPS measures for the protection of human, animal or plant life or health, based on the level of risk each country deems appropriate. In trying to ensure that these measures are not used for protectionist purposes, it imposes a number of obligations, including:

a) The obligation that any SPS measure must be based on scientific principles and not be maintained without sufficient scientific evidence,
b) The obligation to base SPS measures either on a relevant international standard or on a scientific assessment of the risk,
c) The obligation to apply regulations only to the extent necessary to protect human, animal or plant life or health, and,
d) The obligation not to arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail.

37 Read together with Annex A, particularly para. 1 of the SPS Agreement.
38 The distinction between the two categories of risk, i.e. food-borne risks and pest or disease risks is important, since the kind of risk assessment to be conducted is different for each of these risk categories. See Article 5 (I), (2) and (3).

The requirement under Article 2.2 that SPS measures have a scientific basis and cannot be maintained without sufficient scientific evidence has been described as the cornerstone of the SPS Agreement.[39] Article 5.1 on risk assessment underscores this by requiring members to ensure that any SPS measure put in place to identify the likelihood of risk or to determine what requirement may reduce or eliminate that risk must be based on scientific evidence. The WTO Appellate *Body in EC–Hormones*[40] explained that the requirement for SPS measures to be based on risk assessment requires a rational relationship between the measure and the risk assessment. In its words:

> Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the SPS Agreement, requires that the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake. The requirement that an SPS measure be "based on" a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment.[41]

Article 3.1 of the SPS Agreement encourages members to base their SPS measures on international standards, guidelines and recommendations, where these exist and all such national standards which conform with international standards are deemed WTO-consistent.

4.2.3.1 Special and differential treatment for developing countries

Article 10 of the SPS Agreement provides for special consideration for developing countries, in particular offering them time-limited exemptions from some of the strict obligations of the Agreement. The relevant sub-sections of Article 10 read as follows:

1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.
2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.
3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is

39 UNCTAD. (2005). Training Module on the WTO Agreement on Sanitary and Phytosanitary Measures. United Nations Publications. p. 5, available at https://unctad.org/system/files/official-document/ditctncd20043_en.pdf. Accessed 6 January 2022.

40 Appellate Body Report, *EC-Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998.

41 Ibid at para. 193.

> enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.

Of particular note are subsections 2 and 3 on phased–in introduction of measures and time limited exceptions, respectively. Under subsection 2, developing countries are encouraged, not obliged, to allow developing country members longer time frames for compliance with new SPS measures, where the importing country's appropriate level of protection allows scope for this. The Doha Decision on Implementation clarifies that "longer time frames for compliance" shall be understood to normally mean a period of not less than 6 months.[42] Under subsection 3, the SPS Committee may grant developing countries, upon request, specified, time-limited exceptions from all or some of their obligations under the Agreement.

4.2.3.2 Criteria for differentiation

Neither subsections 2 nor 3 of Article 10 of the SPS Agreement differentiates among developing countries for purposes of the application of the special provisions. The reference to the broad category of developing country members by both subsections must be read to include the LDCs as beneficiaries. It cannot be overemphasized that the broad category of developing country members in the WTO lacks any objective criteria upon which it is based. This is without prejudice to the LDCs' sub-category. The immediate suggestion that arises is that developed countries do not feel obliged to accord this broad category of developing countries the special consideration that is contemplated in the provision. In other words, its application is fraught with unpredictability and uncertainty. This explains the several proposals by members to enhance the transparency of the procedure under Article 10 for SDT in favour of developing countries.[43]

4.2.3.3 Determining transition time frame

Article 10 of the SPS Agreement does not provide any objective basis to determine the circumstances that could warrant 'longer time frames' for a developing country to comply with new SPS measures or that which could justify time-limited exemptions of a developing country from all or some of its obligations under the Agreement. Being able to determine such circumstances is important as they may constitute justifiable

42 WTO. (2001). Doha Ministerial Decision on implementation-related issues and concerns, WT/MIN (01)/17, 20 November, para. 3.1.

43 See WTO. (2002). Enhancing transparency of special and differential (S&D) Treatment within the SPS agreement. G/SPS/W/127, 30 October; WTO. (2004). Procedure to enhance transparency of special and differential treatment in favour of developing country members. Decision by the SPS Committee. G/SPS/33 2 November; WTO. (2009). Procedure to enhance transparency of special and differential treatment in favour of developing country members. Decision by the SPS Committee. G/SPS/33/Rev.1, 18 December.

grounds for not just accessing SDT but also for when to limit such access.[44] The only certain element about the 'longer time frames' is that their duration must be at least 6 months, as clarified by the Doha Decision on Implementation. It is completely at the discretion of the importing developed country member to decide whether the minimum six months period or a longer one is given. The situation is the same regarding a request by a developing country for a time-limited exception. The SPS committee is at liberty to take any decision on the request, at its discretion.

4.2.4 The agreement on trade-related aspects of intellectual property rights

The TRIPS Agreement establishes harmonized, minimum standards of intellectual property protection for copyright and related rights, trademarks, geographic indications, patents, protection of new varieties of plants, layout designs of integrated circuits, and undisclosed information including some trade secrets and test data.[45] It also provides for minimum enforcement provisions in respect of its coverage subjects.[46]

Unlike most WTO agreements, the TRIPS Agreement did not make any distinction as to levels of development in setting out obligations of members. In what has been described as a clear case of 'one size fits all', it sets the same minimum rules for IPRs protection.[47] For instance, in the cases of patents, trademarks and copyrights, all members are obliged to give the same level of protection to all patented products. except that the timing of implementation of the rules differs through the provision of longer transition periods for developing countries and LDCs.[48] The Agreement provides for two non-binding provisions, concerning commitments by developed countries to promote technology transfers and technical and financial assistance to developing countries.[49] There are also some aspects of the Agreement which provide flexibility in its implementation at the national level by different countries, including in regard to the measures that could be taken to mitigate negative impacts on health outcomes.[50] Although these flexibilities can be particularly useful to developing countries, for instance in times of public health emergencies, they are however available to all members and so are not a form of SDT.

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44 See Rolland, S. E. (2012). *Development at the WTO*, above n 19 at 291-292.

45 See Article 27.1 (standards of patentability and non-discrimination requirement), Article 28 (exclusive rights of patent holders), Articles 29 and 39.3 (disclosures) and Article 33 (patent term).

46 See Articles 41-17

47 Michalopoulos, C. (2003). *Special and differential Treatment of developing Countries in TRIPS*. TRIPS Issues Papers No. 2, available at https://www.quno.org/sites/default/files/resources/Special-Differential-Treatment-in-TRIPS-English_0.pdf. Accessed 22 April 2022.

48 Article 27.1 of the TRIPS obliges all WTO members to ensure patent protection product (such as a medicine) or process (such as a method of producing the chemical ingredients for a medicine), without discriminating across the location of the invention or the field of technology, for a period not less than twenty years. Article 28 establishes the scope of protection where the patent must prevent other parties, without the patent owner's consent, from making, using, selling or importing a patented product or process; as well as making, using, selling or importing a product obtained directly from a patented process.

49 See Articles. 66.2 and 67 of the TRIPS Agreement

50 Such include 'compulsory licenses' and 'exhaustion of rights' which aim to ensure an appropriate balance between the benefits of innovation and the costs of monopoly pricing. See Articles 6 and 31 of the TRIPS agreement.

The TRIPS Agreement seeks to strike a balance between the long term social objective of providing incentives for future inventions and creation, and the short term objective of allowing people to use existing inventions and creations.[51] In the particular case of pharmaceuticals patents, this means striking a balance between mandatory protection for pharmaceutical products and processes as an incentive for continued pharmaceutical innovation on the one hand, and ensuring access to affordable pharmaceuticals, including through the production and supply of low-cost generic medicines, on the other hand.[52] Azam actually argued that the introduction of pharmaceutical patent would naturally result in increased prices of pharmaceuticals and a diminishing availability of cheap pharmaceuticals in poor countries.[53] The transitional period was thus meant to offer these poor countries some flexibility in undertaking necessary reforms to acquire the capacity to introduce pharmaceutical patents protection, while also guaranteeing access to medicines.

4.2.4.1 SDT for developing countries

In acknowledgement of the weak IPRs protection and limited enforcement capacities of many developing countries at the time the TRIPS Agreement was elaborated, one would have expected extensive SDT provisions in the Agreement. While there are a number of in-built flexibilities for countries that face some constraints in meeting their obligations under the Agreement, only very few qualify as SDT provisions in favour of developing countries.

As indicated above, the TRIPS Agreement set the same standard of obligation for all countries as far as the protection of IPRs is concerned. The only reflection of SDT in the Agreement is the extended period offered to developing countries (and the LDCs among them), within which to adapt their legislation and practices to their TRIPS obligations.[54] The Agreement, however, differentiated between developing countries and the subset of LDCs in setting transition time frames for them to assume their obligations on substantive standards for product patent for pharmaceutical. Developing countries had until 1 January 2000 (five years after the coming into force of the TRIPS Agreement) to apply the provisions of the TRIPS Agreement, including the obligations regarding the protection of process and product patents. Different provisions applied for product patents for pharmaceutical products. Those developing countries that did not grant such protection as at 1 January 2000 were entitled to an extra five-year period to introduce it.[55] Expatiating the point by linking Articles 27 and 65, the WTO Panel in *India–Patents (US)*, held that:

51 See Azam, M. (2016). *Intellectual property and public health in the developing world.* Open Book Publishers.
52 Ibid, at 140-150.
53 Ibid, at 11-12.
54 See Article 27.1 of the TRIPS Agreement.
55 See Article 65.4 of the TRIPS Agreement.

> Article 27 requires that patents be made available in all fields of technology, subject to certain narrow exceptions. Article 65 provides for transitional periods for developing countries: in general five years from the entry into force of the WTO Agreement, i.e. 1 January 2000, and an additional five years to provide for product patents in areas of technology not so patentable as of 1 January 2000. Thus, in such areas of technology, developing countries are not required to provide product patent protection until 1 January 2005.[56]

In view of the special needs and requirements of LDCs, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, they were exempted from the general requirement to become TRIPS compliant with respect to IPRs and their enforcement for a period of ten years following the entry to force of the TRIPS Agreement.[57]

The initial transition period for LDCs to apply the provisions of the TRIPS Agreement ended on 31 December 2005 and thus, implementation should have commenced on 1 January 2006.[58] However, by a decision of the Council for TRIPS on 29 November 2005, members agreed to extend the deadline to 1 July 2013, or until such a date on which a country ceases to be a LDC, whichever date is earlier.[59] The decision of the Council was based on a request by the LDC group, pursuant to Article 66.1 of the TRIPS Agreement, citing socioeconomic, administrative and financial constraints, as well as the need to create a viable technological base, as motivation for their request. Another extension was to follow on 11 June 2013, when the Council again decided to extend the deadline for LDCs to protect IPRs under the TRIPS Agreement until 1 July 2021 or when a country ceases to be a LDC, if that happens before 2021.[60] Most recently, on 29 June 2021, the Council, upon another request from the LDCs,[61] extended the transition period further until 1 July 2034 or when a country ceases to be a LDC, if that happens before 2034.[62] Like the others before it, the 2021 decision does not affect LDCs' right to seek further extensions of the transition period.[63]

LDCs also benefit from an additional transition period with regard to patent requirements for pharmaceutical products. The 2001 Doha Ministerial Declaration on TRIPS and Public Health directed the TRIPS Council to extend the period for them to

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56 Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Complaint by the United States, WT/DS50/R, adopted 16 January 1998. para. 7.27.

57 Article 66.1 of the TRIPS Agreement. The provision also mandates the Council for TRIPS to, upon duly motivated request by a LDC, extend the ten-year period as it deems fit.

58 Article 66.1 of the TRIPS mandates the Council for TRIPS to, upon duly motivated request by a LDC, extend this period as it deems fit.

59 WTO. (2005). Extension of the Transition Period under Article 66.1 for Least-Developed Country Members, (Document IP/C/40, 30 November).

60 WTO. (2013). Extension of the Transition Period under Article 66.1 for Least-Developed Country Members, Decision of the Council for TRIPS of 11 June 2013, (Document IP/C/64, 12 June).

61 WTO. (2020). Extension of the Transition Period under Article 66.1 for Least-Developed Country Members, Communication from Chad on behalf of the LDC group. (Document IP/C/W/668, 1 October).

62 WTO. (2021). Extension of the Transition Period under Article 66.1 for Least-Developed Country Members, Decision of the Council for TRIPS of 29 June 2021, (Document IP/C/88, 29 June).

63 Ibid, para. 2.

introduce pharmaceutical patent protection until 2016.[64] The Council formally adopted a decision implementing this in 2002.[65] Hence, we had the first transition period for introducing protection for pharmaceutical patents as 2002-2016. On 23 February 2015, the LDC group yet again submitted a request for extension of the waiver for LDCs with respect to pharmaceutical patents for as long as a country remains a least developed country.[66] Apart from relying on the general grounds provided by Article 66.1 of the TRIPS Agreement, that is, the "special needs and requirements of LDCs, their economic, financial and administrative constraints and their need for flexibility to create a viable technological base", the LDCs cited their continued "struggle to provide their population with prevention, treatment and care" as motivating the request.[67] They contended that "[p]atent protection contributes to high costs, placing many critical treatments outside the reach of LDCs".[68] Accordingly, it is imperative for them to "retain maximum policy space to enable them to confront their health burdens with effective and affordable strategies."[69]

On 6 November 2015, the Council on TRIPS took the decision to further extend the transition period for the introduction of protection for pharmaceutical patents until 1 January 2033 or until a country is no longer a LDC, whichever date is earlier.[70] The decision is without prejudice to future requests by LDCs for extensions.[71]

4.2.4.2 Assessing the transition periods

Put together, LDCs have been allowed a transitional period spanning over twenty years, and counting at the time of writing, to comply with their TRIPS obligations, including the obligation to establish protection for pharmaceutical patents. The thesis will now scrutinize how LDCs have used this transition periods to create a sound and viable technological base as contemplated by Article 66.1 of the TRIPS Agreement. It should be underscored that the aim of Article 66.1 in providing for a transition period to the benefit of LDCs is to allow them time to develop their national policies and economies to ensure that the eventual implementation of the Agreement will promote and not

64 WTO. (2001). Declaration on the TRIPS Agreement and Public Health, (Document WT/MIN(01)/DEC/2, 20 November).

65 WTO. (2002). Extension of the Transition Period under Article 66.1 of the Trips Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products, Decision of the Council for TRIPS of 27 June 2002 (Document IP/C/25, 1 July).

66 WTO. (2015). Request for an extension of the transitional period under Article 66.1 of the TRIPS agreement for least developed country members with respect to pharmaceutical products and for waivers from the obligation of Articles 70.8 and 70.9 of the TRIPS agreement. *Communication from Bangladesh on behalf of the LDC Group.* IP/C/W/605 (Feb. 23, 2015).

67 Ibid, paras. 1 and 7.

68 Ibid, at para. 1.

69 Ibid, at para. 6.

70 WTO. (2015). Extension of the transition period under Article 66.1 of the TRIPS agreement for least developed country members for certain obligations with respect to pharmaceutical products, Decision of the Council for TRIPS of 6 November 2015, IP/C/73 (Nov. 6, 2015).

71 Ibid, para. 2.

undermine their social, economic, and environmental well-being.[72] The intention was not merely to extend the time for compliance, *simpliciter*. A plausible inference here is that the transition periods under the TRIPS Agreement are allowed so that LDCs can utilize the time to develop the necessary technical and infrastructural capacity to move towards TRIPS compliance. It is thus no surprise that the several arguments that have been used to justify extended transition periods for LDCs have been rooted in the need for these countries to enhance their productive capacities which in turn is dependent on having a sound and viable technological base.[73]

Despite the multiple extension of transition periods for LDCs under the TRIPS Agreement, LDCs have not been able to make full use of the opportunity as their situation has not significantly changed since the first extension decision and they have not been able to develop their productive capacities, and have not beneficially been integrated into the global economy.[74] Clearly, the mere exhaustion of a transition period will not *ipso facto* confer LDCs with the necessary technological capacity to beneficially implement the general requirements of the TRIPS Agreement. For LDCs to stand a chance of emerging from such period with the necessary capacity, targeted technical and financial assistance from developed country members should have been given.[75] Relevant here is Article 66.2 of the TRIPS Agreement which requires developed country members to incentivize domestic enterprises and institutions to promote and encourage technology transfer to LDCs in order to enable them to create a sound and viable technological base. Also relevant is Article 67 of the TRIPS Agreement, which requires developed country members to provide technical and financial cooperation in favour of developing countries and LDCs in facilitating the implementation of the Agreement, including "to realize the cultural, social, technological and other developmental objectives of intellectual property protection".[76] Notwithstanding, nothing in the several extension decisions suggest a connection to the development and dissemination of technologies in LDCs or that the extended periods are supposed to be used for the purpose of technology transfer to LDCs. The transition period is simply extended on an obscure basis, and its length set without any credible consideration of an end objective or its adequacy to achieve such objective. Such shadowy approach to setting transition time frames falls short of responding to the diverse needs of developing countries [and LDCs], and of addressing the wide divergences

72 See Maulidi, W. (2018). The impact of the extensions of pharmaceutical transition period for African LDCs on the implementation of TRIPS: the case of Malawi. In WIPO-WTO colloquium papers: 2018 Africa edition (p. 82), available at Microsoft Word - 2018-Compilation-IP Africa Papers_V8.final updated with signatures (002).docx (wto.org). Accessed 1 January 2022.

73 For instance, see WTO. (2020). *Extension of the Transition Period under Article 66.1 for Least-Developed Country Members*, Communication from Chad on behalf of the LDC group. (Document IP/C/W/668, 1 October), where the LDCs cite the continued challenges they face in meeting their development goals and their aggravation by the covid-19 pandemic as frustrating the development of a sound and viable technological base and hence, justifying their request for the latest extension of the transition period.

74 Maulidi, W. (2018). The impact of the extensions of pharmaceutical transition period for African LDCs on the implementation of TRIPS, above n 72 at 81.

75 See Articles 66.2 and 67 of the TRIPS Agreement.

76 See Articles. 7 and 8 of the TRIPS Agreement.

in the structural capacities of these countries.[77] Hence, both Articles 66.2 and 67 have been described as having limited impact on the situation of LDCs.[78]

4.3 Accessing differential treatment outside the WTO

In this section, the thesis examines the application of the principle of Common but Differentiated Responsibility (CBDR) – a form of SDT – in international environmental law and the categorization of countries as LDCs under the UN system. Both offer important insights into how to objectively differentiate between countries at different levels of development and respond to needs accordingly. The CBDR principle exemplifies a shift from differential treatment for developing countries as a group to individualized differentiation between countries based on objective, issue-specific criteria. In the Montreal Protocol, it importantly demonstrates how to craft objective criteria to differentiate between countries for an effective and equitable responsibility sharing. The categorization of LDCs by the UN does not only demonstrate how to craft inclusion (eligibility) criteria for special treatment to the weakest members of the international community but also, criteria to measure their readiness for graduation from such status.

4.3.1. The Montreal Protocol[79]

CBDR is an established principle of international environmental law developed from applying the principle of equity in general international law. It seeks to introduce equity, justice, and fairness in international environmental relations by balancing countries' responsibilities to remedy global environmental problems with their right to develop.[80] The CBDR principle is defined in Principle 7 of the UNCED's Rio Declaration:[81]

> States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

77 See Low, P. (2021). Special and differential treatment and developing country status, above n 2; Gonzalez, J., Parra, M., Holmes, P and Shingal, A., *TRIPS and Special and Differential Treatment – Revisiting the Case for Applying Patent Protection for Pharmaceuticals in Developing Countries*, (2011) NCCR Working Paper No 2011/37.

78 See Maulidi, W. (2018). The impact of the extensions of pharmaceutical transition period for African LDCs on the implementation of TRIPS, above n 72. See also Dos Santos, F. (2020). Levelling the playing field to promote technology transfer and innovation in African least developed countries. *South African Intellectual Property Law Journal*, *8*(1), 35-55.

79 The Montreal Protocol on Substances that Deplete the Ozone Layer (as either adjusted and/or amended) (otherwise referred to as the Montreal Protocol) 32 I.L.M. 874 (1993), available at https://ozone.unep.org/treaties/montreal-protocol. Accessed 18 December 2021.

80 Nyekwere, E. H., & Ole, N. C. (2021). Understanding the principle of common but differentiated responsibilities and its manifestations in multilateral environmental agreements (MEAs). *Nnamdi Azikiwe University, Awka Journal of Public and Private Law*, *11*, at 270-271.

81 UNCTAD. (1992). Rio Declaration. UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992).

Drawing inspiration from this, it was no surprise that the Vienna Convention for the Protection of the Ozone Layer,[82] which has since become a role model for the notion of a framework convention, reflected the principle of CBDR. The Convention was very clear on the need to differentiate responsibilities according to capabilities by highlighting 'the circumstances and particular requirements of developing countries' in its preamble and by relating parties' general obligations to 'the means at their disposal and their capabilities'.[83] Notably, the Convention's aim of securing internationally binding regulation in respect of the emission of ozone-depleting CFCs, motivated the 1987 Montreal Protocol.

In furtherance of the objective of the Vienna Convention, the Montreal Protocol incorporates the principle of CBDR into its provisions – by administering different obligations for developed and developing states.[84] Under the Montreal Protocol, differentiated obligations imply the adoption and implementation of differing commitments for different countries while taking into account their varied circumstances and capacities, their historical contributions to CO_2 emission and their specific development needs.[85] Accordingly, the Protocol allowed developing countries a longer time frame to phase out controlled substances and, also, a ten-year grace period for 'Article 5 countries' to comply with their obligation to phase out ODS. The success of the Montreal Protocol as part of the international framework regime on international climate change has largely been inspired by its embracing of the principle of CBDR.[86]

Without repeating the general obligations of countries under Article 2 of the Protocol to phase out ozone-depleting substances (the thesis already x-rayed those in chapter 3), the thesis proceeds to examine the special situation of developing countries under Article 5, particularly how the Protocol differentiates among them for the purpose of attaching phase-out responsibilities. In relevant parts, Article 5.1 provides that:

82 United Nations. Vienna Convention for the Protection of the Ozone Layer. 26 I.L.M. 1516 (1987) (otherwise called the Vienna Convention).

83 See Preamble and Article 2.2 of the Vienna Convention.

84 See Nyekwere, E. H., & Ole, N. C. (2021). Understanding the principle of common but differentiated responsibilities and its manifestations in multilateral environmental agreements (MEAs), above n 80. See also Bufundo, N. E. (2005). Compliance with the ozone treaty: weak states and the principle of common but differentiated responsibility. *Am. U. Int'l L. Rev.*, *21*, 461 at 463-464. Article 5 of the Protocol defines a developing country as a party whose annual level of consumption of the prohibited controlled substances is less than 0.3 kilograms per capita and granting these countries the right to delay for ten years compliance with certain ODS reduction target.

85 See Zhao, J. (2005). Implementing international environmental treaties in developing countries: China's compliance with the Montreal Protocol. *Global Environmental Politics*, *5*(1), 58-81 at 64.

86 See Pauw, P., Brandi, C., Richerzhagen, C., Bauer, S., & Schmole, H. (2014). *Different perspectives on differentiated responsibilities: a state-of-the-art review of the notion of common but differentiated responsibilities in international negotiations* (No. 6/2014). Discussion Paper. p. 45, available at https://www.die-gdi.de/uploads/media/DP_6.2014..pdf. Accessed 9 January 2022; Bufundo, N. E. (2005). Compliance with the ozone treaty, above n 84.

> Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances in Annex A is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or any time thereafter until 1 January 1999, shall, in order to meet its basic domestic needs, be entitled to delay for ten years its compliance with the control measures.

Hence, Article 5.1 provides special rights for developing countries whose annual calculated level of consumption of listed controlled substances is less than 0.3 kilograms per capita on the date of the entry into force of the protocol. While developed countries were obliged to phase out major ODS by 1996, developing countries where allowed an additional 10-year period to gradually phase out the same substances. An ordinary reading of the Article would suggest that if per chance any developing country had an annual control level of consumption of listed controlled substances at 0.3 kilograms per capita or above on the date of the entry into force of the Protocol, it would be subjected to the same phase out schedule as developed countries. Notionally, two categories of developing countries are in contemplation here. On the one hand, are the 'Article 5 countries', which are entitled to a delayed compliance with their protocol obligations on the basis that their per capita consumption of controlled substances is below a threshold mark. On the other hand, we find the 'non-Article 5 developing countries' which are not entitled to the 10-year grace period but are obliged, like the developed country signatories, to meet their phase out obligations in a shorter time frame.

4.3.1.1 Criteria for differentiation:

We find here that the Montreal Protocol uses economic criteria to differentiate between developing countries, even if on a notional basis. Any 'Article 5 country' whose annual control level of consumption of listed controlled substances rises to at least 0.3 kilograms per capita, will also be graduated out and into the 'non-Article 5 country' category. The latter is not different from the status of developed countries under the Protocol, in terms of applicable responsibility. Thus, objectively defined economic criteria serve as the basis for graduation. Again, this rules out any arbitrariness or volatility that could result from an otherwise subjective approach.

It is instructive to note that in stipulating countries' obligation for phasing out ODS, the Montreal Protocol made no distinction between some countries' undertakings being voluntary and others taking mandatory obligations. Its stipulations were prescriptive for all countries– developed and developing. 'Article 5 countries' merely benefited from a transition period, after which they were obligated to take up the exact same responsibilities as any other signatory to the Protocol.

4.3.1.2 Determining transition time frame

In the notional scenario created, the protocol does not arbitrarily set any specific time frame at the expiration of which we could look at a particular 'Article 5 country' and conclude that it has failed to keep its annual consumption level of the controlled substance below the threshold mark of 0.3 kilograms per capita. The time frame it would take for such negative transition or progression to happen can only be determined after a finding that an 'Article 5 country' has reached the given threshold mark. It is at that point that we may look back to be able to compute the time it took to reach the threshold. This timeframe may vary from country to country and with circumstances.

4.3.2 LDCs in the UN system

The review of the situation of LDCs in the UN system is significant because there are set criteria for inclusion into the LDC category as well as clear criteria for graduating a country out of the category. The establishment of a category of LDCs was first advocated during the 1964 UNCTAD Conference to attract special support measures for the most disadvantaged economies.[87] Of interest to this thesis is how we identify these 'most disadvantaged economies' in a world where even big developing countries with some industrialization capacities seek special support measures. The then UN Committee for Development Policy (CDP) was mandated to carry out a thorough examination of the special problems facing the vulnerable economies and recommend special measures for dealing with their challenges.[88] In furtherance, the Committee defined LDCs as the most vulnerable members of the international community– having both low-incomes and facing severe structural and physical impediments to their long-term economic and social development.[89] Its latest criteria for defining these countries are: (a) per capita gross national income; (b) the human assets index; and (c) the economic and environmental vulnerability index.[90]

4.3.2.1 Inclusion into the LDC category

The identification of LDCs depends on predetermined threshold values of the three main criteria outlined above, which identify the structural handicaps of these countries:[91]

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87 United Nations (2018). Handbook on the least developing country category: inclusion, graduation and special support measures. United Nations Publication, available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/2018CDPhandbook.pdf. Accessed 2 January 2022.

88 Ibid. The CDP, a subsidiary body of the UN Economic and Social Council, is – inter alia – mandated to review the category of LDCs every three years and monitor their progress after graduation from the category.

89 United Nations, Triennial Review Report of the Committee for Development Policy (2021), Supplement No. 13, Document No. E/2021/33, at 17.

90 Ibid. The very first set of criteria proposed by the CDP for identifying and including any country in the LDC group included low per capita GDP, low shares of manufacturing in GDP and low human capital development (given by the literacy rate).

91 See UNCTAD. (2021). The Least Developed Countries Report 2021. United Nations.

(a) Income criterion: based on a three-year average estimate of the gross national income (GNI) per capita in US dollars, using conversion factors based on the World Bank Atlas methodology (the threshold for inclusion was US$1,018 or below; the threshold for graduation was US$1,222 or above as applied in the 2021 triennial review).
(b) Human Assets Index (HAI): based on two sub-indices: a health sub-index and an education sub-index. The former sub-index consists of three indicators: (i) the under-five mortality rate, (ii) the maternal mortality ratio, and (iii) the prevalence of stunting. Conversely, the education sub-index encompasses: (i) the gross secondary school enrolment ratio, (ii) the adult literacy rate, and (iii) the gender parity index for gross secondary school enrolment.[92]
(c) Economic Vulnerability Index (EVI): consisting of two sub-indices: an economic vulnerability sub-index and an environmental vulnerability sub-index. The economic vulnerability sub-index has four indicators: (i) share of agriculture, hunting, forestry and fishing in GDP, (ii) remoteness and land locked nature of a country, (iii) merchandise export concentration, and (iv) instability of exports of goods and services. The environmental vulnerability sub-index has four indicators: (i) share of population in low elevated coastal zones, (ii) share of the population living in drylands, (iii) instability of agricultural production, and (iv) victims of disasters.[93]

To be included in the list of LDCs, a country must satisfy all three criteria in a single review. In addition to the three criteria, the population of an eligible country must not be more than 75 million. In the CDP's view, countries with more than 75 million population sizes were not entitled to be considered for LDC status because they do not fit as 'small economic size', which typically faces the problem of high economic vulnerability.[94] It is deemed that the recognition of structural handicaps – a fundamental meaning of the LDC category – excludes large economies.[95]

92 All six indicators are converted into indices using established methodologies with an equal weight. The 2021 triennial review set the thresholds for inclusion and graduation at 60 or below and 66 or above, respectively.
93 All eight indicators are converted into indices using established methodologies with an equal weight. The 2021 triennial review set the thresholds for inclusion and graduation at 36 or above and 32 or below, respectively.
94 Ibid, para. 237. See Guillaumont, P. (2010). Assessing the economic vulnerability of small island developing states and the least developed countries. *The Journal of Development Studies*, *46*(5), 828-854.
95 United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States. (2022). Criteria for Identification and Graduation of LDCs, available at http://unohrlls.org/about-ldcs/criteria-for-ldcs/. Accessed 9 January 2022. See also Zada, S. Q., Zada, M. Z. Q., & Yousofi, N. A. (2019). Graduation from LDC Status: Lessons That Could Be Learned from Best Practices. *E-Journal of Law*, 5 (2), available at http://e-journaloflaw.org/wp-content/uploads/2020/01/4-Graduation-From-LDC-Status-Lessons-That-Could-Be-Learned-From-Best-Practices.pdf. Accessed 9 January 2022.

4.3.2.2 Defining graduation criteria

In the same way that the CDP policy determines threshold levels on each of the three criteria for purposes of identifying eligible countries to be included in LDC category, it is also responsible for determining the threshold for graduation from the category. The thresholds for graduation are usually higher than for inclusion.

For the GNI per capita, the inclusion threshold is set at the three-year average of the level of GNI per capita, which the World Bank defines for identifying low-income countries. At the 2021 review it is US$1,018. The graduation threshold is set at 20 percent above the inclusion threshold, that is, US$1,222, at the 2021 review. The income-only graduation threshold is twice the graduation threshold, that is US$2,444, at the 2021 review. For HAI, the CDP has used absolute thresholds to determine inclusion and graduation eligibility since 2015. The inclusion threshold has been set at 60 and the graduation threshold has been set at 10 percent above the inclusion threshold at 66. Each of the six indicators of the health and education subindex of the HAI carry an equal weight of 1/6. In the case of the EVI, the CDP has also been using absolute thresholds to determine inclusion and graduation eligibility since 2015. The inclusion threshold has been set at 36 and the graduation threshold has been set at 10 per cent below the inclusion threshold at 32. The eight indicators of the EVI, grouped into economic and environmental subindex, each carry an equal weight of 1/8. To become eligible for graduation, a country must reach threshold levels for graduation for at least two of the three criteria in two consecutive triennial reviews. Alternatively, the income-only threshold is met – the country's GNI per capita must exceed at least twice the threshold level in two consecutive triennial reviews, that is at least US$2,444 going by the 2021 triennial review.

Instructively, no arbitrariness is allowed in defining both the inclusion and graduation thresholds for the LDC category, arguably making it the most non-contentious country grouping in the WTO and the entire UN system.

4.4 Defining threshold for graduation in the WTO: the example of 'widespread copying' of rental rights

Having examined how graduation criteria is objectively defined both within and outside the confines of the WTO, the thesis now seeks to inquire into how such criteria may be used to define a threshold to trigger the full application of a rule or new rules following a period of exemption. In doing this, it draws inspiration from the notion of 'widespread copying' under Article 11 of the TRIPS Agreement on rental rights. In triggering the obligation to introduce rental rights on the basis of economic data, evidencing widespread copying, the provision demonstrates how economic data can be used to objectively define graduation thresholds.

Article 11 of the TRIPS Agreement establishes a rental right in respect of computer

programs and cinematographic works. It provides that owners of these two categories of works must be granted the right to "authorize or prohibit the commercial rental to the public of originals or copies of their copyright works". With respect to cinematographic works, a member may choose not to grant a rental right unless commercial rental has led to widespread copying such that the exclusive right of the owner to reproduce the work is materially impaired. The rental right is also not applicable to objects that contain computer programs, where the program is not itself the essential object of the rental.

Although Article 11 of the TRIPS Agreement is no longer relevant as technology has moved on, it however offers an interesting approach to defining thresholds for the purpose of graduation.[96] Whether a rental right of cinematographic works is to be recognized (or put differently, whether a copyright is to be granted to the owner of a cinematographic work) depends on the factual situation in a particular country. If the commercial rental has led to widespread unauthorized copying in the country, the rental right must be recognized; if the commercial rental has not led to widespread unauthorized copying, the rental right need not be recognized.[97] Instructively, unless 'widespread copying' in a particular country causes harm to the interest of the owner of a cinematographic work, commercial rental in such country will not be restricted. The domestic need for rentals will continue to be satisfied, irrespective of the patent rights abroad.

Cottier noted that the idea of avoiding distortions as contemplated by Articles 11 (and Article 14.4) of the TRIPS Agreement could be used to develop a thresholds approach to the application of rules, and in a manner that duly reflects different levels of development. In furtherance, he makes a case for a country's implementation of WTO provisions to be contingent on overcoming a set of identified graduating constraints.[98] Countries that fall below a chosen threshold (based on thresholds that reflect the competitiveness of industries or sectors of an economy) would be entitled to derogations.[99] The threshold is used to determine the application of a particular agreement or rule to a particular industry in a country. In the context of pharmaceutical patents, Cottier advocates that countries will have to take into consideration not just the international competitiveness of the domestic industry and the domestic competitive environment, but also the interplay between domestic and foreign sources for pharmaceuticals in reaching a determination whether to put in place patent protection.[100] Rather than require all countries to introduce patent protection, not minding their respective capacities, such obligation should be based on the domestic economy (or sector of the economy) reaching a defined level of international competitiveness in accordance with a threshold defined on the basis of economic criteria. At the threshold level, the domestic industry would

96 See Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law, above n 7 at 816.
97 World Intellectual Property Organization (1997). Implications of the TRIPS agreement on treaties administered by WIPO. World Intellectual Property Organization.
98 See Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law, above n 7 at 804-805, 807.
99 Ibid, at 807.
100 Ibid, at 816-817.

have developed sufficient productive capacity to have its own proprietary products and processes in place. At this point, 'levelling the playing field' becomes necessary, both as a matter of efficiency and fairness. Opening up the domestic industry to foreign competition will then make sense as the domestic industry is deemed to have built necessary capacity to compete, and thereby improve its efficiency. On the other hand, as the domestic industry would expect to benefit from the grant of patents to its products and processes abroad, it ought to offer the same treatment to its competitors. Below the threshold, industries are allowed to develop in accordance with their domestic needs and engage in producing generic medicines regardless of patent protection abroad. Not only have countries like India and Italy followed this path in the past to build their industrial base, but this path provides LDCs with a pragmatic solution to industrial development drive and to the introduction of pharmaceutical patents once they have attained a certain level of competitiveness.[101]

At this juncture, the question of how exactly to measure defined levels of competitiveness and set a threshold for graduation comes to the fore. The literature suggest that an answer could lie in creating a composite index specific to a particular sector to determine competitiveness and thereby, a basis for benchmarking countries' readiness for the introduction of rule obligations in the sector. The thesis will next examine this approach, specifically, efforts to apply it in the pharmaceutical sector.

4.4.1 The composite indicator approach

On the question of how to define relevant thresholds of competitiveness for purposes of graduation, Cottier suggests examining how the following can be adapted for use:[102] socio-economic indicators in the UNDP's Human Development Index;[103] the UNDP's Technology Achievement Index;[104] and the Global Competitiveness Index published by the World Economic Forum.[105] Instructively, as opposed to being single indicators, all three indexes are composites – made up of different indicators that ensure that final outcomes are the result of a balanced assessment.

101 Azam, M. (2016). *Intellectual property and public health in the developing world*, above n 51 at 253.

102 See Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law, above n 7 at 809.

103 The HDI is a composite index of life expectancy, education and per capita income indicators, which measures the socio-economic development levels of countries. It was created to emphasize that people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone. See UNDP. (2020). Human Development Report, available at http://hdr.undp.org/en/content/human-development-index-hdi. Accessed 9 January 2022.

104 The TAI is used by UNDP to measure how well a country is creating and diffusing technology and building a human skill base, reflecting capacity to participate in the technological innovations of the network age. It measures four dimensions of technological capacity: creation of technology, diffusion of recent innovations, diffusion of old innovations, human skills. See Desai, M., Fukuda-Parr, S., Johansson, C., & Sagasti, F. (2002). Measuring the technology achievement of nations and the capacity to participate in the network age. *Journal of Human Development*, *3*(1), 95-122.

105 The GCI 4.0 assesses the microeconomic and macroeconomic foundations of national competitiveness, which is defined as the set of institutions, policies, and factors that determine the level of productivity of a country. GCI Reports are available at https://www.weforum.org/reports/the-global-competitiveness-report-2020. Accessed 9 January 2022.

Azam suggests that country-specific data be used to create a composite index that would not only determine competitiveness in the sector, but also the threshold at which patent protection needs to be introduced. He goes on to articulate a number of issues/indicators that should be considered in designing a composite index for such determination, including: capacity to meet local demands; capacity for export opportunities; number of plants with certifications for export markets; access to required pharmaceuticals; incidences of diseases and the ratio of off-patent and patented medicines used for treatment; level of R&D; market share of world pharmaceutical trade; strong regulatory environment; adequate skilled human and infrastructural resources; and good working conditions.[106]

Bearing in mind that the rationale for the waiver on patent protection enjoyed by Bangladesh largely lies in the huge structural incapacities that earned the country LDC status in the first place, the issues/indicators raised could well serve in designing a dual-purpose plan– the simultaneous graduation of Bangladesh from LDC status and its assumption of obligations under the TRIPS Agreement, including the introduction of patent protection. Azam suggests evaluating these issues/indicators along with the World Bank data on basic infrastructure, the High Technology Infrastructure Index and the Residents Patent Index to create an innovation capability and competitiveness index.[107]

Lopez Gonzalez *et al.* take a step further from merely recommending possible indicators for consideration in creating a composite index to actually demonstrate the creation of one for operationalizing a threshold approach to graduation under the TRIPS Agreement.[108] The first thing Gonzalez *et al.* do in the creation of a composite index, is to identify four broad constraints that pose as challenges to countries in their implementation of the provisions of the TRIPS Agreement. The identified constraints are economic constraints, access to pharmaceuticals, capacity constraints, and incidence of health outcomes. Next, they proceed to identify and combine the indicators that capture these constraints, using an aggregation technique based on a ranking system. For each indicator, they ranked countries against each other, then used the common ranking unit and applied sets of weights to create a composite indicator. Gonzalez *et al.* acknowledged that determining the set of weights to be used could prove to be an arbitrary exercise, thus it should be an outcome of a negotiated process.[109]

Some more introspection reveal that Gonzalez *et al.* proffered a detailed description of how to create a system that defines graduation thresholds against analytical criteria, which are themselves based on prior identified constraints. They use this to identify countries that should be exempted from the obligation to protect pharmaceutical patents under the TRIPS Agreement. The composite indicator approach has the

106 Azam, M. (2016). *Intellectual property and public health in the developing world*, above 51 at 254-256.
107 Ibid, at 256.
108 Gonzalez, J., Parra, M., Holmes, P and Shingal, A., *TRIPS and Special and Differential Treatment,* above n 77.
109 Ibid, at 27.

advantage of being "transparent and easily predictable" when it comes to summarizing and combining data that come in different units. It also allows for an aggregate ranking of countries across the different constraints they face.[110] It is the relative standing of countries against the constraints they face (following the ranking) that is of interest in defining which countries should benefit from a waiver, that is, which country should be on an exemption list.[111] Accordingly, the authors proceeded to draw up a list of countries that should be exempted from the TRIPS' provisions for patent protection in the pharmaceutical sector.[112]

4.5 Suggestions for improving access to special and differential treatment in the WTO

An important quest in efforts to reform the existing framework for SDT, is the question of how to condition access to SDT objectively and make it more responsive to development needs. While this chapter of the thesis has, in more concrete terms, examined how triggers allowing and limiting access to SDT provisions could be better directed to achieve this goal, the predictability, transparency and fairness of SDT provisions could be no less telling towards achieving that goal. Below, the thesis discusses four areas, arising from the analysis in preceding sections of this chapter, where we can achieve enhanced predictability, transparency and fairness of SDT provisions.

4.5.1 Transition time frames

A typical issue with most WTO agreements is that transition time frames for implementing various provisions are set at a standard length for a broad range of countries, with markedly different level of resources and at different stages of development.[113] Indeed, such longer time periods for implementation are provided for in virtually all WTO agreements, with the exception of the Agreement on the Implementation of Article VI (anti-dumping) of GATT 1994[114] and the Agreement on Preshipment Inspection.[115]

According to the WTO, transition time-related flexibility was intended to respond to shortfalls in institutional capacity within developing members in the implementation of agreements and related commitments.[116] The aim was to provide developing countries with the space to adapt their policies and implement legislations to push through with

110 Ibid, at 28.
111 Ibid, at 27.
112 This thesis espouses the composite indicator approach in developing its own methodology for defining SDT eligibility criteria on an agreement-by-agreement basis.
113 Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO*, above n 19 at 24.
114 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201
115 Agreement on Preshipment Inspection, 1868 U.N.T.S. 368
116 WTO. (1999). Developing countries and the multilateral trading system: past and present. High Level Symposium on Trade and Development. Background Note by the Secretariat. 17-18 March, available at https://www.wto.org/english/tratop_e/devel_e/bkgdev_e.doc. Accessed 2 January 2022.

required reforms.[117] In plain terms, transition time frames were introduced as a form of SDT, precisely to facilitate implementation.[118] Implicit here is the assumption that a detailed assessment of the costs and investments required to cover adjustment shocks arising from the reform process are defined and covered.

Describing transitional period as the major plank of SDT, Prowse contends that long transition periods alone do not suffice to address the numerous implementation-related problems facing developing countries.[119] Put differently, setting a standard length of transition periods for all developing countries falls short of responding to their diverse needs and the constraints or implementation-related challenges facing these countries.[120] Also, without a complementary coherent assistance programme to build the capacities of these countries (enabling them to overcome identified constraints), including facilitating their understanding of the importance of complying with their commitments, transition periods will continue to fall short of their original intendment.[121]

As the repeated requests of the LDCs for extensions to implement TRIPS provisions indicate, such arbitrary approach to setting transition periods as discussed here characterizes it as a mere postponement of implementation of commitments rather than a planned and sequenced phasing in of such implementation. For longer transition periods to facilitate the integration of developing countries into the multilateral trading system, they must be complemented by two essential components: i) an assessment of the cost against the availability of resources to help build capacity to implement WTO agreements, and (ii) an analysis and recommendation of appropriate policy sequencing to meet WTO commitments within the context of the country's overall development process.[122] In essence, this requires that transition periods reflect individual country cases, based on an evaluation policy and capacity constraints. Also, that there is in place an appropriate implementation plan for reforms.

4.5.2 Country categorization or re-categorization

A core issue in the SDT reform debate has been about refining country categories in the WTO to ensure that SDT adequately reflects the diverse development needs of countries. This follows the rejection of the arbitrary practice of self-designation of developing status as determining which country is eligible for SDT, hence questioning the credibility of the existing developed-developing country categories. It is doubtful whether new country categories are what is required to address the main issue with SDT in the WTO, which is managing the implementation and reform process in such a way

117 Breckenridge, A. (2002). Developing an Issues-based Approach to Special and Differential Treatment, paper presented at the third meeting of the Integration and Trade Network, 19-20 March. Inter-American Development Bank, available at https://issuu.com/idb_publications/docs/working_en_8774. Accessed 2 January 2022.

118 Ibid, at 9.

119 Prowse, S. (2002). The role of international and national agencies in trade–related capacity building. *World Economy*, *25*(9), 1235-1261 at 1245.

120 Gonzalez, J., Parra, M., Holmes, P and Shingal, A., *TRIPS and Special and Differential Treatment,* above n 77.

121 Prowse, S. (2002). The role of international and national agencies in trade–related capacity building, above n 119.

122 Ibid, at 1246.

that the related adjustment costs do not undermine expected gains. The policy framework needed to achieve this objective is typically country-specific.[123] Accordingly, new broad country categories are unlikely to address the concern of 'lack of responsiveness [of SDT] to differing needs' that exists under the current regime. There is also the real risk of high volatility and non-consensus following any debate on country recategorization in the WTO.

It is against this backdrop that the thesis proposes an issue-based and country-specific approach to SDT. This approach advocates doing away with SDT based on country categories, arbitrary time frames and broad exemptions. It rather calls for a definite country-focused plan to help developing countries to deal with constraints that restrict them from implementing trade agreements. This approach, which is developed further in the next chapter, obviates the automatic qualification of countries for SDT based on their mere categorization as developing countries.

4.5.3 Reformed basis for decision-making on special and differential treatment

A third feature of a few SDT provisions which is problematic and is not particularly well taken to by many developing countries is that access to SDT is decided by the membership of the WTO upon the request of a developing country member. This is often prevalent with those SDT provisions that provide for the possibility of an extension to transition time frames. Examples of such discretionary provisions includes Article 66.1 of the TRIPS on the requirement of a 'duly motivated request' for extension to be submitted by LDCs to the Council on TRIPS, and compliance delays under Article 10.2 and 10.3 of the SPS Agreement where the SPS Committee is enabled to receive and grant developing countries request for temporary exceptions from obligations. Other such cases are typified in the time-limited exceptions to certain provisions of the Agreement on Technical Barriers to Trade (Article 12.8), and extensions to the standard SDT provisions under the Agreement on Implementation of Article VII of GATT 1994 (Customs Valuation – Annex III.1 and III.2). In a consensus-based institution like the WTO, the concern is that the discretionary character of decisions relating to SDT may lead to undesirable forms of conditionality and arbitrariness.[124] The multilateral trading system is better off having a greater degree of policy certainty and predictability. On this issue, the solution could lie in redefining all such SDT provisions so that their application depends on demonstrable objective criteria. Once the criteria exist or are met, then such exception to obligations automatically kicks in.

123 Ibid, at 1246-1247; Breckenridge, A. (2002). Developing an Issues-based Approach to Special and Differential Treatment, above n 117 at 11.

124 Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO*, above n 19 at 24.

4.5.4 *Lessons for defining graduation criteria*

The thesis finds instructive for the WTO two lessons from the crafting of graduation criteria for LDCs in the UN system. The first, is the fact that measurable criteria are used as the basis for creating the LDC category to the exclusion of other developing countries. In other words, distinguishing among developing countries is done on the basis of objective criteria, including economic and social and human development indices. This underscores the point we had made earlier in chapter 2 that economic development must not be reduced to a mere assessment based on cold economic indices but includes softer indices like the well-being of people and their capabilities.[125] Importantly too, these criteria also form the basis for considering whether a country should be graduated.

The second, lies in the relationship between the inclusion and graduation criteria for the LDC group. There is a conscious effort to link a country's graduation from the LDC category to redressing the structural problems that included it in that category in the first place. Noteworthy is the fact that an impact assessment and a vulnerability profile of such country is considered by the CDP in finally adjudging that a country has met all graduation criteria, is indeed eligible for graduation and should thus be graduated. Such linkage ensures that the only basis to graduate a country out of the category is that the situation that placed it in the category in the first place no longer exists.

A credible graduation mechanism is, indeed, central in moving SDT away from open-ended blanket exemptions toward a needs-driven and evidence-based approach that will ensure that it is as targeted as possible. Ideally, graduation should reflect progressive regulation in the sense that it represents the application of single and uniform rules to all countries in a manner that takes into account differing levels of development, as a matter inherent to the rule itself.[126] The contemplation here is that graduation be strictly defined by law. Invariably, WTO law would then provide a 'single regime of objectives, principles, rules, and standards by allowing for differential and progressive application of suitable norms commensurate with the level of competitiveness of industries and sectors concerned.'[127] Progressive regulation is about phasing in obligations as opposed to the use of exemptions and opt-outs. It seeks to subject all WTO members to single and uniform rules but graduate them in terms of application.

4.6 Conclusion

With the increasing unwillingness of developed countries in the WTO to continue to offer SDT on a broad and open-ended basis that simply serve to allow developing countries to avoid their WTO obligations, the issues of differentiation and graduation assume even greater significance. While it is important to ensure that SDT continues to

125 Nafziger, E. W. (2012). *Economic development*. p. 14. Cambridge University Press. Instructively too, the UN Sustainable Development Goals (SDGs) are replete with such multi-development indices.
126 Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law, above n 7 at 794.
127 Ibid.

be available to all deserving members, it is no less important to set triggers that would allow and limit access to SDT on a provision-by-provision basis– ensuring that only countries in need of it get it. The principle of graduation [or more aptly, progressive regulation] holds the brightest potential for triggering and administering SDT in such way. Graduation in the WTO needs to move away from merely depicting the classification of different countries to entailing the idea of applying single and uniform rules in a manner that different levels of social and economic development are taken into account as a matter inherent to the rule itself.[128]

SDT must be seen for what it is– an enabler for developing countries to be able to take on their full trade treaty obligations rather than an exemption, hence, furthering their integration into global trade. Accordingly, SDT provisions (including transition periods) must be designed with the aim of providing members with the opportunity to advance their rule implementation capacity and converge towards a common set of rules. Integrating developing countries into the global rule-making system in such a way requires that time-bound or circumstance-bound flexibilities must be complemented by periodic reviews, capacity-building, and appropriate policy sequencing to ensure an alignment between a country's WTO commitments and its overall development process.[129]

In the next chapter, the thesis defines the concept and implementation details of a 'differentiated differentiation' approach to differentiation among developing countries for the purpose of SDT. The approach lends itself to the reformed principle of graduation which encapsulates the idea of progressive regulation.

128 Ibid.
129 Prowse, S. (2002). The role of international and national agencies in trade–related capacity building, above n 119 at 1246.

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Chapter 5

Strengthening special and differential treatment rules through more differentiation*

* An earlier draft of this chapter is published as Ukpe, A., & Khorana, S. (2021). Special and differential treatment in the WTO: framing differential treatment to achieve (real) development. Journal of International Trade Law and Policy, 20(2), 83-100

5.1 Introduction

On the heels of the 1986-1994 Uruguay Round of multilateral trade negotiations, developing countries increasingly expressed discontent with SDT provisions deploring them as having failed both to balance North-South trade concessions and to confront the increasing marginalization of poor countries from world trade.[1] Developing countries demanded that the existing SDT measures be reviewed to strengthen their effectiveness and operationality.[2] This was the condition for their participation in the launch of the Doha Round in 2001. The Doha Ministerial Declaration called for a review of SDT provisions, with a view to strengthening them and making them more precise, effective, and operational.[3] During the early years of the Doha Round negotiations, developing countries alone made as many as 88 specific proposals to strengthen SDT.[4] Among the proposals were suggestions on improved preferential access to industrialized country markets, exemptions from specific WTO rules, binding requirements to provide technical and financial assistance to help developing countries implement multilateral trade rules and benefit from negotiated rights, and an expansion in aid to address supply-side constraints.[5] However, dissent against the 'one-size-fits-all' principle of SDT, including calls to introduce a higher level of differentiation between developing countries were raised by developed countries.[6] The objection by developed countries was portrayed in separate speeches by former US Trade Representative, Robert Zoellick,[7] and former EU Commissioner for External Trade, Peter Mandelson.[8] They both expressed concerns about the need to ensure the 'right degree of differentiation' for a robust SDT regime that addresses the needs of developing countries in the WTO. Past WTO Rounds, inextricably linked SDT negotiations to introducing differentiation between developing countries, suggesting that an ambitious SDT regime

1 Bernhardt, T. (2014). North-South imbalances in the international trade regime: Why the WTO does not benefit developing countries as much as it could. *Consilience*, (12), 123-141.

2 WTO. (2006). Analysis of the twenty-eight agreement-specific proposals, Communication by Kenya on behalf of the African Group, TN/CTD/W/29, 9 June. See Simo, R. Y. (2021). Developing Countries and Special and Differential Treatment. In *International Economic Law: (Southern) African Perspectives and Priorities*. 233-281 at 255. Kugler, K. & Sucker, F. (eds.). Juta & Co. Ltd.

3 Doha Ministerial Declaration, para. 44.

4 WTO. (2003). General Council Chairman's proposal on an approach for special and differential treatment. JOB (03)/68. 7 April 2003.

5 See WTO. (2003). Special and differential treatment: grappling with 88 proposals. Briefing Notes Cancun WTO Ministerial, available at https://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief21_e.htm. Accessed 27 December 2021. See also Mah, J. S. (2011). Special and differential treatment of developing countries and export promotion policies under the WTO. *The World Economy*, *34*(12), 1999-2018.

6 See Hoekman, B. M., Michalopoulos, C., & Winters, L. A. (2003). *More favorable and differential treatment of developing countries: Toward a new approach in the World Trade Organization* (Vol. 3107). World Bank Publications. See also Poensgen, I., & Inan, C. (2020). Reforming the WTO, part 5: how should the burden be shared?. *LSE Brexit*, available at http://eprints.lse.ac.uk/104753/. Accessed 18 December 2021.

7 See World Street Journal. (2004). Robert Zoellick's Letter to WTO Member Nations, 11 January, available at https://www.wsj.com/articles/SB107393275634376900. Accessed 22 December 2021.

8 Mandelson, P. (2005). 'Doha for Development' Speech to Informal Meeting of EU Development Ministers, Leeds, UK, available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_639. Accessed 22 December 2021.

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can only be achieved as a trade-off for differentiation among beneficiaries. Developed countries in the WTO have remained insistent that they would not grant the same concessions to all developing countries without regard to their economic size and diversity.[9] They emphasize that SDT should be limited to only those members who actually need it to be able to fully benefit from their membership in the organization.[10] Also, they have continued to call on advanced developing members to renounce their status as 'developing' and assume their full WTO obligations.[11]

As the Doha Round negotiations remain deadlocked,[12] this chapter focuses on identifying possible ways forward for the promotion of development in the WTO through SDT– the only tool that is realistically available. It advocates a new evidence-based, case-by-case approach to SDT in the WTO that will ensure that the poorest countries get all the deserved support they need to take on their trade obligations and that the advanced developing countries immediately take on their membership responsibilities.[13] To this end, the rest of the chapter is structured as follows: Section 5.2 reviews the rationale for more differentiation in the WTO with a view to identifying cases deserving of SDT. Section 5.3 outlines the case for more differentiation in the WTO. Section 5.4 reviews existing theoretical approaches to differentiation in the WTO to draw lessons for the articulation of a new SDT reform proposal. Section 5.5 presents the reform proposal. Section 5.6 concludes the chapter and offers some thoughts on how to move forward with SDT reform.

5.2 The rationale for more differentiation

5.2.1 Making the rules fairer

The preamble of the Marrakesh Agreement Establishing the WTO underscores the economic development of developing countries as a major objective of the system and encourages 'positive efforts' by developed country members to actualize it.[14] Generally, the several WTO agreements also reflect the underlying intent of SDT, and policies to support the development and integration of developing countries into the global trading

9 See WTO. (2019). An undifferentiated WTO: self-declared development status risk institutional irrelevance. Communication from the United States WT/GC/W/757, 16 January; European Commission (2018). WTO Modernisation: Introduction to Future EU Proposals. Concept Paper, 18 September, available at https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf. Accessed 22 December 2021

10 European Commission. (2018). WTO Modernisation, above n 9.

11 See Bacchus, J., & Manak, I. (2021). *The Development Dimension: Special and Differential Treatment in Trade*. Routledge.

12 See Martin, A., & Mercurio, B. (2017). Doha dead and buried in Nairobi: lessons for the WTO. *Journal of International Trade Law and Policy*, 16(1), 49-66; Mavroidis, P. C. (2011). Doha, Dohalf or Dohaha-The WTO Licks Its Wounds. *Trade L. & Dev.*, *3*, 367.

13 The chapter draws inspiration from Azam, M. (2016). *Intellectual property and public health in the developing world* (p. 348). Open Book Publishers and Lopez Gonzalez, J., Mendez Parra, M., Holmes, P., & Shingal, A. (2011). TRIPS and Special & Differential Treatment–Revisiting the Case for Derogations in Applying Patent Protection for Pharmaceuticals in Developing Countries, National Centre of Competence in Research Working Paper No. 2011/37, Berne.

14 See Preamble to the Marrakesh Agreement Establishing the WTO, available at https://www.wto.org/english/res_e/publications_e/ai17_e/wto_agree_preamble_jur.pdf (accessed 26 April 2020).

system. SDT provisions specifically aim to enhance trading opportunities for developing countries, protect their interests, and allow flexibility in taking on new trade obligations, as well as in the use of trade policy instruments.[15] However, it has been opined by experts that other than merely reflecting developmental aspirations, WTO rules generally fall short of advancing the interests of developing countries in real terms. For instance, while export subsidies (an important policy tool for many developing countries) are prohibited by WTO rules, farm support to agricultural produce by developed countries are not.[16] Historically, countries, such as the UK and the US, permitted the use of special treatment by countries to enable the development of specific sectors. Both countries allowed the use of export subsidies in the 18th and 19th centuries by their former colonies in order to develop their textile industry and the rail sector respectively, but developing countries are denied this under the current SDT framework.[17] Similarly, trade-related investment measures (TRIMs), such as local content requirements (also an important policy tool used by many developing countries to increase local inputs in production processes), are prohibited by WTO rules.[18] Evidence also suggests that several developed WTO member countries have employed similar investment measures and protectionist policies, such as import substitution and high tariffs, to support their industrial development.[19]

Given that the benefits of preferential schemes are being increasingly eroded, developing countries have also questioned the economic value of traditional SDT.[20] Lower tariffs, which are a result of WTO negotiations, have resulted in the loss of benefits granted to developing countries and LDCs.[21] This has exposed the LDCs and other smaller developing countries to competition from highly efficient developed country competitors, and also provided them with far less competitive market access conditions for their key exports.[22] On the part of developed countries, there has been a clear change in attitude towards SDT. While developed countries continue to recognize the specific needs of LDCs, they are less willing to accord SDT to emerging economies, which have become major trading powers

15 See Hegde, V., & Wouters, J. (2021). Special and Differential Treatment Under the World Trade Organization: A Legal Typology. *Journal of International Economic Law*, 24(3), 551-571 at 556; Lee, Y. S. (2016). The long and winding road–Path towards facilitation of development in the WTO: Reflections on the Doha round and beyond. *Law and Development Review*, *9*(2), 437-465 at 448.

16 Lee, Y. S. (2016). The long and winding road, above n 15 at 451.

17 Ibid. See also Chang, H. J. (2002). *Kicking away the ladder: development strategy in historical perspective*. Anthem Press.

18 The TRIMs Agreement prohibits any investment measures that may be inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT. See also Lee, Y. S. (2016). The long and winding road, above n 15, at 453-454.

19 Shafaeddin, M. (1998). *How did developed countries industrialize? The History of Trade and Industrial Policy: The cases of Great Britain and the USA* (No. 139). United Nations Conference on Trade and Development.

20 Akinmade, B., Khorana, S., & Adedoyin, F. F. (2020). An assessment of United Kingdom's trade with developing countries under the generalised system of preferences. Journal of Public Affairs, e2308.

21 See Francois, J., Hoekman, B., & Manchin, M. (2006). Preference erosion and multilateral trade liberalization. *The World Bank Economic Review*, *20*(2), 197-216.

22 Cling, J. P. (2014). The future of global trade and the WTO. *Foresight*: The Journal of Futures Studies, Strategic Thinking and Policy, 16(2). 109-125.

over time.[23] Indeed, the significant share of developing countries like China, India, Mexico and Viet Nam, in world trade questions the legitimacy of SDT as a tool to help the poorest countries. The case of China is, particularly, instructive. The WTO describes China as the World's leading merchandise trader.[24] The country is the largest exporter of goods in the world since 2009, with the World Bank estimating the country's total exports amounted to US$2.641 trillion in 2019.[25] Data from UN Comtrade indicates that China's global market share of total merchandise trade more than quadrupled within between 1995 and 2018, rising from 3 percent in 1995 to 12.4 percent by 2018. Over the past decade or so, China, India and Mexico are grouped in an exclusive class of five countries, including Hong Kong and Ireland, that have risen the most in rankings among the top 20 traders of goods and services in the world.[26] These all underscore the rationale to seek to secure convergence among WTO members on acceptable criteria for defining which countries are deservedly in need of SDT.

5.2.2 The definition of 'developing country'

The present categorisation of developing countries at the WTO applies to a wide range of countries that, in reality, are disparate in terms of their level of development. The category of LDCs, created by the UN in 1971 and adopted by the WTO, is the only formal categorisation reflecting the least developed among the developing countries.[27] Under the Enabling Clause, deeper flexibilities, such as longer transition periods to implement disciplines, and deeper preferences in the context of preferential trade programmes, are accorded to the LDCs.[28]

The concept of 'developing countries' can be traced to the provision of GATT where Article XVIII of GATT 1947 gave developing countries the right to protect infant industries and use trade restrictions for balance-of-payments purposes. Articles XXXVI, XXXVII, and XXXVIII of GATT 1994 subsequently recognized the special needs of developing countries and exempted them from making reciprocal concessions during trade negotiations. Article XVIII (1) provides that:

23 See WTO. (2019). An undifferentiated WTO, above n 10. See also Bacchus, J., & Manak, I. (2021). *The Development Dimension*, above n 11.

24 WTO. (2018). World Trade Statistical Review. WTO

25 See https://data.worldbank.org/indicator/NE.EXP.GNFS.CD?most_recent_value_desc=true. Accessed 27 December 2021.

26 WTO. (2019). World Trade Statistical Review. WTO.

27 The criteria for designating a country as a LDC by the UN are low income, weak human assets, and high economic vulnerability in addition to the requirement of the country not exceeding the population of 75 million, available at https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-criteria.html. Accessed 27 December 2021.

28 Paragraph 2(d) of the Enabling Clause permits deeper differentiation in order to accord special treatment to the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

> [T]he contracting parties recognise that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.

Paragraph 4(a) of the Article explains its purpose as being to allow a contracting party, whose economy "can only support low standards of living and is in the early stages of development", to be free to deviate temporarily from the provisions of the other Articles of the GATT under prior defined circumstances. This is perhaps the closest that the GATT/WTO system has come to defining 'developing countries.'[29] Reading Paragraphs 1 and 4(a) of Article XVIII together, Cui highlights the two criteria to support the identification of a developing country. The first is 'low standard of living' and the second is 'in the early stage of development'. He, however, raises questions on how low the standards of living should be, and at what stage of development can a country qualify as being in an 'early stage of development'.[30] Annex I to the GATT provides an insight in respect of both criteria. By 'low standards of living', it urges members to consider the normal position of that economy rather than the exceptional circumstances, such as those that may result from the temporary existence of exceptionally favourable conditions. In the case of 'early stage of development', Annex I explain that the phrase is not meant to apply only to contracting parties that have just started on the process of economic development but applies to contracting parties whose economies are undergoing industrialisation to reduce their dependence on primary products' production.[31]

The explanation in Annex I on how to identify a developing country, however, falls short of establishing any objective criteria to guide an attempt to draw up a list of developing countries. The language used in attempting a definition lacks any legal precision and is, at best, a guide in which the phrases of 'low standards of living' and 'in the early stage of development' should be interpreted. Citing *Ceylon-Article XVIII Applications*,[32] Cui illustrates the arbitrariness that underlies such criteria in defining 'developing countries.' In this case, Ceylon had applied to the GATT Working Party under Article XVIII to seek exemption for a period of ten years to impose quantitative restrictions on the importation of specified petroleum products if at any time this should prove necessary to ensure the development and operation of the domestic, petroleum refinery. In examining Ceylon's application, the GATT Panel had to first consider whether Ceylon was eligible under paragraph 4(a) of Article XVIII. Going by the criteria of 'low standards of living', the Panel found that the GNP per capita for Ceylon in 1955 was US$128. This was higher than the GNP per capita of countries

29 See Cui, F. (2008). Who are the Developing Countries in the WTO?. *The Law And Development Review*, *1*(1), 124-153, at 133.
30 Ibid, at 134.
31 GATT, Annex I Notes and Supplementary Provisions, Ad Article XVIII.
32 Panel Report, *Ceylon-Article XVIII Applications,* GATT Doc. L/71 (26 November 1957).

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such as Burma and India, but lower than that of Greece, Cuba, and the Dominican Republic, and substantially lower than the GNP per capita of industrialized countries in Western Europe.

To examine the criteria and decide whether Ceylon was 'in the early stage of development', the Panel based its consideration on the share of manufacturing, mining, and construction in the country's GNP. This share (including mining, a primary industry) was found to be about 10 percent, a figure lower than that of Burma and Greece, and substantially lower than that of developed industrial countries.[33] Cui considers the Panel's preference for GNP per capita over the GDP per capita, or other national income indicators, in the determination of both 'low standards of living' and 'in the early stage of development' as arbitrary. This is given that the Panel provided no reasons for the preference.[34] Cui made the same point in respect to the Panel's inclusion of mining in the calculation of the share of certain industries relative to the GNP. He opines that albeit the Panel's choice was seemingly arbitrary it was justified because there was no provision in GATT Article XVIII to govern such issues.[35]

Nevertheless, the use of socioeconomic indicators to categorize countries by their level of economic development is widespread. The World Bank and the Organisation of Economic and Cooperation Development (OECD) use economic criteria such as GNP per capita; vulnerability index; social criteria like human development indexes; and institutional criteria, such as governance and freedom index. Despite criticisms that such indicators are unsuited for the WTO because they seek to measure broad development issues (rather than specifically address trade-related concerns of developing countries) for which the WTO has no mandate, they provide an objective basis to differentiate between countries based on level of development.[36]

5.2.3 Self-designation for qualification

Self-designation is a means for developing countries to qualify for SDT at the WTO. Rolland acknowledges that WTO members self-designate in a bid to secure the benefits of various SDT provisions.[37] She, however, notes that the claim is not consistent with reality. In reality, while individual countries are at liberty to self-designate, such self-designation is subject to scrutiny by other WTO members.[38] Any member that challenges a claim by another to developing country status bears the burden of disproving the claim as opposed to any expectation on the claimant to prove its claim.[39] Nevertheless,

33 Ibid, at para. 4.
34 Cui, F. (2008). Who are the Developing Countries in the WTO?, above n 29, at 135.
35 Ibid.
36 See Paugam, J. M., & Novel, A. S. (2005). Why and How Differentiate Developing Countries in the WTO. In *Theoretical Options and Negotiating Solutions,* (p. 11). *Paper prepared for the IFRI/AFD Trade and Development Conference, Paris* (Vol. 28), available at https://www.ifri.org/sites/default/files/atoms/files/novel_paugam_nov_2005.pdf. Accessed 27 December 2021.
37 Rolland, S. E. (2012). *Development at the WTO*. Oxford University Press.
38 Ibid.
39 Cui, above n 29, at 139.

accepted practice suggests that the self-designating country/claimant may bear the burden of demonstrating that it meets the requirements to benefit from the SDT.[40] Implicit in the practice of self-designation is that any country can claim the status of 'developing' and once claimed, such country is entitled to SDT, irrespective of its actual capacity or level of development. The problem with such an across-the-board approach is that it fails to respond to actual development needs, and in some cases even creates unfair competition between developing countries for trade opportunities. For instance, a small country, like the Gambia, with a GDP per capita as low as US$772.0 in 2019, according to data from the World Bank, must compete with a large developing country like Mexico with a GDP per capita of almost US$10,000 in 2019. Of course, the Gambia is already prejudiced from the onset, in terms of the level of its resources and capacity and does not stand a chance to favourably compete with Mexico. This underscores the point that the WTO must ensure a level playing field, not just between developed and developing countries, but also between developing countries themselves.

5.3 The legal case for more differentiation

Rolland notes that the continued absence of specific criteria for determining whether a country qualifies as 'developing', has seen countries with significant differences, including in size, population, economic and trade capacities, geographic and political conditions, treated as developing countries in WTO jurisprudence.[41] Such factual discrepancy between legal uniformity and economic diversity underscores the need to achieve a balance in the application of trade rules for countries in the WTO. The question is: can differentiation be the tool to secure such legal fine-tuning? In context, the principle of differentiation is rooted in the need to treat similarly-situated developing countries similarly.[42] Differentiation was introduced to reduce the political and economic conundrum associated with claims for preferences by a wide diversity of developing countries. Preferences could, however, still be claimed by developing countries on a needs-basis, and without undermining the gains from reciprocal concessions, to developing countries as a whole.[43]

In setting down a legal case for differentiation between developing countries in the WTO, a logical start point is to emphasize that the principle of differentiation is not strange to the WTO as it is already being implemented in the system's legal acquis. The thesis will now turn to examine the cases with various WTO agreements which have already established one sort of differentiated sub-categories of developing countries or the other. Up to this point, the thesis has variously referred to the category of LDCs,

40 Ibid. See also *Chile Taxes on Alcoholic Beverages case (Arbitration procedure under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes)*, WT/DS87/15 (23 May 2000), para. 18.

41 Rolland, S. E. (2012). *Development at the WTO*, above n 37, at 80.

42 See WTO Appellate Body Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (7 April 2004), paras. 153-154.37

43 Rolland, S. E. (2012). *Development at the WTO*, above n 38, at 159.

which itself, is a sub-category of developing countries that has its basis in the Enabling Clause. Asides from this, the Uruguay Round negotiations saw to the emergence of new developing countries' sub-categories in defining, through several agreements, eligibility for specific SDT provisions. An example is the specific sub-category of developing countries with a GNP per capita inferior to USD$1000 per year identified by the WTO SCM Agreement and allowed to use export subsidies for a product, as long as their exports remains below a given threshold of global market share, that is, 3.25 percent of world exports of the product.[44] Actually, the SCM Agreement categorizes developing countries into four. First, is the LDC group. Second, is the twenty countries listed in Annex XII whose GNP per capita is less than US$1000. Third, are those countries 'in the process of transformation from centrally-planned into a market, free enterprise economy.'[45] The fourth is the broad category of developing countries. The Agreement on Agriculture creates an entirely new sub-category of developing countries– the Net Food-Importing Countries (NIFDC). Along-with the LDCs, these countries benefit from certain commitments by developed countries concerning food aid, technical assistance and export credits. The TRIPS Agreement, on its part, recognizes a sub-category of "WTO members with insufficient or no pharmaceutical manufacturing capacities", and accords them special rights.[46]

The use of 'special' and 'differential' at the WTO supports the view that differential treatment is intrinsic to the current SDT framework. Given developing countries are at different levels of development and with varying needs, a 'one size fits all' approach cannot address the divergent needs of this group of countries. This is consistent with the ruling of the WTO Appellate Body, in *EC-Tariff Preference*,[47] that 'the needs of developing countries vary over time' and that differentiation between countries is allowed in order to respond to their different development, financial and trade needs.[48] The 'similarly-situated' approach advocated by the Appellate Body provides legal support to initiatives that propose differentiating between developing countries for purposes of according SDT only to those that need it.[49]

Drawing from the WTO panel in the *US-Copyright* case,[50] the word 'special'

44 See listed countries in Annex VII of the SCM Agreement.

45 See SCM Agreement, Article XXIX.

46 See WTO. (2001). Doha Ministerial Declaration on the TRIPS Agreement and public health, para. 6. WT/MIN(01)/DEC/2. 20 November. The declaration recognized that "WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing." The declaration called for additional flexibilities to allow such members deal with the difficulties they face. A resultant temporary waiver was transposed into a permanent amendment of the TRIPS Agreement by virtue of a 2005 Protocol Amending the TRIPS Agreement. See WTO. (2005). Amendment of the TRIPS Agreement. General Council Decision of 6 December 2005. WT/L/641). See Ooms, G., & Hanefeld, J. (2019). Threat of compulsory licences could increase access to essential medicines. *BMJ*, *365*, 2.

47 WTO Appellate Body Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, above n 42.

48 Ibid, paras. 169 and 173.

49 Ibid, 154.

50 Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, 15 June 2000.

connotes 'having an individual or limited application or purpose'.[51] Within the context of SDT, it suggests that for a treatment to be considered special, it must apply to a particular country or case based on objective facts or conditions that are peculiar to that country or case. In other words, a treatment that is made available to countries or cases simply on the basis that they fall within a broad and subjectively defined category, such as the category of developing countries in the WTO, cannot be said to be special. From this, the distinction between differential treatment and 'special' treatment lies in the focus of each term.[52] While the focus of the former is on different categories, that is, by allowing special treatment to distinguish between one category and another, the latter focuses on the peculiarities of a single country or of a single case. Where 'categories' exist, special treatment will not simply apply broadly to all members of a category. It looks into the 'category' to identify meritorious and deserving individual cases based on objective facts or conditions. So, while it may be the case that all countries of a particular category are categorised based on a common (and often broad) differentiating factor, it cannot be the case that all WTO members of such category are entitled to the same special treatment simply on the basis that they are included in the same category. Nevertheless, this can indeed be the case if all countries in a given category exhibit the same unique characteristics that warrant the same special treatment.

Important differences exist between 'special' and 'differential' treatment, despite being used relatedly at the WTO. This precipitates the debate on the need to link the two words — 'special' and 'differential' – in the WTO. Paugam and Novel[53] opine that a scrutiny of the rationales for countries' resort to the usage of the Enabling Clause offers some insight into the differences. On the one hand, the Enabling Clause exclusively uses the term 'special' in reference to the sub-category of least developing countries, particularly so in urging regard for their 'special economic difficulties and the particular development, financial and trade needs'. On the other hand, the co-authors report that the notion of 'differential' and 'more favourable' treatment is used in reference to a broader category of 'developing country'.[54] Thus, it can be reasonably deduced that the Enabling Clause accords differential treatment to only developing countries, including the sub-set of LDCs as distinct from treatment which is generally available to all WTO members. Given some peculiar features, circumstances, or needs of some countries within the category of developing countries, i.e. LDCs, the Enabling Clause allows for further differentiation to offer 'special treatment' to this sub-category of developing

51 Ibid, para. 6.109.

52 See Paugam, J. M., & Novel, A. S. (2005). Why and How Differentiate Developing Countries in the WTO, above n 36 at 4. The usage of the two terms by the Enabling Clause is instructive. The Enabling Clause exclusively uses 'special treatment' in reference to distinctive treatment available to the sub-category of LDCs only (in the context of measures available to all developing countries) while 'differential and more favourable treatment' is used in reference to treatment available to the broader category of developing country. See paras 1 and 2 of the Enabling Clause.

53 Paugam, J. M., & Novel, A. S. (2005). Why and How Differentiate Developing Countries in the WTO, above n 36 at 4.

54 Ibid.

countries in response to their peculiar features, circumstances or needs.[55] 'Special' is used to distinguish the treatment available exclusively for LDCs from the treatment that is generally available to the broader group of developing countries qualifying for SDT.[56] Thus, the specific features, circumstances, or needs of LDCs are the basis for according them special treatment and not simply the basis that they are developing countries. If anything, the latter only prequalifies them.

Paragraph 7 of the Enabling Clause clearly affirms the intention of WTO members to treat developing countries differently when it comes to holding them to their trade obligations. Such is to be directly linked with a demonstrable and improving capacity of these countries to participate in international trade. Paragraph 7 further underscores the principle of graduation by which developing countries are expected to take up reciprocal trade commitments as their capacities improve. It reflects the idea of graduating developing countries out of SDT based on some objective criteria. In other words, it allows for differential treatment of developing countries on the basis of such objective criteria. This is without prejudice to the fact that the Enabling Clause defined no such objective criteria.

5.4 Approaches to differentiation

The ability of developing countries to implement and benefit from the implementation of WTO rules and disciplines varies, depending on factors such as their institutional capacity, income, size, and level of development. This underscores the need for differentiation between countries in order to appropriately determine which rules should apply to which countries at any point in time. This, in turn, raises the following questions: which developing countries can benefit from implementing a specific rule such that the benefits to them exceed implementation costs and which countries require SDT before they are able to implement such rules? The rationale for these questions is that some developing countries do not have the capacity to implement the rules even if these were beneficial. They would require some support to be able to implement the rules and reap associated benefits. Differentiation, thus, becomes important to sort developing countries effectively to achieve development. The WTO specifically recognizes and differentiates between developing countries. Indeed, efforts to differentiate between developing countries for the purpose of determining SDT eligibility is consistent with the letter and spirit of WTO law.[57] It remains, however, that 'objective criteria', which should serve as the basis for such differentiation across WTO agreements are yet to be clearly articulated. The thesis next moves to review existing approaches to differentiation

55 See Paragraph 2(d) of the Enabling Clause.

56 See Rolland, S. E. (2012). *Development at the WTO*, above n 37.

57 Article 27(5) & (6) of the SCM Agreement categorizes developing countries into four groups for determining which country should be allowed the use of export subsidies. The Agreement on Agriculture provides for Net Food-Importing Developing Countries (NFIDC), an entirely new sub-category of food insecure developing countries that require food aid and other financial and technical assistance.

and suggest a reform proposal for the current SDT framework.[58]

5.4.1 Country-based approach

Country-based approaches generally group countries with similar development situations together for purposes of SDT application. The grouping could either be based on geographic or socio-economic criteria.

5.4.1.1 Geographic indicators:

Two possible types of geographic differentiation exist, based on a trade and non-trade concern.[59] First is the regional grouping of countries of the world into regions. The World Bank divides countries in the world into six geographical regions: Africa, East Asia and the Pacific, Europe and Central Asia, Latin America and the Caribbean, Middle East and North Africa, and South Asia. The UN system divides the world into five geographical regions: Africa, Americas, Asia and the Pacific, Europe and Central Asia, and the Middle East. Whichever grouping one adopts, they are both deemed as reflecting similar development situations of countries in the same geographic group. This implies that similar treatment for countries in the same geographic group is required to address their development and trade needs. Differentiation is only necessary when SDT is to be given to countries in a different regional grouping. Factual differences in the development situations of countries (even in the same geographic region) however, weaken this approach to categorization. Huge diversities exist in respect of the development situations and trade needs of countries in the same regional grouping. For instance, the development situation and trade needs of Sub-Saharan countries like the Gambia (a LDC), South Africa (an emerging economy) and Cape Verde (an island country) depicts some huge diversities and would accordingly require differential treatment to respond to the peculiar needs of each.

The second geographic differentiation is based on purely non-trade elements like relief, climate, natural resources and exposure to natural disasters. SDT in this instance seeks to compensate for the natural handicaps of vulnerable countries where 'geographic diseases' concentrate.[60] The customary use of the notion of 'small and vulnerable economies' (SVEs) in the WTO is evidence that this approach to differentiation has already infiltrated the WTO system. This supports the view that beyond considerations of the spatial and environmental peculiarities that shape the natural environment, common outcomes from the interaction of peoples with the environment is also an

58 For a detailed analysis of these approaches, see Paugam, J. M., & Novel, A. S. (2005). Why and How Differentiate Developing Countries in the WTO, above n 36 at 10; Hoekman, B., Michalopoulos, C., & Winter, L. A. (2004). Special and differential treatment of developing countries in the WTO: Moving forward after Cancun. *World Economy*, *27*(4), 481-506; Hoekman, B. (2005). Operationalizing the concept of policy space in the WTO: Beyond special and differential treatment. *Journal of International Economic Law*, *8*(2), 405-424.

59 Paugam, J. M., & Novel, A. S. (2005). Why and How Differentiate Developing Countries in the WTO, above n 36 at 10-11.

60 Ibid, at 11.

important consideration in geographic differentiation of countries.[61] In other words, geographic differentiation encapsulates both elements of human geography as well as the geological features of a country. The grouping of SVEs for instance, is on the basis of a combination of several socio-economic factors related to their size: small domestic markets; low GDP per capita; their resource base is narrow, fragile and susceptible to disruption by natural disasters; limited local capacity for productive investment; and high dependence on a small range of primary products for foreign exchange.

Hoekman *et al* note that a country-based approach has the advantage of not just basing differentiation on strict WTO requirements but rather takes into account the entire gamut of support needed by a developing country to manage its trade reform.[62] For instance, we would need to consider the effect of a drought situation in a particular developing country in a determination of whether that developing country has the capacity to implement a particular WTO rule. This approach tends to have the advantage of basing differentiation on a holistic development assessment of a country – with development institutions like the World Bank and the UN agencies tackling the broader development concerns while the WTO focuses on purely trade-related development concerns. Such reflection of specialization in institutional responsibility taking could help to avoid what the literature describes as 'unconstructive outcomes' that may result if the WTO, for instance, was to take on broad development issues, particularly in the absence of clearly defined developing countries' priorities and constituent interests.[63] On the other hand, the literature identifies a clear weakness of country-based grouping in the lack of an established correlation between unfavourable geographical conditions and poverty or economic performance.[64] With every country having the potential to show geographic vulnerability in one form or the other, special trade measures can hardly provide the solution to geographic disaster.

5.4.1.2 Socio-economic Indicators

As earlier suggested, the use of socio-economic indicators to categorize countries for economic development purposes is widespread among the world's development institutions.[65] Most common for country categorization purposes are such economic criteria like GNP per capita, vulnerability index; social criteria like human development indexes; and institutional criteria like governance, and freedom index. Again, the thesis acknowledges criticisms that these indicators generally fail to address core trade concerns of developing countries as they measure broad development issues for which the WTO

61 See Chen, H., Lai, K., He, L., & Yu, R. (2020). Where you are is who you are? The geographical account of psychological phenomena. *Frontiers in psychology*, *11*, 536.
62 Hoekman *et al* (2004). Special and differential treatment of developing countries in the WTO, above n 58 at 493
63 Ibid.
64 Paugam, J. M., & Novel, A. S. (2005). Why and How Differentiate Developing Countries in the WTO, above n 36 at 11.
65 Ibid.

has no mandate.[66] Notwithstanding, the use of socio-economic criteria to determine eligibility for differential treatment and also when to 'graduate' a country from such treatment is one which holds a bright prospect for successfully defining objective criteria for doing the same in the WTO.

Unfortunately, this is an area where the Enabling Clause falls short as it merely provides for graduation of developing countries from special treatment, for instance in the case of GSP schemes, without a hint at the criteria for such graduation, nor a guide to defining any. Usually, graduation is triggered by macro-economic and trade specific thresholds, combining country-based approaches (whole eligibility of a country to preferential programs) and product-based approaches (exclusion of a country's sector/ product that has become internationally competitive).[67] The arbitrariness which characterizes how preference-giving countries deal with the definition, application and withdrawal of graduation criteria in GSP schemes make such criteria anything but objective and contributes to their political volatility.

5.4.2 The rule-of-thumb approach

Hoekman *et al* suggest an alternative rule-of-thumb approach which in effect identifies a group of countries that will include the LDCs, other groups of low-income countries, small economies with weak institutional capacities, who would be required to comply with 'core' WTO rules like the MFN and National Treatment rules. On the other hand, they will be allowed the option of opting out of other 'non-core' rules, either because such rules are resource intensive (like the TRIPS Agreement), for which they lack the capacity to implement, or because such rules could hinder their development priorities [such as public health or food security].[68] This approach would require redefining the current three-fold country classification in the WTO. Hoekman *et al* suggest that stricter economic based criteria would be required to regroup countries along the lines of their income level and institutional capacities.[69] Only low income and small economies should receive SDT. The idea of grouping countries based on objective criteria of income level ensures that the negative externalities of SDT will be minimal for other trading partners.

The approach allows an appeals procedure for countries that feel that they have been particularly hurt by being excluded from benefiting from SDT. A case-by-case consideration of such countries' complaints would be necessary to determine their merit. This would require regular implementation audits of agreements in issue and needs-assessment for the dissatisfied countries. The potential cost to the WTO system in terms of time and resources is the bane of this approach.

66 Ibid.
67 Ibid.
68 Heokman *et al* (2004). Special and differential treatment of developing countries in the WTO, above n 58 at 493.
69 Ibid, at 494.

5.4.3 Rule-based approach

Here, the basis for differentiation is to be found in successfully defining objective criteria for eligibility on an agreement-by-agreement [or provision-by-provision] basis.[70] Essentially, countries that exhibit similar 'differences' in respect to a particular rule for which SDT is intended will be accorded that SDT. Whether the same grouping, or a different conflagration of them, will receive SDT in respect of another rule is an entirely independent consideration. Put differently, graduation here is not horizontal as a country may graduate from SDT in respect of a particular agreement but remain eligible in respect of another agreement. According to the literature, the first step here would require designing relevant criteria for the purpose of each specific SDT measures.[71] The second would be to identify the targeted group of countries corresponding to the final SDT objective.[72]

This approach has the advantage of ensuring that SDT better responds to the specific [trade-related] needs of countries, particularly, as attention is given to the economic costs and benefits of implementation of WTO rules.[73] The downside of this approach lies mainly in the fact that it requires regular implementation audits that may likely boil down to an assessment of each beneficiary country's implementation of each relevant agreement. The huge costs involved, in terms of time and resources, is something which many developing countries cannot afford. Also, there is no guarantee that the results of implementation audits, particularly, assessed costs and benefits of implementation, will be acceptable to all WTO members. The volatility and multi-stakeholder process that may be required to determine an objective criteria that will be acceptable to all members may not only make negotiations more complex but could expose the WTO system to cross-conditionality arising from other international development institutions.[74] Despite the challenges to this approach, the thesis considers it as most consistent with an analytical approach to SDT, particularly in terms of measuring economic development needs against legal provisions. It is most consistent with the 'one-size-does-not-fit-all' precept and can best ensure that only those countries that are most in need of SDT get it at any point in time.

70 See Hoekman *et al* (2003). *More favorable and differential treatment of developing countries* above n 6; Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO: Why, When and How?* p. 8, Staff Working Paper ERSD-2004-03, available at http://www.wto.org/english/res_e/reser_e/ersd200403_e.htm. Accessed 18 December 2021; Stevens, C. (2002). *The Future of Special and Differential (SDT) for Developing Countries in the WTO*, IDS Working Paper 163, available at https://www.ids.ac.uk/publications/the-future-of-special-and-differential-treatment-sdt-for-developing-countries-in-the-wto/. Accessed 18 December 2021.

71 Paugam, J. M., & Novel, A. S. (2005). Why and How Differentiate Developing Countries in the WTO, above n 36 at 12.

72 Ibid.

73 Heokman *et al* (2004). Special and differential treatment of developing countries in the WTO, above n 58 at 493.

74 Ibid.

5.4.4 Implicit threshold approach

Essentially, this is a variant of the rules-based approach which allows countries access to SDT based on factual differences. The view that a country may graduate from a provision-specific SDT measure while still remaining eligible for others, suggests that graduation is based on objective criteria inherent to each particular rule. As Cottier suggests, the application of the rule to a country exhibiting such factual difference is defined on the basis of economic thresholds.[75] An obligation to apply the rule would kick in when the economic threshold is reached. An important aspect of the implicit threshold approach lies in defining an objective basis for graduation, that is, identifying objective criteria that will define access to SDT on a provision-specific basis.[76] This may be defined either:

(a) by reference to explicit economic thresholds in terms of GDP per capita that determines whether non-LDCs can continue to apply export subsidies to manufactures, such as under Article 27(2) (a) and Annex VII of the SCM Agreement; or,
(b) by negotiation of staggered time frame for phasing in WTO obligations. This proposal on SDT reform relates particularly to the fact that while countries including LDCs are eligible for differential treatment, a provision-specific approach would allow using objective criteria to include additional countries into the SDT basket. The challenge of defining objective criteria relevant to specific SDT concerns, however, remains.[77]

Reaching the specific threshold will trigger the application of the rule in issue. Until the threshold is reached, the country is not obliged to implement the rule.[78] Keck and Low had earlier endorsed the idea of graduating countries from SDT based on economic criteria at a disaggregated, provision-specific level.[79] While acknowledging the difficult negotiation that could follow an attempt to define acceptable economic criteria in the WTO, they describe any such effort as worthwhile as it would result in the greater good, in terms of less politicisation of the system and ensuring that SDT provisions respond more effectively to real needs.[80]

75 Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law. *Journal of International Economic Law*, *9*(4), 779-821 at 807.
76 Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO* above n 70 at 26.
77 Ibid.
78 Ibid.
79 Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO*), above n 70 at 10.
80 Ibid, at 9-10.

5.5 'Differentiated differentiation': proposal for reform

5.5.1 Defining differentiated differentiation

While there is a lack of consensus on appropriate criteria for country [re]categorisation at the WTO,[81] it is unarguable that more differentiation between countries is vital if SDT is to become a useful tool to address the special concerns of developing countries.[82] This thesis advocates defining the eligibility criteria for allowing countries access to the SDT on an agreement-by-agreement basis.[83] While this may attract criticism from various stakeholders, the rationale for this approach is based on the fact that SDT should be geared towards supporting countries to improve their rule implementation capacities. It is against this backdrop that the thesis proposes 'differentiated differentiation' as an implicit threshold approach to differentiation. By its nature, differentiated differentiation is amenable to the principle of graduation, in that, it identifies which countries should be allowed derogation from a particular WTO rule at any given time.[84] Under this approach, graduation from SDT is not horizontal, given that a country may graduate from SDT for a particular WTO agreement, but may remain eligible for SDT under another agreement.

The suggestion that 'particular concerns' 'should be taken into consideration, as appropriate, during the Uruguay Round Agriculture and Non-agricultural Market Access (NAMA) negotiations' is an indication that special attention could be given to the concerns of developing countries (including capacity constraints) as they undertake increasing WTO rule obligations.[85] Again, this demonstrates that the WTO already permits differentiated treatment according to a country's level of development. Differentiated differentiation could be used to reflect this across all agreements. The success of the proposed endeavour, however, lies in defining the criteria for SDT eligibility on a provision-by-provision basis rather than an across-the-board approach.[86] While acknowledging that additional resources and efforts would be required to

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81 While there appears to be broad agreement among WTO members on the need to accommodate different levels of development, the questions of how to define, designate and graduate a developing country remain contentious. Developing countries led by China have rejected the use of hard economic criteria to essentially redefined the developing country category as proposed by the US. See WTO. (2019). An undifferentiated WTO, above n 9; WTO. (2019). The continued relevance of special and differential treatment in favour of developing members to promote development and ensure inclusiveness, Communication from China, India, South Africa and the Bolivarian Republic of Venezuela. WT/GC/W/765, 28 February.

82 The recent EU's WTO reform proposal recognize the delicate balancing required. While avoiding issues around eligibility criteria, it underscores the point that SDT should be 'needs-driven and evidence-based' – effectively, targeting more differentiation among countries. See European Commission (2018). WTO Modernisation, above n 9.

83 Contrastingly, this approach does not focus on country categorization. It is rather agreement-specific. For an earlier exposition of this approach, see Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO*, above n 70; Hoekman *et al* (2003). *More favorable and differential treatment of developing countries* above n 70; Stevens, C. (2002). *The Future of Special and Differential (SDT) for Developing Countries in the WTO*, above n 70.

84 See Cottier (2006), above n 75 and Gonzalez *et al* (2011), above n 13.

85 WTO. (2007). *WTO Analytical Index: Guide to WTO Law and Practice*, Vol. 1, p. 90, Cambridge University Press, Cambridge, UK. See also WTO. (2012). *WTO Analytical Index: Guide to WTO Law and Practice*, (3rd Edition), Cambridge University Press, Cambridge, UK.

86 See Hoekman *et al* (2003) above n 70; Keck and Low (2004), above n 70; Stevens (2002), above n 70.

apply such differentiated approach, the advantage of ensuring that SDT responds to specific [trade-related] needs of countries, makes it worth the while.[87] Admittedly, it faces similar challenges as the rules-based approach earlier articulated, including high implementation costs and the complexities with the determination of objective criteria for differentiation in the WTO.

Despite the challenges listed above, the proposed framework is consistent as it provides a transparent analytical approach for a reformed SDT framework, particularly in terms of measuring the economic development needs against legal provisions. It will help ease tension around the question of access to SDT and move the WTO toward the goal of making SDT wholly transitional and aimed at full compliance with WTO members' obligations. This way, the WTO is able to respond to the needs of its poorest members while also ensuring that the advanced developing countries bear their full responsibilities as WTO members.

5.5.2 Implementation proposal for differentiated differentiation

As earlier suggested, 'differentiated differentiation' as an implicit threshold approach to differentiation is amenable to the principle of graduation which identifies which countries should be allowed derogation from a particular WTO rule at any given time.[88] The rationale for 'differentiated differentiation' is that SDT should be geared towards supporting countries to improve their rule implementation capacities rather than provide them with a permanent exemption. Accordingly, the assumption of trade treaty obligations by developing countries should be determined by their rule implementation capacity at any given time. To operationalise such modulation of commitments, firstly, we need to determine what constraints developing countries are likely to face in implementing a particular rule.[89] Secondly, we should identify, based on some analytical criteria, the countries that suffer from these constraints and hence, lack the capacity to implement the rule. Targeted SDT, including derogation from discipline, could then be offered to such countries to overcome the constraint(s). The objective here is to ensure that SDT is targeted at only those countries that justifiably need it. This approach requires that rule implementation obligation is made contingent on a country overcoming a set of identified constraints. That is, the modulation of commitments only kicks in when identified constraints have been overcome. Invariably, countries that fall below a preferred threshold would be entitled to SDT while those above the threshold would not be eligible for SDT. Adopting a new evidence-based, case-by-case approach

87 Hoekman *et al* (2004), above n 58, at 493.

88 See Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law, above n 75; Gonzalez *et al* (2011). TRIPS and Special & Differential Treatment, above n 13.

89 Using the TRIPS Agreement, Gonzalez *et al* (2011) identified four possible constraints (economic constraints, access to pharmaceuticals, capacity constraints, and incidence of health outcomes) that make developing countries particularly vulnerable to patent protection enforcement, on which basis they then selected relevant indicators that capture these constraints. Further basing on a combination of the indicators, they were able to draw up a list of countries that were deserving of exemption from TRIPS provisions for patent protection in the pharmaceutical industry.

to SDT could ensure both that the concerns of the poorest countries are addressed and that advanced developing countries pull their weight in the organization.

To operationalise a threshold approach to differentiation to determine which country should be exempted from rule discipline, the use of analytical criteria to identify constraints that countries face as a result of, or in the process of, rule implementation is central. Gonzalez *et al* note the possibility of a mismatch between the analytical criteria used and actual constraints identified.[90] This acknowledges the fact that the analytical criteria will at best be a proxy for a given constraint. Nonetheless, identifying and using a combined set of indicators to identify possible constraints could be less problematic. A composite indicator will better reflect such constraints vis-à-vis the varied needs of countries.

5.5.3 Designing a composite indicator approach

A composite indicator approach is proposed to combine indicators into a composite measure. The composite indicator encapsulates individual indicators, each of which has been pre-ranked according to a weighted structure. In practical terms, this requires, firstly that having identified the constraints that countries faced in the implementation of a rule, we proceed to propose appropriate indicators (with weights attached to each) to capture these constraints. Secondly, it requires ranking countries by indicators, and thirdly, taking the average ranking score (mean) and applying the sets of weights to create a composite indicator. The weights should be an outcome of a negotiated process that takes countries' performance of global trade into consideration. Fourthly, this approach calls for determining the relative standing of countries in terms of constraints faced. This latter step is done by ranking the countries against each other using the composite score of the constraints per indicator. This will allow us to draw up a list of developing countries in a manner that reflects their heterogeneous needs.

Determining the threshold for graduating countries (on the list of countries) for derogation from a particular discipline is important. In this regard, the thesis recommends a statistically based score threshold procedure to determine the graduation threshold. This would involve a calculation of the Mean of the average scores of the composite weighted constraints for all countries on the list. The Mean value presents an objective basis at which we can objectively peg the threshold for graduating countries out of SDT. Countries below the Mean will be entitled to SDT while those that hit the Mean value and above are straightaway considered for graduation.

90 Gonzalez *et al* (2011). TRIPS and Special & Differential Treatment, above n 13 at 17.

5.5.4 Procedural reform: A case for improved monitoring of technical assistance delivery

The question with the differentiated differentiation approach remains whether special provisions, for example that allow a longer transition period for developing countries to apply international trade obligations could become more effective. Differentiated differentiation will require successful implementation of WTO agreements and the rationalisation of institutional and human resources, policy adaptation, and improved coordination with relevant stakeholders to facilitate their participation at the WTO.[91] In practical terms, this would require setting up a multi-stakeholder structure to coordinate the implementation of such agreements; developing agreement-specific strategies and action plans to achieve the goals of each agreement; and putting an appropriate regulatory and legislative framework in place to support reforms aimed at achieving the objective of any particular agreement. For several developing countries and LDCs, the financial and technical resources to initiate and sustain such broad reform are lacking. Technical assistance provisions through the WTO obligates developed countries and the Secretariat to provide technical assistance to help developing countries take full advantage of the multilateral trading system.[92] However, the vagueness of such provisions (in terms of form and purpose) and their largely hortatory character have generated concerns about their effectiveness.[93]

Again, the thesis refers to China's successful compliance with its ODS reduction obligations under the Montreal Protocol as offering some insight into how countries could leverage targeted assistance during transition periods, in particular to comply with their trade obligations.[94] China's case suggests that financial or technical assistance should ideally be linked to a country's compliance with the procedural requirements of an agreement and continuous improvement of its implementation strategies as far as complying with obligations under that agreement is concerned.

5.5.5 Monitoring and review

To further ensure SDT accountability and effectiveness, a mechanism to monitor and report progress on rule implementation during a transition period could prove invaluable. The July 2004 Package[95] refers to 'monitoring and surveillance' in the context

91 See Prowse, S. (2002). The role of international and national agencies in trade–related capacity building. *World Economy*, *25*(9), 1235-1261 at 1241 and 1246.

92 See Article XXV of the WTO General Agreement on Trade in Services (GATS), 1869 U.N.T.S. 183; Article 11 of the TBT Agreement; Article 9 of the SPS Agreement; Article 67 of the TRIPS Agreement.

93 See Jin, J. (2019). The failure of special and differential treatment in international trade: an indication for future WTO rules, available at http://dx.doi.org/10.2139/ssrn.3445751. Accessed 27 December 2021. See also Switzer, S. (2017). A contract theory approach to special and differential treatment and the WTO. *Journal of International Trade Law and Policy*, 16(3), 126-140.

94 See chapter 3 of this thesis.

95 WTO. (2021). Doha Work Programme (the July Package), General Council Decision of 1 August 2004, WT/L/535, available at https://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf. Accessed 27 December.

of agriculture and suggests only 'enhancing' the existing system of notifications.[96] Since the significant contributions of SDT provisions are spread more across specific WTO agreements than in the general provisions, it may be more effective to integrate SDT monitoring mechanism(s) into substantive agreements.

Underscoring the importance of reporting requirements in promoting accountability and effectiveness of treaty obligations, Rolland summarizes that it could be useful to monitor and improve compliance with obligations; gather information that may be used for reforming a particular rule or agreement; and assist in the design and delivery of effective capacity-building support to deserving beneficiaries.[97] Such a mechanism will be useful in providing early warning signals if a developing country is not on course to meet the SDT objective. Any problem can be timely identified. If such developing country requires on-going assistance to be redirected or modified, that is done in time to address the problem. This approach will incentivize developing countries to draw motivation from knowing that continuous technical assistance is linked to meeting certain thresholds in their progress towards complying with trade treaty obligations.

A mandatory requirement for all SDT beneficiaries to self-report progress as part of a peer review process should also be put in place for the beneficiaries of technical assistance. Such peer review process is key to instituting much needed accountability in multilateral governance arrangements.[98]

5.6 Conclusion and the way forward

Globalisation has altered the pattern of world trade and a few developing countries have progressed from being traditional goods exporters to becoming partners in preferential trade agreements. While the changing pattern of trade has favoured several countries, it has been criticized as limiting the economic freedom of developing countries, in that it prevents them from accessing markets in the rest of the world to support their varied development needs.[99] Sen opined that a major failing of the current SDT approach has been its usage as the basis for exempting developing countries from WTO obligations instead of helping these countries comply with WTO obligations to support full integration into the global trading system.[100] There is ample evidence to suggest that the gains from SDT have been limited and benefits are not being harnessed by developing countries and LDCs, hence, the need to rethink the current SDT framework at the WTO. No doubt, SDT reform is on the front burner of the current raging debates to reform the WTO. With the US's proposal for the use of hard criteria (e.g., high income, the share of global trade, membership in the OECD or G20) to redefine the

96 Ibid, Article 48.
97 Rolland, S. E. (2012). *Development at the WTO*, above n 37, at 128.
98 See Gupta, A., Karlsson-Vinkhuyzen, S., Kamil, N., Ching, A., & Bernaz, N. (2021). Performing accountability: face-to-face account-giving in multilateral climate transparency processes. *Climate Policy*, *21*(5), 616-634.
99 See Verter, N. (2017). International trade: the position of Africa in global merchandise trade. In *Emerging issues in economics and development*. Ibrahim, M. (ed.). 64-89. IntechOpen.
100 Sen, A. (1999), *Development as Freedom,* Random House, New York.

'developing country' category,[101] the EU's proposal for flexibilities to be limited to only those countries most in need,[102] Norway's call for a 'constructive conversation . . . about the development dimension',[103] and Canada's call for a balance between reciprocity and flexibility and more differentiation between developing countries,[104] the opportunity must not be lost to get the WTO to deliver on its promise of development.

At present, SDT in the WTO is undefined and self-declared. As the debate on SDT has revealed, there is a lack of agreement [among stakeholders] on what SDT should entail, where it is appropriate, and what its purpose should be in the multilateral trading system. The thesis has essentially, argued that the WTO's approach to SDT must be framed through the lens of 'what development means.' It is partly for this reason that considering the level or stage of a country's development would help determine the level and type of SDT required to help it achieve sustainable development. This thesis advocates for 'differentiated differentiation' in the application of SDT and makes a case for defining SDT eligibility criteria on a provision-by-provision basis.

'Differentiated differentiation' envisages that SDT is geared towards supporting countries to improve their rule implementation capacity rather than provide them with a permanent exemption. Hence, whether a developing country is allowed to derogate from a particular rule is dependent on its capacity to implement the rule at a given time. In practical terms, we would first need to determine what constraints developing countries are likely to face in implementing that rule. Secondly, we would have to identify, based on some analytical criteria, the countries that suffer from these constraints and hence, lack the capacity to implement the rule. To ensure that selected analytical criteria sufficiently reflect the heterogeneity of possible constraints, the thesis proposes a combined set of indicators that will serve to identify such constraints. Targeted SDT, including derogation from discipline, could then be offered to the deserving country to overcome the identified constraint(s). This approach not only puts an end to the long-drawn debate on country re-categorization in the WTO, but it also ensures that only those countries that justifiably need SDT get it. To avoid a situation where the SDT framework as proposed is used as an eternal crutch, the thesis advocates for graduating SDT beneficiaries based on the use of a statistically based score threshold procedure to determine the threshold for graduation.

Developing countries need to visualize SDT for what it is– a trade tool to promote development. To ensure that SDT advances development, and does not impede it, a broader understanding of the meaning of development must be taken and reflected in the design of an alternative approach to SDT. Consistent with a more comprehensive

101 WTO. (2019). An Undifferentiated WTO, above n 9.

102 European Commission (2018). WTO Modernisation, above n 9.

103 WTO. (2019). Pursuing the Development Dimension in WTO Rule-Making Efforts. Communication from Norway, Canada, Hong Kong, China, Iceland, Mexico, New Zealand, Singapore, and Switzerland. WT/GC/W/770/Rev.3, 7 May.

104 WTO. (2018). Strengthening and Modernizing the WTO: Discussion Paper. Communication from Canada. JOB/GC/201, 24 September.

goal of sustainable development as expressed in the preamble of the WTO Agreement, development should be viewed as an empowering process for individual humans/ countries.[105] It is this view that should be the guiding light for efforts to promote development at the WTO. This more expansive view contemplates that trade is a pathway to engaging with the challenges and opportunities of the wider world. Thus, trade becomes a means to promote the broadest fulfilment of both individual and national potential.[106] This broader view of what development means must be reflected in SDT design at the WTO. The focus of SDT should thus not be on more exclusion but more inclusion. SDT 'should enable rather than exempt'.[107]

105 See Bacchus, J., & Manak, I. (2021). *The Development Dimension*, above n 11.
106 Ibid, at 57.
107 Low, P., Mamdouh, H., and Rogerson, E., *Balancing Rights and Obligations in the WTO – A Shared Responsibility*, p. 27. (Geneva: IDEAS Centre, 2019).

6

Chapter 6

Applying the differentiated differentiation approach to the WTO customs valuation agreement*

* Formerly known as the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, 1868 UNTS 279. The Agreement is annexed to the WTO Agreement as Annex 1A. The selection of the CVA for the demonstration of differentiated differentiation is motivated by the fact that along-with other resource-intensive WTO agreements like the TRIPS and TBT Agreements, it places some of the most onerous implementation obligations on developing countries, particularly, in terms of the legal, regulatory, and institutional changes required of members. Discussions to address the challenges faced by developing countries in complying with these two agreements remain deeply dividing among WTO members. See https://www.wto.org/english/news_e/news21_e/devel_12feb21_e.htm; North refuses to engage on S&DT provisions on TBT, customs valuation (twn.my); https://www.wto.org/english/news_e/news21_e/devel_18jun21_e.htm. Accessed on 2 December 2021. Another motivation for selecting the CVA is its potential to help developing countries deal with massive revenue losses resulting from the persistent problem of trade misinvoicing — a method for moving money illicitly across borders which involves the deliberate falsification of the value, volume, and/or type of commodity in an international commercial transaction by at least one party to the transaction. A recent survey by the Global Financial Integrity (GFI) reports US$8.7 trillion as the sum of the value gaps identified in trade between 135 developing countries and 36 advanced economies over the ten-year period 2008-2017, with US$817.6 billion reported for 2017 alone. Trade misinvoicing is the largest component of illicit financial outflows measured by GFI. The full GFI report is available at https://gfintegrity.org/report/trade-related-illicit-financial-flows-in-135-developing-countries-2008-2017/. Accessed 2 December 2021.

6.1 Introduction

Customs valuation is an important aspect of trade facilitation. It refers to the customs procedure applied to determine the customs value of imported goods. If the rate of duty is *ad valorem*, the customs value is essential to determine the duty to be paid on an imported good.[1] In other words, an *ad valorem* duty depends on the value of a good.[2] Under this system, the customs value of a good is multiplied by an *ad valorem* rate of duty (e.g., 5 percent) in order to arrive at the amount of duty payable on an imported item. This underscores the importance of establishing generally acceptable rules and systems for the valuation of imported goods. Given such importance of the valuation of goods, procedures for determining the dutiable value of imported goods have been the subject of international negotiations since the early 1920s.[3] The 1947 GATT negotiations established the principles for customs valuation and indeed, the first noteworthy international agreement on customs valuation.[4] Embodied in Article VII of the GATT, the principles underscored that customs value should not be arbitrary, fictitious, or based on the value of indigenous goods.

The CVA regulates customs valuation practices and in the main requires that the customs value of imported goods, to the greatest extent possible, should be the transaction value, that is, the price paid or payable for the goods.[5] Being a highly technical and complex agreement, developing countries have generally found it difficult to effectively implement this agreement, despite its huge development prospects.[6] Indeed, many

1 Customs duties are designated in either specific or *ad valorem* terms or as a mix of the two. *Ad valorem* is the Latin word for 'on the value'. In case of a specific duty, a concrete sum is charged for a quantitative description of the good, for example $1 per item or per unit. The customs value of the good does not need to be determined, as the duty is not based on the value of the good but on other criteria. In this case, no rules on customs valuation are needed and the CVA does not apply. See WTO. Trade topics - Technical information on customs valuation, available at https://www.wto.org/english/tratop_e/cusval_e/cusval_info_e.htm#:~:text=Customs%20valuation%20is%20a%20customs,paid%20on%20an%20imported%20good.. Accessed 30 November 2021.

2 Wang, K., Chou, P., and Liang, W. (2021). Commodity taxes and rent extraction. Journal of Economics, pp. 1-13.

3 For a historical account of the development of the CVA, see Rajkarnikar, P. R. (2006). Implementation of the WTO Customs Valuation Agreement in Nepal: An ex-ante impact assessment (No. 18). ARTNeT Working Paper Series.

4 Goorman, A., & De Wulf, L. (2005). Customs Valuation in Developing Countries and the World Trade Organization Valuation Rules. In Customs Modernization Handbook, De Wulf, L., & Sokol, J. B. (Eds.). pp. 155-181 at 160-163. World Bank. The Tokyo Round of Trade Negotiations that was conducted between 1973 and 1979 ended up in the signing of the first Agreement on the Implementation of Article VII of the GATT (commonly referred to as the Tokyo Round Customs Valuation Code, hereinafter also referred to as the 'Tokyo Round Code'). The Code was preserved intact in the subsequent Uruguay Round Negotiations conducted between 1986 and 1993 that led to the formation of the WTO, as the Uruguay Round's *Agreement on Implementation of Article VII of General Agreement on Tariffs and Trade* 1994. The Agreement is what we now know and refer to as the CVA. It however has a stronger binding force than the Tokyo Round Code, as a result of the Uruguay Round's 'single-package' undertaking. The 'single-package' principle is embodied in Article II: 2 of the Marrakesh Agreement Establishing the WTO, which provides that [t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all members".

5 See Article 1 of the CVA.

6 See Alagic, O. (2020). Customs Valuation: A Bosnian and Herzegovinian Perspective. Global Trade and Customs Journal, 15(2); Le, D. H., Nayyar, A., & Le Rots, N. (2018). Implementation of the WTO Agreement on Customs Valuation in Vietnam: Trade Integration and Local Compliance at Da Nang Port. *Indian Journal of Finance*, 43; Jiang, Z. (2017). Customs Valuation and Transfer Pricing: Legal Rules, Practices-A China Case Study-and Proposals to Address the Significant Concern for Cost-Efficient Compliance and Trade Facilitation. *Global Trade and Customs Journal*, *12*(6); Menciūnienė, V., Rugenytė, D., & Simanavičienė, Ž. (2010). The practice of customs valuation methods in developing countries. *Business, Management and Economics Engineering*, *8*(1), 79-95.

developing countries lack the requirements to effectively implement the CVA. The implementation of the CVA assumes the existence of a certain degree of capacity on the part of the responsible implementing agency at the national level, usually the national customs administrations. Since national customs administrations are traditionally responsible for applying customs tariffs to imported goods, they are often assumed to possess the necessary capacity for implementing the CVA. However, it is not a good policy to make assumptions about the capacity of a customs administration without an assessment of the situation on the ground.[7] This is particularly important within the context of the central argument of this thesis that a country's obligation to implement any WTO agreement, including the CVA, should be dependent on it having the capacity to so implement. Accordingly, ascertaining whether any one customs administration has the requisite capacity to implement the CVA should be based on an actual assessment of its existing capacity.

The main objective of this chapter of the thesis is to demonstrate how we may apply an implicit threshold approach, malleable to the principle of graduation, to identify countries that should be entitled to delayed application of the general provisions of the CVA under the tenets of SDT. The rest of the chapter is structured as follows: section 6.2 overviews the general and special provisions of the CVA. It also reviews the requirements and challenges faced by developing countries in implementing the CVA. Section 6.3 identifies the capacity requirements for countries to effectively implement the CVA and the constraints that limit these countries in the implementation process. Section 6.4 focuses on demonstrating differentiated differentiation in the context of the CVA, using a composite indicator approach. This required the thesis to analytically identify indicators that capture the constraints that countries face in their application of the CVA and to combine the underlying criteria into a composite measure that allows for the ranking of countries based on their capacity to implement the CVA. In section 6.5, the thesis explores the use of a statistical method to determine the threshold for holding countries on the ranking list to the strict application of CVA provisions. Section 6.6 sums up the chapter findings– that for countries to benefit from the implementation of trade agreements, there must first exist the capacity for them to implement such agreements. The question of whether a country should be exempted from rule implementation at any time should be guided by an objective determination of whether there exists an implementation-related capacity constraint in respect of such country and how SDT is contemplated to address such constraint if it exists.

7 Malone, J. (2002), Defining/developing capacity building in the field of customs valuation, Presentation by European Commission at Seminar on Technical Assistance on Customs Valuation, (WTO, 6-7 November, available at https://www.wto.org/english/tratop_e/cusval_e/seminar_nov02_e/programme_e.htm (accessed 10 September 2021).

6.2 Overview of the customs valuation agreement

6.2.2 Structure of the agreement

The CVA is constituted of twenty-four articles and three annexes. Article 1-8 of the Agreement sets out the technical rules of customs valuation. These rules are discussed in some detail in the next sub-section on methods of valuation. The rest of the articles concern themselves with implementation issues in national legislation and practice, including issues like rights of appeal and publication requirements, the settlement of valuation disputes between WTO members, and the administration and review of the Agreement by the WTO Valuation Committee and Technical Committee. More specifically, Article 9 provides the rules for converting currency as may be necessary; Article 10 provides for the confidentiality of valuation information; Article 11 provides for an importer's rights of appeal against customs decisions; Article 12 contains the publication requirements of national laws, regulations, judicial decisions and administrative rulings; Article 13 provides for an importer's right to release of imported goods, pending customs final decision; Article 14 states the legal effect of Interpretative Notes in Annex I and other annexes; Article 15 defines the main terms of the Agreement; Article 16 provides for an importer's right to an explanation from customs as to how the customs value of his goods was determined; Article 17 provides for the right of customs administrations to question importers on a declared value; Article 18 establishes the institutional structures; Article 19 provides for dispute settlement; Article 20 provides for SDT for developing countries; Article 21 provides the guide for reservations by members; Article 22 contains the requirement for national legislation to conform to the Agreement; Article 23 provides for the annual review of implementation by members; and, Article 24 appoints the Secretariat.

Annex I of the Agreement contains the Interpretative Notes, which are deemed to be an integral part of the Agreement.[8] The articles of the Agreement are to be read and applied in conjunction with their respective Interpretative Notes.[9] The Interpretative Notes and the General Introductory Commentary elaborate the meaning of key terms of the Agreement, provide examples of how valuation methods should be applied to particular cases, and provide a general explanation of the overall purposes of the Agreement.[10] Annex II of the Agreement defines the role, responsibility, and working procedures of the Technical Committee vis-à-vis the administration of the Agreement and Annex III of the Agreement contains provisions that define rights of developing country members to delay or make reservations against the application of certain provisions of the Agreement.

8 See Article 14 of the CVA.

9 Ibid.

10 The Commentary and Interpretative Notes were negotiated during the Tokyo Round at the same time as the articles of the articles of the Agreement itself. Hence, they are generally held to indicate a contemporaneous view of the drafters' intentions.

6.2.1 Guiding principles and objectives of the agreement

The CVA seeks to tackle customs clearance delays resulting from valuation verification and to ensure that the customs value of goods entering a market is properly assessed to reflect the actual price of the goods as agreed between the buyer and seller. For a broad appreciation of the principles and objectives that shaped the CVA, the thesis will here review the substantive GATT Article VII on customs valuation. Article VII of the GATT 1994 lays out the general principles of customs valuation to be followed by WTO Members with regard to all goods subject to import duties. Article VII: 2 (a) underscores the prohibition of arbitrary, fictitious customs values and the basing of customs value on the value of merchandise of national origin. It also sets the obligation to take 'actual value' as the basic rule of customs valuation.[11] Other principles include the obligation to consider the nearest ascertainable equivalent of the 'actual value' as a substitute rule as provided in Article VII: 2 (c); the exclusion of certain internal taxes as provided in Article VII: 3; and transparency in determining the value of products subject to duties or other charges or restrictions per Article VII: 5.

Having regard to the many variables which influence customs valuation as provided for in GATT Article VII, it falls short of the certainty and predictability requirement of a legal system, which is required to prevent customs officials from making an arbitrary use of valuation procedures, or WTO members from using customs valuation for protectionist purposes.[12] The CVA not only makes up for this gap but also provides a more practical basis for determining the customs value of imported goods.

If we go back to the Tokyo Round Customs Valuation Code, we find a first statement of the objectives of the CVA. The Code sets out the objectives as being: to further the objectives of the GATT; to secure additional benefits for the international trade of developing countries; to provide greater uniformity and certainty in the implementation of the provisions of the GATT; and, to provide a fair, uniform and neutral customs valuation system that precludes the use of arbitrary or fictitious customs values.[13] These objectives are restated in the preamble to the CVA:

a) Furthering the objectives of the GATT 1994: Consistent with the objective of the GATT to promote international trade by reducing tariffs and other barriers to trade including, the elimination of discriminatory

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11 Article VII: 2 (b) defines 'actual value' as the price at which, at the time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. Paragraphs 2:1, 2:2, 2:3 and 2:4 go on to clarify how 'actual value' may be understood in various situations. Notwithstanding, the term albeit does not always lend itself to 'actual value' to a uniform interpretation in practice, hence leaving room for ambiguity and manipulation. See Streatfeild, J. (2005). A Brief Negotiating History of Customs Valuation in the GATT and WTO, available at http://dx.doi.org/10.2139/ssrn.1483725. Accessed 2 December 2021.

12 See Pistor, K. (2020). The value of law. *Theory & Society*, *49*(2); Weiss, W. (2003). Security and predictability under WTO law. *World Trade Review*, *2*(2), 183-219. Legal certainty requires that laws be clear and predictable, so that legal subjects know which conduct is lawful and which behaviour is prohibited.

13 See Preamble of the Tokyo Round customs valuation code, available at https://www.worldtradelaw.net/tokyoround/valuationcode.pdf.download. Accessed 30 November 2021.

treatment in international commerce, the implementation of the CVA by WTO Members helps to avoid impairing the effect of tariff reductions by arbitrary customs valuation systems.[14]

b) Securing additional benefits for the international trade of developing countries: SDT provisions contained in Article 20 and Annex III of the CVA permit developing countries to delay the application of the agreement and reservation on certain specific rules, in furtherance of their development interest. Such provisions are the main legal steps for achieving this objective.

c) Providing greater uniformity and certainty in the implementation of the provisions of the GATT: In furtherance of this objective, Article 18 of the CVA regulates the administration, consultations, and settlement of customs valuation disputes as well as establishes a Technical Committee on Customs Valuation, which through its advisory opinions, commentaries or explanatory notes of the Technical Committee on Customs Valuation helps to ensure uniformity in interpretation and application of the agreement.[15]

d) Providing a fair, uniform, and neutral customs valuation system that precludes the use of arbitrary or fictitious customs values: The requirement of fairness is arguably a reflection of the duty of every WTO member to respect the non-discriminatory principle of the WTO as provided in GATT Article I: 1 and III: 1. In what appears like a restatement of the principle of non-discrimination, the General Introductory Commentary to the CVA recognizes that "customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply". No doubt, the intent is clear that customs valuation procedures should not be used to discriminate against imports of a particular origin.

Uniformity is pursued by the express requirement of Article 22: 1 of the CVA, for members to ensure that their respective national laws, regulations, and administrative procedures conform to the provisions of the agreement. The principle of neutrality is expressed in the resolve to use 'transaction value' as the primary basis for customs value under the CVA and the use of other specified alternatives in a strictly hierarchical order only in cases where it is not possible to use the transaction value.[16] The WTO itself

14 See the Preamble to the General Agreement on Tariffs and Trade (GATT 1994), available at https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm. Accessed 30 November 2021.

15 See Annex II to the CVA, particularly, paras. 1, 2(a) and 2(d).

16 See the General Introductory Commentary to the CVA, and Annex I: General Note, Sequential Application of Valuation Methods.

underscores the objective of the CVA to provide a fair, uniform and neutral system for the valuation of goods for customs purposes, describing the ideal system as one that conforms to commercial realities, and which outlaws the use of arbitrary or fictitious customs values.[17]

6.2.3 Methods of customs valuation

The General Introductory Commentary to the CVA sets out the primary basis for the calculation of customs value as the 'transaction value'. Article 1 of the Agreement reinforces this and goes on to define 'transaction value' as "the price actually paid or payable for the goods when sold for export to the country of importation".[18] Accordingly, the value should be based on the selling price agreed between the buyer and seller, which is represented on the invoice. The underlying idea here is that it is in the interests of both customs administrations and traders that goods be taxed based on the realities of the commercial transactions taking place. This is what is known as the 'transaction value method'. Article 8 of the CVA broadens the definition of the transaction value to include some other elements impacting the value of imported goods beyond the price actually paid or payable, that is the price stated on the invoice.

Whenever the customs value of a good cannot be determined under the provisions of Article 1, that is, using the transaction value method, the CVA lays down five specific alternatives to be applied in sequential order as follows:

a) Transaction value of identical goods: Under this method, the customs value of a good is determined according to the transaction value of identical goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.[19] The concept of 'identical goods' as described in Article 15 and other relevant conditions and adjustments contained in Article 8 of the CVA are important considerations in this regard.
b) Transaction value of similar goods: Under this method, the customs value of a good is determined based on the transaction value of similar goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.[20] The definition of 'similar goods' under Article 15 is an important consideration here, particularly, as it is the main difference with the preceding method. The conditions and adjustments considered in Article 8 of the CVA per this method are the same as those in the preceding method.

17 https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm#rules See also Rajathi, M, (2021), A Study on WTO Recommendations and Customs Valuation Practices in India, Journal of Interdisciplinary Cycle Research, Vol. XIII Is. 1, pp. 18 – 35 at 24.
18 For a full appreciation of the definitional exposition of 'transaction value', Article 1 must however be read in conjunction with Article 8.
19 See Article 2 of the CVA.
20 See Article 3 of the CVA.

c) Deductive value method: Under this method, customs value is based on the unit price at which the imported goods or identical or similar goods are sold in the greatest aggregate quantity in an unrelated party transaction, subject to the deduction of profits and certain costs and expenses incurred after importation.[21]
d) Computed value method: Here, customs value is determined on the basis of the costs of materials and of production in the country of export plus certain other costs, for example, packing, engineering, development work, an amount for profit, general expenses, transport, and insurance.[22] While Article 4 of the CVA makes clear that the computed value method will normally be used only if the deductive value method fails, it leaves room for a reversal of that order of application, at the request of the importer.
e) Fall-back method: The fall-back method is applied only if customs value cannot be determined by any of the preceding methods provided for by the CVA. In such instances, national customs authorities may devise their respective procedures based on any of the previous methods, as long as such procedures are reasonable and consistent with the principles of Article VII of the GATT and the general provisions of the CVA.[23]

It should be emphasized that deviations from the transaction value method are allowed only when it is not possible to use the transaction value (e.g. related parties impacting the price, cases where there is no sale, unreliable supporting documentation) and, even then, in strict adherence to the hierarchical series of the five alternative methods of valuation for those cases.[24] Any deviation from the transaction value increases the extent of discretion that can be exercised by customs authorities. The use of each subsequent alternative method further increases that extent of discretion. Hence, compliance with the hierarchical series is intended to restrict those opportunities for deviation and eliminate the use of fictitious or arbitrary customs values to the extent possible.[25]

21 See Article 5 of the CVA.
22 See Article 6 of the CVA.
23 See Article 7 of the CVA.
24 WTO (2020), WTO Customs Valuation Agreement: objectives, requirements and challenges, WCO News 93 (October 2020), available at https://mag.wcoomd.org/magazine/wco-news-93-october-2020/wto-customs-valuation-agreement-objectives-requirements-and-challenges/. Accessed on 1 December 2021.
25 Ibid.

6.2.4 Special provisions for developing countries

The thesis had earlier noted that in line with the CVA's objective of securing additional benefits for the trade of developing countries, it provides for SDT of developing countries in its Article 20. Below are the various reflections of SDT permitted:

a) Delay of application of the Agreement for five years for developing countries: Article 20.1 allows developing country members, not party to the Tokyo Round Code, to delay the application of the provisions of the Agreement for a period of five years from the date of entry into force of the WTO Agreement for the member concerned.
b) Delay of application of the computed value method for three years following the application of all other provisions of the Agreement: Article 20.2 allows developing country members, not party to the Tokyo Round Codes to delay the application of the computed value method for a period not exceeding three years following their application of all other provisions of the Agreement. In practice, this means that developing country members, not party to the Tokyo Round Code, can delay the computed value method a total of eight years.
c) Extension of the transition period: Paragraph 1 of Annex III of the Agreement allows developing country members for whom the five-year delay in the application of the provisions of the Agreement provided for in Article 20.1 is insufficient to request, before the end of the five years, an extension of such a period. It is generally understood that the members will give sympathetic consideration to such a request in cases where the developing country member in question can show good cause.
d) Reservations to retain established minimum values: Paragraph 2 of Annex III provides that developing country members may make a reservation to retain an already-existing system of officially established minimum values on a limited and transitional basis under such terms and conditions as may be agreed to by the Committee (even though minimum prices are prohibited under the Agreement).
e) Reservation against Article 4: Paragraph 3 of Annex III allows developing country members to make a reservation permitting them to refuse the request of importers (allowed under Article 4 of the Agreement) to reverse the order of the deductive and computed value methods.
f) Special application of the deductive method: Paragraph 4 of Annex III allows developing country members to value the goods under

the deductive method even if the goods have undergone further processing in the country of importation, whether or not the importer so requests.

g) Provision of technical assistance to developing country: In recognition of the peculiar development challenges of developing countries, including, as regards their implementation of trade agreements, Article 20.3 of the CVA provides for technical assistance to aid their implementation of the CVA. The article provides that developed country members shall furnish, on mutually agreed terms, technical assistance to developing country members that so request. On this basis, developed country members shall draw up programmes of technical assistance which may include, inter alia, training of personnel, assistance in preparing implementation measures, access to sources of information regarding customs valuation methodology, and advice on the application of the provisions of the Agreement.

In what was a clear acknowledgment of the daunting challenge that the CVA posed to their domestic capacities, developing countries took maximum advantage of relevant SDT provisions to delay the application of the general provisions of the agreement.[26] Pursuant to Article 20(1) of the CVA, fifty-eight developing country members—virtually all developing countries that were not party to the Tokyo Round Valuation Code requested a five-year delay of the application of the CVA, until 1 January 2000.[27] Nine others, including Argentina, Brazil, India, Malawi, Mexico, Morocco, Peru, Turkey, and Zimbabwe, who were signatories to the Tokyo Round Code but had invoked similar provisions under the Code on delayed implementation for five years, continued the remainder of the transitional period under the CVA.[28] The Article 20(1) delay period expired on 1 January 2000. By December 1999, just before the five-year delay period was to end, about thirteen developing countries requested an extension of the delay period on grounds that suggested that they were not yet able to fully assume their obligations. The Committee granted these requests.[29] On grounds of 'exceptional circumstances'

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26 See WTO. (1996). First Annual Review of the Implementation and Operation of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, G/VAL/6. 10 January. (Background Document by the Secretariat).

27 See generally, WTO Analytical Index: Guide to WTO Law and Practice: Customs Valuation Agreement (Implementation of Article VII of the GATT) – Article 20 (Practice), available at https://www.wto.org/english/res_e/publications_e/ai17_e/cusval_e.htm. Accessed 2 December 2021. See also Fasan, O. (2007). The effectiveness of WTO law in developing countries: the relevance of rule legitimacy and ownership. *University of New South Wales Law Journal*, *30*(2), 409-436 at 420.

28 This was pursuant to the WTO General Council's Decision on the continued application under the WTO customs valuation agreement of invocations of provisions for developing countries for the delayed application and reservations under the customs valuation agreement 1979. WT/L/38. (1995).

29 These countries are d Côte d'Ivoire, Dominican Republic, Egypt, El Salvador, Guatemala, Jamaica, Kuwait, Mauritania, Myanmar, Paraguay, Sri Lanka, Tanzania and Tunisia. See WTO (2000). Report (2000) of the Committee on Customs Valuation to the Council for Trade in Goods, G/L/414. 14 November.

Peru also requested in 1999, an extension period of two years, notwithstanding that it had acceded to the Tokyo Round Code in 1994.[30] The Committee also granted this.

Records further show that as of December 1996, forty-seven developing countries invoked Article 20(2), which provided for delayed application of the computed value method; thirty-one invoked Annex III, paragraph 2 that allowed developing countries, which prior to the entry into force of the CVA valued goods on the basis of officially established minimum values, to make a reservation to enable them to retain such values on a 'limited and transitional basis under such terms and conditions as may be agreed to by the Members'; fifty-three countries invoked the provisions of Annex III, paragraph 3, which allowed reservations concerning the reversal of the sequential order of Articles 5 and 6; and, fifty countries invoked Annex III, paragraph 4, allowing reservations to the application of Article 5(2) whether or not the importer so requests.[31]

All the approved requests or waivers in respect of such requests eventually expired as of December 2004 and no further extension of the five-year delay period was possible for any country.[32] As Fasan earlier noted, this suggests that all WTO members should currently be implementing the CVA. However, this is not the case as a recent report of the Committee on Customs Valuation indicates that about one-third of the WTO's 164-membership have not notified their national legislation on customs valuation.[33] Indeed, the situation on the ground in a number of developing countries does not support a diligent application of the Agreement in those countries.[34]

6.3 Identifying CVA implementation capacity requirements and related constraints

6.3.1 The requirements

The requirements for effective implementation of the CVA spreads across the political, legislative, and technical spheres. On the one hand, is the need for political will to carry out necessary reforms to achieve the required level of capacity. On the other hand, is a need for an understanding within government and customs administration of the extent of administrative, legislative, and managerial changes that need to take place.[35] Necessarily, a country would need both infrastructural changes and the expertise in

30 See WTO (1999). Minutes of the Meeting of 4 October 1999, G/VAL/M/11. 4 October 1999. (Committee on Customs Valuation).

31 See generally, Fasan, O. (2007). The effectiveness of WTO law in developing countries: the relevance of rule legitimacy and ownership above, n 27 at 419-423.

32 See WTO. (2004). Tenth Annual Review of the Implementation and Operation of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, G/VAL/W/136. 21 October 2004. (Background Working Document by the Secretariat).

33 WTO. (2021). Report of the Committee on Customs Valuation to the Council for Trade in Goods. G/L/1410. 26 October.

34 See Alagic, O. (2020). Customs valuation–challenges in Bosnia and Herzegovina, above n 6; Le, D. H., Nayyar, A., & Le Rots, N. (2018). Implementation of the WTO Agreement on Customs Valuation in Vietnam, above n 6; Jiang, Z. (2017). Customs Valuation and Transfer Pricing, above n 6; Menciūnienė, V., Rugenytė, D., & Simanavičienė, Ž. (2010). The practice of customs valuation methods in developing countries, above, n 6.

35 WTO (2020), WTO Customs Valuation Agreement: objectives, requirements and challenges, above n 24.

technical valuation rules, ranging from the basic requirements for implementation of the transaction value to complex issues such as transfer pricing, royalties, and license fees, and e-commerce business models, to effectively implement such technical and complex agreement like the CVA.[36] Hence, implementation of the CVA must be founded on a secure base, covering not only its actual content but also the associated administrative tools, powers, and mechanisms to allow effective functioning.[37] In view of this, Goorman and De Wulf outlined the requirements for effective implementation of the CVA by a country as including the establishment of a supportive legislative and regulatory framework; a mechanism for judicial review; administrative procedures; organizational structure; and training.[38] This thesis analyses the requirements under three broad headings: legislations and regulations; valuation procedures and control and organizational set-up and training.

Legislation and Regulations

By virtue of Article 22.1 of the CVA, provisions of the CVA need to be incorporated in national law. While the legislative and regulatory framework adopted will be influenced by a country's existing legislative practice, the valuation legislation is expected to be comprehensive, covering the CVA and its interpretative notes, as well as a number of specific provisions, including the following:

a) Rates of exchange: Article 9.1 of the CVA requires members to publish the rates of exchange to be used for currency conversion. It is necessary to determine how and when rates of exchange will be published as this enhances transparency in the valuation process, particularly from an importer's perspective. A country like Canada adjusts exchange rates daily and makes it available to the importing public through the customs computer systems.
b) Time of currency conversion: Payments for imported goods are often expressed in a currency other than that of the country of importation. The payments need to be converted to the equivalent amount in the currency of the country of importation by the use of rates of exchange. Article 9.2 of the CVA allows members to choose between the time of exportation or importation as the basis for converting currencies.
c) Right of appeal: Article 11 of the CVA requires that the legislation of each member provide a right of appeal, without penalty, to the importer or any other person liable for the payment of customs

36 Ibid.
37 Keen, M. (2003). Changing Customs: Challenges and Strategies for the Reform of Customs Administration, Washington. DC: International Monetary Fund Report.
38 Goorman, A., & De Wulf, L. (2005). Customs Valuation in Developing Countries and the World Trade Organization Valuation Rules, above n 4 at 160-163 and Annex 8.b. World Bank Publications.

duty in connection with the determination of customs value. Article 11.2 provides that a final right of appeal to a judicial authority must also be available. This requires countries to establish a fair and independent review mechanism within the customs administration as the first point of redress for importers. For example, if an importer is not satisfied with the determination of customs value by a regional office, he should be entitled to have the determination reviewed at headquarters. A right of appeal to a judicial authority should lie only if the importer is not satisfied with the results of the review by headquarters.[39]

d) Release of goods before final determination of customs value: Article 13 of the CVA requires members to make provisions in their legislation to allow an importer to withdraw their goods from customs control in situations where the final determination of customs value is delayed. In deserving cases, a guarantee in the form of a surety or a deposit could be taken to cover the potential liability for customs duty as determined by the customs administration. Where such provision is lacking, customs administrations may hold goods under customs control until the valuation issues have been settled. However, this could, potentially, result in fatal losses to the importer in terms of time and cost.[40] As the disputes usually relate to the terms and conditions of the transaction and not to the goods themselves, it is unnecessary to hold the goods until these issues have been resolved. [41]

e) Transport and insurance costs: Under Article 8.2 of the CVA, countries must include in their legislation a provision to either include or exclude costs of transport, insurance, and so on in the customs value (so-called CIF or FOB basis for valuation).

Valuation procedures and control

The complexity of customs valuation is one that necessarily requires every customs administration to prioritize the development of a valuation policy, procedures, and compliance monitoring systems, to among other things, ensure the transparency of valuation functions. This requires that the valuation function be fully integrated into customs' overall operational structure.[42] As valuation does not operate in isolation of

39 A system that provides for the first level administrative appeal usually results in a quick and reasonably inexpensive solution to resolving disputes. It also fosters uniform and consistent valuation practices and ensures that appeals to a judicial authority occur only in cases where there is a genuine dispute between the importer and the administration about the determination of the customs value.

40 See Walsh, J. T., (2003), Customs Valuation. In Changing Customs: Challenges and Strategies for the Reform of Customs Administration. Keen. M. (Ed.). pp. 83-94 at 87, fn. 89. International Monetary Fund.

41 Ibid.

42 Goorman, A., & De Wulf, L. (2005). Customs Valuation in Developing Countries and the World Trade Organization Valuation Rules, above n 4 at 160.

the overall clearance and control system, the implication is that the quality of a customs administration, including the extent to which it is information technology compliant and employs modern control strategies, will reflect on the quality of its valuation exercise.

The implementation of the CVA requires a shift from concentrating on intervention at the clearance stage to focusing on the modernization of both customs processes and systems. The modernizing measures required for the implementation of the CVA are those that are included in the World Customs Organization (WCO) Revised Kyoto Convention, including simplification of procedures, computerization, strengthening of internal controls and management systems, provision of advance rulings on valuation, implementation of risk assessment management and strengthening of post-clearance audit capacities; as well as the implementation of Authorized Economic Operator (AEO) programmes.[43] A comprehensive risk management system is central to effective valuation control.[44]

Organizational setup and training

The WTO emphasizes the importance of having the appropriate organizational structure in place for the effective implementation of the CVA.[45] The recommended organizational structure for valuation requires the establishment of a central valuation office complemented with regional and local offices as needed in relation to country size and the national customs administration.[46] The central valuation office is responsible for establishing valuation policy, developing procedures, supervising correct and uniform implementation by all offices, ensuring adequate training, and monitoring international developments in valuation.[47] The establishment of separate customs units set up to deal with valuation issues is beneficial for the development of customs infrastructure, as much as the establishment of national committees on technical issues and committees on customs valuation policy to deal with legislation and regulation. These committees play a role in strengthening capacity and expertise on valuation and ensuring national uniform interpretation and application of valuation laws and regulations.[48] Valuation rules must not only be understood but also applied consistently and in a standardized manner, as this will engender confidence in traders that they will be treated properly and fairly. Accordingly, such traders will be more inclined to respect the rules.

Coming back to the issue of the promotion of effective valuation function, including

43 See Preamble to the International Convention on the Simplification and Harmonization of Customs Procedures, also known as the Kyoto Convention (established in 1974 and revised in 1999 to reflect changes in the speed of commerce and the advancement of information technology), available at http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/conventions/pf_revised_kyoto_conv.aspx Accessed 3 December 2021.

44 Cariolle, J., Chalendard, C., Geourjon, A. M., & Laporte, B. (2019). Measuring and improving the performance of customs valuation controls: An illustration with Gabon. *The World Economy*, *42*(6), 1850-1872.

45 Ibid.

46 Goorman, A., & De Wulf, L. (2005). Customs Valuation in Developing Countries and the World Trade Organization Valuation Rules, above n 4 at 160.

47 Ibid.

48 Cf. Article 18, CVA

control within a customs administration, training and re-training of the right personnel is key. Officers must be well trained to apply the usually complex valuation legislation and the methodology. Since effective monitoring and control require the ability to identify suspect transactions, analyse information, and audit the books and records of selected importers, training programmes must be broad enough to also equip officers with related skills.[49] Many developing countries face the challenge of having small customs administrations and are plagued by a lack of resources, which often implies that no part of these administrations is specifically set up to deal with valuation issues.[50] A dearth of knowledge within customs administrations of the contents of the CVA, as well as difficulties to understand it, is also a common challenge in many developing countries.[51]

For the purpose of analysis, scholars and practitioners alike, have attempted to variously categorize the CVA implementation requirements discussed above.[52] Without prejudice, this thesis adopts the requirement categorization by Malone because of its comprehensiveness, both in terms of requirements spread (across the literature, generally) and its reflection of the actual capacity issues in developing countries. Also, it is appealing that he goes on to articulate what needs to be done in order to deliver and develop the requisite capacity building. Giving due consideration to the general provisions of the CVA, Malone draws up a list of capacity requirements with respect to the application of the CVA. He divides these into two major categories, and each of these categories is sub-divided further into essential and recommended capacity requirements. These are specified below:

a) Core capacity needs – the essential valuation capacity requirements: which includes comprehensive valuation-specific legal framework; full knowledge of the customs valuation agreement; full knowledge of the instruments of the WTO Valuation Committee and the WCO Technical Committee on Customs Valuation; total familiarity with current business practices, procedures and documentation; total familiarity with relevant trading public (practices, procedures); and administrative guidelines and instructions.
b) Highly recommended valuation capacity requirements: which includes specialist valuation units; formal and well-maintained valuation rulings system; knowledge of related party transactions; knowledge of generally

49 Walsh, J. T., (2003), Customs Valuation. In Changing Customs, above n 40 at 93.
50 WTO (2020), WTO Customs Valuation Agreement: Objectives, Requirements and Challenges, above n 25.
51 Ibid
52 See Le, D. H., Nayyar, A., and Le Rots, N. (2018). Implementation of the WTO Agreement on Customs Valuation in Vietnam, above n 6; Malone, J. (2002), Defining/developing capacity building in the field of customs valuation, above n 7; Strachan, A. (2002). Developing capacity building in the area of customs valuation — a perspective from the Commonwealth Secretariat, Presentation by the Commonwealth Secretariat at Seminar on Technical Assistance on Customs Valuation, (WTO, 6-7 November, available at https://www.wto.org/english/tratop_e/cusval_e/seminar_nov02_e/programme_e.htm (accessed 10 September 2021).

accepted accounting principles; and, knowledge of specific forms of commercial arrangements (e.g., royalties and license fees, agents and commissions).

c) Core capacity needs – essential customs infrastructure capacity requirements: which includes relevant legal regulatory system– stable, comprehensive and modern legal framework which ensures that customs legislation is directly applicable and can be implemented; associated procedures, setting out the obligations of importers (for example, requirements to make an accurate and complete customs declaration or customs value declaration, requirements to produce relevant and essential documents); services responsible for post import auditing, with related standards and procedures; training programmes for officials involved in valuation work; and guarantee or customs bond system.

d) Highly recommended customs infrastructure capacity requirements: which includes knowledge and capacity to conduct risk management (risk analysis); procedures to inform, educate and consult with trading public; capacities to exploit information technology (e.g., import declarations, record keeping, risk analysis); and stability and predictability in meeting and maintaining human resource skills and capacity.

At a macro level, the capacity building requirements identified by Malone can be synthesized into three: the political commitment to enable customs to fulfil their tasks (including, the creation of the necessary legal framework); the operational/infrastructure capacity of the customs administration; and, the existence of adequate technical capacity within the administration The thesis builds on these below to distil possible constraints that undermine the capacities of developing countries to implement the CVA.

6.3.2 The constraints

A constraint is something that limits or restricts someone or something.[53] It is an element or factor that blocks a system from achieving more of what it was designed to accomplish– its goal.[54] With the majority of global trade being increasingly organized along global and regional value chains, goods and services cross customs borders multiple times before the final product reaches its destination market.[55] The evidence indicates

53 Oxford Advanced Learners Dictionary of Current English (2015) (9th Edition), (Oxford University Press, United Kingdom)

54 See Nyaoga, R. B., Wang, M., & Magutu, P. O. (2015). Testing the relationship between constraints management and capacity utilization of tea processing firms: Evidence from Kenya. Future Business Journal, 1(1-2), 35-50.

55 See Raei, M. F., Ignatenko, A., & Mircheva, M. (2019). *Global Value Chains: What are the Benefits and Why Do Countries Participate?*. International Monetary Fund Working Paper. Vol. 2019 Is. 018, available at http://dx.doi.org/10.2139/ssrn.3333741. Accessed 3 December 2021; Ponte, S., Gereffi, G., & Raj-Reichert, G. (2019). Introduction to the handbook on global value chains. In *Handbook on Global Value Chains*. Ponte, S., Gereffi, G.

that developing countries particularly face serious constraints in participating in such cross-border trade due to their high trade costs [and low production capacities].[56] The constraints placed on developing countries by high trade costs often manifest in form of domestic information costs, legal and regulatory costs, customs clearance procedures, and administrative red tape.[57]As a goal of the WTO, trade facilitation aims to lower transaction costs [and production costs] through "the simplification, modernization and harmonization of export and import processes", including the requirements and formalities related to importation and exportation as well as to international transit of merchandises".[58] When read in conjunction with the modernizing measures required for CVA implementation as cited in the preamble of the Revised Kyoto Convention above, it is without a doubt that the modernization of customs procedures is key to trade facilitation.

Developing countries, particularly, in Africa, generally suffer from high trade costs and a difficult 'doing business environment'. Such challenges like cumbersome customs procedures, a myriad of fees and formalities, and a lack of transparency and awareness of trade rules and regulations by traders and officials continue to undermine the predictability of their trade regimes.[59] The World Bank reports that it takes more days than in any other region to import and export goods in Africa, especially sub-Saharan due to the complex trade procedures and numerous documentation requirements.[60] Hassan notes that it would take an exporter from sub-Saharan Africa 108 hours and US$ 542 on average to complete border compliance procedures, compared to a global average of 64 hours and US$ 389.[61] Sadly too, the World Bank's Logistics Performance Index (LPI) also indicates that Africa is behind other regions of the world in terms of customs, infrastructure, competence in trade-related logistics, and timeliness of exports and imports.[62] Customs barriers in Africa are also magnified by a large number of landlocked countries in Africa and the need for goods to go through separate procedures at each country's customs checkpoint is also indicative of the level of customs infrastructure in the region.[63] It is estimated that the costs of trading among Africa's landlocked countries are 50 times higher, and the volume 60 percent lower, than in countries along the coast.[64] African governments, with the support of some international development

& Raj-Reichert, G. (Eds.). pp. 1–21. Edward Elgar.

56 Ibid. See also Hassan, M. (2020). Africa and the WTO Trade Facilitation Agreement: State of Play, Implementation Challenges, and Policy Recommendations in the Digital Era. In *Fostering Trade in Africa*, Odularu, G. O., Hassan, M., & Babatunde, M. A. (Eds.). pp. 5-38. Springer, Cham.

57 Hassan, M. (2020). Africa and the WTO Trade Facilitation Agreement, above n 56 at 8.

58 See WTO | Trade facilitation. Accessed 4 December 2021.

59 Hassan, M. (2020). Africa and the WTO Trade Facilitation Agreement, above n 56 at 6.

60 World Bank (2019) Doing business 2019: going beyond efficiency. World Bank'

61 Hassan, M. (2020). Africa and the WTO Trade Facilitation Agreement, above n 56.

62 World Bank (2019b) Logistics performance index. World Bank.

63 See Peterson, J. (2017). An overview of customs reforms to facilitate trade. *Journal of International Commerce and Economics*, 1, p.10. Sub-Saharan African has 15 landlocked countries out of a total of 48 in the region. These countries are Botswana, Burkina Faso, Burundi, the Central African Republic, Chad, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia, and Zimbabwe

64 Ibid.

organizations and developed country governments, have begun establishing one-stop border posts to facilitate goods transit between landlocked and coastal countries but these remain far inadequate in the main.

Constraints like high trade costs resulting from cumbersome customs procedures, inadequate border infrastructure, etc., go a long way in shaping considerations whether a country is able or ready to implement an international agreement like the CVA. Gray underscores the point when he notes that domestic capacity in terms of infrastructure as well as institutions impacts the likelihood that agreements will be carried out.[65] Accordingly, even if countries have every intention to comply with their commitments under international agreements, a constraint at the domestic level can make compliance problematic or unfeasible.[66] Put differently, a constraint could limit or restrict a country's capacity to implement an agreement. The case for domestic capacity in explaining compliance to international agreements is well established in international law.[67] Against this backdrop, the thesis will now proceed to review three categories of constraints that developing countries face in implementing the CVA, namely, legal and regulatory constraints, customs infrastructure capacity constraints, and valuation capacity constraints.

6.3.2.1 Legal and regulatory constraints

Legal and regulatory constraints refer to the availability of the necessary legal and administrative framework, including judicial and organizational procedures and structures required for the implementation of the CVA. From the thesis' analysis of the CVA capacity requirements identified by Malone, countries should ideally have in place a comprehensive and modern valuation-specific legal framework; established mechanism for administrative and judicial review; established administrative guidelines, procedures and instructions; and a formal and well-maintained valuation rulings system to effectively implement the CVA. While developing countries have done well in terms of meeting their notification requirement on national customs legislation some of these legislations are not fully compatible with the WTO valuation system.[68] For instance, while section 13 (1) of Nepal's customs legislation requires customs duty on imported

65 Gray, J. (2014). Domestic capacity and the implementation gap in regional trade agreements. *Comparative Political Studies,* 47(1), pp. 55-84 at 56 and 60.

66 Ibid.

67 Chayes, A., & Chayes, A. H. (1993). On Compliance. *International Organization*, 47(2), pp. 175-205; Fisher, R. (1981). *Improving compliance with international law* (Vol. 14). University of Virginia Press; Simmons, B. A. (1998). Compliance with international agreements. Annual Review of Political Science, Vol.1(1), pp. 75-93; Guzman, A. T. (2002). A compliance-based theory of international law. California Law Review, Vol. 90(6), pp. 1823-1887; Raustiala, K., & Slaughter, A. (2002). International law, international relations and compliance. In Carlsnaes, W., Risse, T., and Simmons, B. Handbook of International Relations (pp. 538-558). SAGE Publications Ltd, https://www.doi.org/10.4135/9781848608290.n28; Raustiala, K. (2005). Form and substance in international agreements. American Journal of International Law, Vol. 99(3), 581-614. See also Kadir, H. D. A. (2021). Compliance, Violation and Contestation: States, International Law, and Factors of Compliance. IIUM Journal of Human Sciences, 3(1), pp. 1-13.

68 See WTO (2021). Report (2021) of the Committee on Customs Valuation to the Council for Trade in Goods, above n 33.

goods, to be assessed on the basis of their transaction value, subsection 4 and 5 of the same section has given the right to customs officials to fix the price of concerned goods on the basis of recorded price and price list obtained from the international market.[69] Also, many developing countries' legislations omit the right of importers to launch a complaint through their trade representative to the WTO in what could be termed inaccurate or incomplete incorporation of CVA provisions, hence, lacking full compatibility with the WTO system.[70] Such discrepancies between provisions of national customs legislation and WTO provisions on customs valuation undermine the necessary supporting legal framework to implement the CVA.

Another concern lies with the undue delay that plagues the judicial systems of several developing countries. Once adjudication proceedings are initiated it may take more than ten years before the case reaches the highest court of the land and is disposed of. Due to this, traders and importers would rarely challenge customs even if they strongly disagreed with a valuation, for instance, or even the methodology used for valuation. They accept such valuation, which is often against the transaction values, simply on the premise that delays in the clearance of goods (due to challenging customs' decision) will be more expensive than accepting the disputed valuation costs.

6.3.2.2 Customs infrastructure capacity constraints

Customs administrations perform broad, important functions that facilitate the flow of goods and services across international borders. The role requires that customs adopt specific practices that allow imports to clear at customs checkpoints more efficiently.[71] Accordingly, effectively implementing the CVA requires an efficient customs administration. Since customs valuation does not operate in isolation from the overall customs operational and management system, a strategic pathway to achieving such efficiency lies in strengthening customs infrastructure for valuation as a key part of a comprehensive customs modernization programme. In line with the Revised Kyoto Convention, this can be achieved by, for example, the online publication of customs rules and regulations; the streamlining of customs paperwork; the use of electronic platforms for customs filing and clearance; the adoption of risk management tools for customs inspections that separate high-risk (e.g., potentially dangerous or illegal) cargo from low-risk cargo; and coordination between the border management agencies of signatory countries.[72]

The literature on trade facilitation suggests that next to those improving infrastructure, reforms enhancing customs efficiency appear to play the second-biggest role in boosting a country's trade performance. For instance, Moïsé *et al* find that trade facilitation

69 See Rajkarnikar, P. R. (2006). Implementation of the WTO Customs Valuation Agreement in Nepal, above n 3 at 20.
70 Goorman, A., and De Wulf, L. (2005). Customs Valuation in Developing Countries and the World Trade Organization Valuation Rules, above n 4 at 161.
71 Peterson, J. (2017). An overview of customs reforms to facilitate trade, above n 63.
72 Peterson, J. (2020). The WTO Trade Facilitation Agreement: Implementation Status and next Steps. *Journal of International Commerce and* Economics, 1., p.5.

measures which aim to streamline customs procedures, including single windows, pre-arrival processing, physical inspections, post-clearance audits, separation of release from clearance, and AEO systems, have the potential to reduce trade costs by 5.4 percent.[73] Felipe and Kumar show that an improvement in customs efficiency in the importing country by 1 percent would improve trade flows by 1.04 percent.[74] Moïsé and Sorescu find that trade facilitation measures enhancing customs efficiency through, for example, improved harmonization and simplification of documents, automated processes, and streamlined border procedures have the highest impact on trade volumes.[75]

While developed countries continue to lead in implementing institutional reforms (often referred to as the 'soft' infrastructure of customs) that reduce customs inefficiency, increase transparency, and decrease opportunities for corruption by customs officials, developing countries generally continue to pursue broad-based customs reforms that, in some cases, include both infrastructure and institutional (soft infrastructure) reform.[76] Barka however notes that in sub-Saharan Africa for example, customs reform is often associated with so-called 'hard infrastructure reform' as opposed to 'soft infrastructure reform'. Hence, it is no surprise that the use of manual processes for customs documentation is high, contributing to customs delays in the region. These delays, in turn, increase the likelihood of traders making 'facilitative payments' (that is, bribes) to customs officials to speed the clearance of their goods through border checkpoints.[77]

The thesis' analysis of the CVA capacity requirements identified by Malone, further reveals some markers that could be suggestive of CVA-specific customs infrastructure capacity constraints in a country. These include associated procedures, setting out the obligations of importers (for example, requirements to make an accurate and complete customs declaration or customs value declaration, requirements to produce relevant and essential documents); services responsible for post import auditing, with related standards and procedures; guarantee or customs bond system; and the application of information technology (e.g., import declarations, record keeping, risk analysis).

73 Moïsé, E., Orliac, T., & Minor, P. (2011). Trade facilitation indicators: The impact on trade costs. OECD Trade Policy Papers 118. OECD Publishing, available at https://www.oecd-ilibrary.org/trade/trade-facilitation-indicators_5kg6nk654hmr-en. Accessed 27 November 2021.

74 Kumar, U., & Felipe, J. (2010). The Role of Trade Facilitation in Central Asia: A Gravity Model (No. 628, pp. 12504-5000). Levy Economics Institute Working paper, available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.187.1742&rep=rep1&type=pdf. Accessed 27 November 2021.

75 Moïsé, E., & Sorescu, S. (2013). Trade facilitation indicators: The potential impact of trade facilitation on developing countries' trade. OECD Trade Policy Papers 144. OECD Publishing, available at https://www.oecd.org/dac/aft/TradeFacilitationIndicators_ImpactDevelopingCountries.pdf. Accessed 27 November 2021.

76 See Cantens, T., Raballand, G., Strychacz, N., & Tchouawou, T. (2011). Reforming African customs: the results of the Cameroonian performance contract pilot. *World Bank, Africa Trade Policy Notes*, *13*; Barka, H. B. (2012). Border Posts, Checkpoints, and Intra-African Trade: Challenges and Solutions. African Development Bank, Chief Economist Complex, available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/INTRA%20AFRICAN%20TRADE_INTRA%20AFRICAN%20TRADE.pdf. Accessed 27 November 2021. "Hard infrastructure reform," includes the building or improvement of roads, railways, airports, and seaports, information and communications technology (ICT) systems, and reliable sources of power. "Soft infrastructure reform" encompasses the streamlining and harmonization of customs and border procedures, the incorporation of ICT-enabled processes, and the elimination of corruption at border checkpoints

77 Barka, H. B. (2012). Border Posts, Checkpoints, and Intra-African Trade: Challenges and Solutions, above n 76. Peterson, J. (2020). The WTO Trade Facilitation Agreement, above n 72.

6.3.2.3 Valuation capacity constraints

Being a highly technical agreement, implementing the CVA requires expertise in technical valuation rules, ranging from the basic requirements for implementation of the transaction value to complex issues such as transfer pricing, royalties and license fees, and e-commerce business models. Developing countries are generally plagued by heavy administrative constraints such as a dearth of technical expertise, poor or non-existent training facilities, and uncompetitive salaries for the public service, which are insufficient to attract the best. Hence, the administrative capacity to effectively implement the CVA system is so often lacking in these countries. Goorman and De Wulf note that the enormous variety of goods traded, widely differing prices for similar goods, continuously changing prices, as well as different levels of transaction and sale conditions complicate the correct valuation of imports.[78] They underscore the point that a lot of the information needed to value a transaction is not readily available as it remains with the exporter. For instance, cross-checking the outgoing invoices of the exporter with the incoming invoices of the importer or performing simple checks such as determining the existence of the exporter is normally not possible or excessively unwieldy for many developing countries.

Another challenge in relation to the valuation capacity of developing countries lies in the requirement to apply the alternate methods of valuation in the CVA in strict order. As this requires updated information on values of identical and similar goods, and information that is not readily available or that requires complicated calculations, many developing countries find it unduly burdensome, costly, and time-consuming. For example, applying the computed value would require that investigations be carried out in exporting countries and many developing countries simply do not have the financial resources and manpower to undertake such ventures.[79]

Drawing from Malone, the following are possible indicators that could reflect valuation capacity constraints in a country: proportion of officers with full knowledge of the CVA; proportion of officers with full knowledge of the instruments of the WTO Valuation Committee and the WCO Technical Committee on Customs Valuation; proportion of officers with full total familiarity with current business practices, procedures and documentation; total familiarity with relevant trading public (practices, procedures); knowledge of related party transactions; knowledge of generally accepted accounting principles; knowledge and capacity to conduct risk management (risk analysis), and; knowledge of specific forms of commercial arrangements (e.g., royalties and licence fees, agents and commissions).

78 Goorman, A., and De Wulf, L. (2005). Customs Valuation in Developing Countries and the World Trade Organization Valuation Rules, above n 4 at 16.

79 Ibid, at 161.

6.3.2.4 Linking implementation to capacity

Instructively, the concept of differentiated differentiation, as expounded in this thesis, underscores the point that obligation to implement an agreement should be dependent on the existence of the capacity to implement such agreement. Accordingly, once a deficiency is noted per any of the constraint indicators as discussed above, it should suffice to, at the least, prompt an investigation of the actual capacity of the concerned customs administration to implement the CVA.

A scrutiny of the WTO's Trade Facilitation Agreement (TFA)[80] reveals that linking implementation to capacity is not just an established issue in the WTO today, it offers insight into how the effectiveness of SDT may be assessed. Article 13.2 of the TFA makes clear that the extent and the timing of implementation of the provisions of the TFA "… ***shall be related to the implementation capacities of developing and least-developed country Members***". (***Emphasis added***). In other words, until these countries acquire the necessary implementation capacity, implementation of the provision(s) of the TFA concerned will not be required of them.[81] Ayoki puts the point more pointedly when he suggests that where implementation capacity is lacking, developing countries are not bound to implement the relevant rule obligation.[82] Such clear linkage between implementation and capacity is a key premise for the success of any agreement.[83] Accordingly, only by directly linking the obligation to implement the CVA to implementation capacity will developing countries stand the chance to effectively implement the Agreement, and hence, reap the expected benefits therefrom.

6.4 Designing a composite indicator approach

For operationalizing differentiated differentiation in the context of the CVA, the thesis proposes a composite indicator approach, which requires that we identify indicators that capture the constraints that countries face in their application of the agreement and combine them into a composite measure.

Composite indicators are becoming increasingly important for not just benchmarking countries' performance but also, as tools for policy evaluation and communication.[84] In terms of definition, composite indicators are mathematical combinations of a set of indicators that represent different dimensions of a concept whose description is

80 An amendment protocol for the Trade Facilitation Agreement was adopted by the General Council in November 2014 to bring the TFA into the WTO's legal framework. The TFA entered into force on 22 February 2017. Full text of the agreement is available at https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm. Accessed 12 May 2022.

81 Goorman, A., and De Wulf, L. (2005). Customs Valuation in Developing Countries and the World Trade Organization Valuation Rules, above n 4 at 162.

82 Ayoki, M. (2018). *Special and Differential Treatment of Developing Countries in the WTO Agreement on Trade Facilitation: Is there a cause for optimism?* p. 5. (No. 87592). University Library of Munich, Germany, available at https://mpra.ub.uni-muenchen.de/87592/. Accessed 5 December 2021.

83 Alem, T. (2020). WTO Accession and Developing Countries, above n 21.

84 El Gibari, S., Gómez, T., & Ruiz, F. (2019). Building composite indicators using multicriteria methods: a review. *Journal of Business Economics*, *89*(1), 1-24 at 1.

the objective of the analysis.[85] The literature provides a wide range of methodological approaches to designing or constructing composite indicators, although three main processes are necessarily required, including normalization, weighting, and aggregation.[86] In designing a composite indicator, the thesis is guided by the following methodological steps detailed in El Gibari *et al*:

a) Defining the phenomenon to be measured: The definition of the concept should give a clear sense of what is being measured by the composite index. It should refer to a theoretical framework, linking various sub-groups and underlying indicators.
b) Selecting a group of individual indicators: Here, the number and nature of the components that will constitute part of the composite index need to be determined and then, the specific indicators used in estimating each of the components of the composite index is selected. As the strengths and weaknesses of a composite index largely derive from the quality of the underlying indicators, their selection should ideally be based on considerations like their relevance, analytical soundness, timeliness, accessibility, etc.
c) Normalizing the individual indicators: This step aims to make the indicators comparable and to define the polarity. Normalization is required prior to any data aggregation as the indicators in a data set often have different measurement units. By normalizing the indicators, we can ensure that an increase in the normalized indicators corresponds to an increase in the composite index.
d) Aggregating the normalized indicators: Aggregation is the combination of all components to form one or more composite indices (mathematical functions). It requires the definition of the importance of each individual indicator (weighting system) and the identification of the technique for summarizing the individual indicator values into a single number. Different aggregation methods are possible, and the choice must be conditioned by the nature of the indicators.

   In addition to the implicit weights introduced during normalization, explicit weights may be defined during aggregation. Explicit weighting can have a significant effect on the overall composite

85 See Saisana, M., & Tarantola, S. (2002). State-of-the-art report on current methodologies and practices for composite indicator development. European Commission, Joint Research Centre, available at https://www.semanticscholar.org/paper/State-of-the-art-Report-on-Current-Methodologies-Saisana-Tarantola/c44c82c47e2bab33083ce02ad015ff4e4d6bf7f9. Accessed 5 December 2021.See also Mazziotta, M., & Pareto, A. (2017). Synthesis of indicators: The composite indicators approach. In *Complexity in society: From indicators construction to their synthesis*. Maggino, F, (Ed.). (pp. 159-191). Springer, Cham.

86 See El Gibari, S., Gómez, T., & Ruiz, F. (2019). Building composite indicators using multicriteria methods, above n 84 at pp. 1-2.

indicator and the results obtained. It is conventionally justified on the basis that weights should reflect the relative importance (significance, reliability, or other characteristics) of the individual indicators. Many composite indicators rely on equal weighting, meaning that all variables are given the same weight. In other cases, the weights are directly obtained from the data.

e) Validating the composite index: This step aims to assess the robustness of the composite index, in terms of capacity to produce correct and stable measures and its discriminant capacity. As the outcomes and rankings of individual units on the composite index may largely depend on the decisions taken at each of the previous steps, it becomes important to conduct statistical analysis to explore the robustness of rankings to the inclusion and exclusion of individual indicators and setting different decision rules to construct the composite index.[87]

This thesis employs a composite indicator approach because of its high utility in summarizing, focusing, and condensing the complexity of a huge variety of data. The ease of interpretation of composite indicators compared to efforts at tracing a common trend in many single indicators makes them even more appealing.[88] Despite some criticism against its conceptual and methodological leanings, the pros of using composite indicators outweigh the cons.[89] Moreira and Crespo underscore the main advantage of composite indicators as being their multidimensionality since they represent aggregate and relatively simple measures of a combination of components of complex phenomena.[90] No less strategic is the fact that the composite indicator approach provides us an aggregating technique that allows the ranking of countries against each other based on the constraints they face in implementing the CVA. The relative standing of countries from such ranking is vital for the subsequent exercise of determining which countries should be allowed delayed application of CVA provisions and indeed, the benchmark to guide such determination.[91]

87 Mazziotta, M., & Pareto, A. (2017). Synthesis of indicators, above n 85 at 161-182.

88 Ibid. See also Moreira, S. B., & Crespo, N. (2017). Composite Indicators of Development: Some Recent Contributions. In *Emerging Trends in the Development and Application of Composite Indicators*. Jeremic, V., Radojicic, Z., & Dobrota, M. (Eds.). (pp. 140-162 at 141). IGI Global; Paruolo, P., Saisana, M., & Saltelli, A. (2013). Ratings and rankings: voodoo or science?. *Journal of the Royal Statistical Society: Series A (Statistics in Society)*, 176(3), 609-634.

89 For a detailed discussion of the pros and cons of composite indicators, see Saltelli, A. (2007). Composite indicators between analysis and advocacy. *Social indicators research*, *81*(1), 65-77 and Nardo, M., Saisana, M., Saltelli, A., & Tarantola, S. (2005). Tools for composite indicators building. *European Commission, Ispra*, *15*(1), 19-20, available at https://www.researchgate.net/publication/277294848_Tools_for_Composite_Indicators_Building. Accessed 5 December 2021.

90 See Moreira, S. B., & Crespo, N. (2017). Composite Indicators of Development, above n 88 at 141.

91 See Gonzalez, J.L., Parra, M.M., Holmes, P. & Shingal, A. (2011). TRIPS and Special and Differential Treatment – Revisiting the Case for Derogations in Applying Patent Protection for Pharmaceuticals in Developing Countries. p. 17. Working Paper No. 2011/37, National Centre of Competence in Research. The authors point out that the alternative to the composite indicator approach require the use of econometrics with its inherent complex, less transparent methodology on comparison with the transparent and easily predictable composite indicator approach.

6.4.1 Capturing CVA constraints using analytical criteria

To operationalize the differentiated differentiation approach, particularly, to identify which countries should benefit from delayed application of CVA commitments under the special provisions for developing countries, there is a need to use a set of analytical criteria to categorize the constraints that countries face in implementing the CVA. As already noted in chapter five of this thesis, there will invariably be a mismatch between the analytical criteria used to identify the constraints and the actual constraint identified due to the fact that the analytical criteria will, at best, be a proxy for a given constraint.[92] Gonzalez *et al* make the point that defining such a set of analytical criteria will require finding an appropriate methodology that combines a set of indicators, the choice of which will need to take on board a set of assumptions and/or a weighting structure.[93] The thesis notes that an alternative econometric approach or even one relying on a weighting structure will also come with their methodological shortcomings.[94]

For the specific purpose of demonstrating the differentiated differentiation approach, this thesis adopts the Global Competitiveness Index (GCI) 4.0 (2019) as an available database in selecting indicators that, in relative terms, ideally reflect the three identified constraints categories (legal and regulatory constraints, customs infrastructure capacity constraints and valuation capacity constraints) that developing countries face in implementing the CVA.[95] The GCI developed by the World Economic Forum (WEF) has been used as a standard to measure a country's competitiveness and is a good predictor of economic growth.[96] The GCI 4.0 evaluates the productivity and efficiency of countries. The WEF publishes Global Competitive Reports every year with the objective of assessing the capacity of the world's economies to achieve sustained economic growth.[97] The GCI 4.0 estimates the following factors of economic and social well-being: institutions; infrastructure; ICT adoption; macroeconomic stability; health; skills; product market; labour market; financial system; market size; business dynamism; and innovation capability.[98] It enables decision makers to estimate the productivity of individual sectors and the economy as a whole.

The 2019 Global Competitiveness Report finds that enhancing competitiveness at the national level is still key for improving living standards and as such, sustained economic growth remains a critical pathway out of poverty and a core driver of human development.[99] Instructively, Cottier suggests that the application of rules to a country

92 Ibid, at 17.
93 Ibid.
94 Ibid.
95 See World Economic Forum (2019), Global Competitiveness Report, Schwab, K. (Ed.), World Economic Forum.
96 Nababan, T. S. (2019). Development analysis of global competitiveness index of ASEAN-7 countries and its relationship on gross domestic product. IJBE (Integrated Journal of Business and Economics), DOI, 10.
97 Marčeta, M., & Bojnec, Š. (2021). Innovation and competitiveness in the European Union countries. International Journal of Sustainable Economy, 13(1), 1-17.
98 For international indices to affect the design and implementation of policy they must help identify groups, geographical areas, institutions, or sectors of the economy that need to be addressed.
99 World Economic Forum (2019), Global Competitiveness Report, above n 95 at 1.

or its industries should be defined on the basis of thresholds founded on economic indicators of competitiveness and development.[100] Based on both survey data and archival sources, the GCI 4.0 included main drivers of productivity or pillars in its 2019 report: institutions, infrastructure, macro-economy, health and primary education, higher education and training, market efficiency, technological readiness, and business sophistication and innovation, which are critical to a nation's competitiveness and hence economic growth. These form the basis of the indicators chosen to represent the identified constraints.

The thesis will here proceed with an elucidation of the identification, using GCI 4.0 indicators of the countries that may be inhibited in their implementation of CVA provisions according to the three identified constraints.[101] It first presents a summary table of the constraints, the title of each indicator, preceded by its reference number, and a description of the indicators (signposting the issues that each indicator tries to capture). The selection of each GCI indicator is guided by its relevancy in describing or depicting one of the three CVA implementation constraints identified in this thesis. For instance, the GCI indicators' 1.10 (Burden of government regulation), 1.11 (Efficiency of legal framework in settling disputes), and 1.22 (Legal framework's adaptability to digital models) are specifically selected to depict 'legal and regulatory constraints' because, upon a review of all the indicators of the GCI 4.0 (2019), the thesis finds them (the three selected indicators) most fitting for the purpose.

100 Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law. *Journal of International Economic Law*, *9*(4), 779-821 at 808.

101 The GCI 4.0 is a 'composite indicator'; its computation is based on successive aggregations of scores, from the indicator level (the most disaggregated level) to the overall score (the highest level). At every aggregation level, each measure is computed by taking the average of the scores of its components (see Appendix A for the detailed composition and methodology). The overall GCI 4.0 score is the average of the scores of the 12 pillars. In total, there are 103 indicators distributed across the 12 pillars. Indicators are sourced from international organizations, academic institutions and non-governmental organizations. Forty-seven indicators, accounting for 30% of the overall GCI score, are derived from the World Economic Forum's Executive Opinion Survey (see Appendix B). The survey is a unique, global study that surveys every year approximately 15,000 business executives with the help of 150 Partner Institutes. For a detailed composition and methodology of the GCI 4.0, see World Economic Forum (2019), Global Competitiveness Report, above n 95, Appendix A.

Table 6.4: Summary of CVA constraints and selected GCI 4.0 (2019) indicators

Constraint	GCI Indicator - No./Name	Description of Indicators
Legal and regulatory constraints	1.10 Burden of government regulation	Response to the survey question[102] "In your country, how burdensome is it for companies to comply with public administration's requirements (e.g. permits, regulations, reporting)?" [1 = extremely burdensome; 7 = not burdensome at all] | 2018–2019 weighted average or most recent period available. *Source: World Economic Forum, Executive Opinion Survey (various editions).*
	1.11 Efficiency of legal framework in settling disputes	Response to the survey question "In your country, how efficient are the legal and judicial systems for companies in settling disputes?" [1 = extremely inefficient; 7 = extremely efficient] | 2018–2019 weighted average or most recent period available. *Source: World Economic Forum, Executive Opinion Survey (various editions).*
	1.22 Legal framework's adaptability to digital business models	Response to the survey question "In your country, how fast is the legal framework of your country adapting to digital business models (e.g. e-commerce, sharing economy, fintech, etc.)?" [1 = not fast at all; 7 = very fast] | 2018–2019 weighted average or most recent period available *Source: World Economic Forum, Executive Opinion Survey (various editions).*
Customs Infrastructure Capacity Constraints	3.02 Mobile-broadband subscriptions	Number of active mobile-broadband subscriptions per 100 population | 2018 or most recent period available This indicator includes standard mobile-broadband subscriptions and dedicated mobile-broadband data subscriptions to the public internet. *Source: International Telecommunication Union, World Telecommunication/ICT Indicators database (June 2019 edition).*
	3.03 Fixed-broadband internet subscriptions	Number of fixed-broadband internet subscriptions per 100 population | 2018 or most recent period available This indicator refers to the number of subscriptions for high-speed access to the public internet (a TCP/IP connection), including cable modem, DSL, fibre, and other fixed (wired)-broadband technologies—such as Ethernet, LAN and broadband over powerline communications. *Source: International Telecommunication Union, World Telecommunication/ICT Indicators database (June 2019 edition).*

102 The 2019 edition of the Survey captured the views of 16,936 business executives in 139 economies between January and April 2019. The Survey comprises 78 questions. Most questions ask respondents to evaluate on a scale of 1 (considered among the worst in the world) to 7 (considered among the best in the world) the performance on various topics of the country where the respondent operates. The questions are organized into 10 topical areas: Infrastructure; Technology; Financial Environment; Foreign Trade and Investment; Domestic Competition; Business Operations and Innovation; Security; Governance; Education and Human Capital; and Risks. The Survey is administered in a variety of formats by the Partner Institutes. The primary method of administration is the online survey tool, but other methods are used: mail-in surveys, face-to-face interviews and telephone interviews. For further details about the survey, including on data treatment and score computation, see World Economic Forum (2019), Global Competitiveness Report, above n 95, Appendix B.

Table 6.4: Continued

Constraint	GCI Indicator - No./Name	Description of Indicators
	3.04 Fibre internet subscriptions	Fibre-to-the-home/building internet subscriptions per 100 population | 2017 or most recent period available This indicator refers to the number of internet subscriptions using fibre-to-the-home or fibre-to-the-building at downstream speeds equal to or greater than 256 kb/s. This should include subscriptions where fibre goes directly to the subscriber's premises or fibre-to-the-building subscriptions that terminate no more than two metres from an external wall of the building. Fibreto-the-cabinet and fibre-to-the-node are excluded. *Source: International Telecommunication Union, World Telecommunication/ICT Indicators database (June 2019 edition).*
	7.07 Border clearance efficiency	Assesses the effectiveness and efficiency of the clearance process by customs and other border control agencies in the eight major trading partners of each country. The scale ranges from 1 (worst) to 5 (best). | 2018 More details about the methodology can be found at https://lpi.worldbank.org/about *Source: The World Bank Group Turku School of Economics, Logistics Performance Index 2018.*
Valuation Capacity Constraints	6.02 Extent of staff training	Response to the survey question "In your country, to what extent do companies invest in training and employee development?" [1 = not at all; 7 = to a great extent] | 2018– 2019 weighted average or most recent period available. *Source: World Economic Forum, Executive Opinion Survey (various editions).*
	6.03 Quality of vocational training	Response to the survey question "In your country, how do you assess the quality of vocational training?" [1 = extremely poor among the worst in the world; 7 = excellent among the best in the world] | 2018–2019 weighted average or most recent period available. *Source: World Economic Forum, Executive Opinion Survey (various editions).*
	6.05 Digital skills among active population	Response to the survey question "In your country, to what extent does the active population possess sufficient digital skills (e.g. computer skills, basic coding, digital reading)?" [1 = not all; 7 = to a great extent] | 2018–2019 weighted average or most recent period available. *Source: World Economic Forum, Executive Opinion Survey (various editions).*

6.4.2 Combining the analytical criteria to create a composite indicator

The GCI 4.0 indicators used to reflect the three identified constraints underline the heterogeneity in the constraints that countries face in implementing their commitments under the CVA. Having already identified the CVA implementation constraints and proposed appropriate indicators for measuring them, the next logical step is to combine the indicators that capture these constraints into a composite measure.

For each indicator of the three identified constraints, the thesis adopts the GCI

4.0 (2019) ranking of countries against each other as a reference point.[103] The thesis chooses a list of 50 countries, with a mix of developed, developing, and least developing countries, for the demonstration of this approach. See Tables 6.5, 6.6, and 6.7 below. In practice, we may only need to apply this approach (differentiated differentiation) across the self-selecting 'developing country' category in the WTO. This is particularly so because the problem with the current application of SDT mainly arises as a result of the heterogeneity of the 'developing country' category where big developing countries like China, South Africa, and Mexico are at least in theory, able to claim the same privileges as least developed countries like the Gambia, Rwanda, and Haiti. In principle, the procedure could as well apply to all countries in the WTO as the calculation of rankings is independent of the number of countries that are considered. However, by involving all representations of WTO members in this demonstration, the thesis establishes that even when the standard is applied to all WTO members, the exemption list (of countries that may be exempted from a rule obligation) that is generated is generally reflective of the low human, institutional, and infrastructural capacities of developing and least developing countries to implement resource-intensive WTO agreements.

Table 6.5: Ranking of CVA legal and regulatory constraints by countries

Country	1.10 Burden of government regulation 1–7 (best)			1.11 Efficiency of legal framework in settling disputes 1–7 (best)			1.22 Legal framework's adaptability to digital business models		
	Value	Score	Rank/ 141	Value	Score	Rank/ 141	Value	Score	Rank/ 141
Argentina	2.6	27.1	125	2.8	30.1	118	3.5	42.0	77
Bangladesh*	3.3	38.8	84	3.3	37.9	96	3.3	38.0	93
Botswana	3.5	41.5	72	4.4	56.2	39	3.3	37.9	94
Brazil	1.7	11.4	141	2.7	28.5	120	3.0	33.5	111
Brunei Darussalam	3.3	38.9	83	4.0	49.9	60	3.1	35.8	102
Burundi	3.9	49.1	35	4.0	50.0	59	3.4	39.2	88
Cambodia	3.6	42.7	66	3.0	33.8	106	3.5	41.4	83
Cameroon	3.5	42.3	68	3.6	43.1	75	3.4	40.2	86
Canada	3.9	48.3	38	4.7	61.7	23	4.5	58.0	27
Chad	3.2	36.4	91	3.1	35.7	101	2.5	24.4	130
China	4.4	56.3	19	4.1	51.9	52	4.6	59.5	24
Chile	3.4	40.2	77	4.1	52.3	50	4.1	51.4	39
Cyprus	3.7	44.5	57	3.4	40.1	87	3.6	43.4	70
Ecuador	2.5	24.7	130	2.9	32.5	115	3.1	34.9	104
Egypt	3.4	40.3	75	3.9	48.6	66	3.5	41.8	79
France	3.6	42.8	65	4.6	60.8	26	4.0	50.8	42
Gambia, The	4.3	54.5	22	4.7	61.2	24	3.3	37.6	96
Germany	4.4	56.9	15	4.8	63.9	22	5.0	67.3	9
Guatemala	3.0	33.7	100	2.7	27.6	123	3.3	38.9	90
Haiti	2.4	23.2	134	2.4	22.7	133	2.6	26.7	125
India	4.1	51.8	26	4.1	51.8	53	4.5	58.9	25

103 The GCI 4.0 actually covers 141 countries in measuring national competitiveness.

Table 6.5: Continued

Country	1.10 Burden of government regulation 1–7 (best)			1.11 Efficiency of legal framework in settling disputes 1–7 (best)			1.22 Legal framework's adaptability to digital business models		
	Value	Score	Rank/ 141	Value	Score	Rank/ 141	Value	Score	Rank/ 141
Indonesia	4.0	50.8	29	4.1	51.1	55	4.5	58.0	28
Israel	3.5	42.2	69	4.5	58.7	32	4.9	65.3	12
Jamaica	3.2	37.2	89	3.6	43.1	74	3.1	35.1	103
Japan	4.0	50.1	31	5.1	69.0	16	4.2	54.0	34
Kazakhstan	4.0	49.4	34	4.1	50.9	56	4.0	50.5	43
Korea, Rep.	3.3	37.6	87	4.2	53.2	45	4.3	55.2	33
Malaysia	5.0	66.7	5	5.1	69.0	15	5.2	70.0	5
Mauritius	4.0	50.2	30	4.5	58.3	33	3.7	45.4	59
Mexico	2.9	31.1	116	3.0	31.1	112	3.8	46.6	53
Mozambique	3.0	33.0	107	2.9	31.4	117	2.5	24.9	129
Nigeria	2.7	28.5	122	3.1	34.3	103	2.5	25.5	127
Nepal*	3.1	35.5	92	3.4	39.4	89	3.0	33.2	114
Qatar	5.0	66.1	6	5.3	72.3	8	4.9	64.9	14
Russian Federation	3.2	37.0	90	3.5	41.4	83	3.9	48.1	51
Rwanda	4.7	61.5	9	5.0	66.2	20	4.7	61.9	18
Singapore	5.5	74.4	1	6.2	86.6	1	5.6	76.5	3
South Africa	3.0	33.6	101	4.6	59.4	31	3.5	42.4	73
Switzerland	4.8	63.2	8	5.8	80.5	4	4.6	60.5	20
Tajikistan	4.4	56.2	20	4.5	57.9	34	3.6	43.8	66
Thailand	3.7	45.8	50	4.2	53.5	44	3.6	43.8	67
Tanzania	3.8	46.1	48	4.1	52.4	49	3.8	46.0	55
United Arab Emirates	5.2	70.3	4	5.5	75.4	6	5.4	72.5	4
United Kingdom	4.3	55.6	21	5.1	68.1	19	4.9	64.8	15
United States	4.5	57.7	14	5.3	71.2	11	5.7	78.0	1
Venezuela	1.8	12.8	140	1.7	11.7	141	1.9	14.7	136
Viet Nam	3.4	39.8	79	3.6	43.0	76	3.6	43.1	71
Yemen	2.8	29.4	119	3.0	33.3	111	1.9	14.7	137
Zambia	3.5	42.4	70	3.5	41.8	81	3.1	34.8	106
Zimbabwe	2.4	24.1	132	3.3	38.6	92	2.5	25.2	128

* The United Nations CDP, at its triennial review held from 22 to 26 February 2021, has recommended Bangladesh and Nepal for graduation from the LDC category having met all three eligibility criteria of graduation, including income per capita, human assets, and economic and environmental vulnerability for the second time. However, given the extraordinary challenges posed by the COVID-19 pandemic on countries, the normal preparatory period for transition to a developing country was extended from three years to five years, till 2026. See UNCTAD. (2021). The Least Developed Countries Report 2021, (UNCTAD/LDC/2021).

Table 6.6: Customs infrastructure capacity constraints by countries

Country	3.02 Mobile-broadband subscriptions			3.03 Fixed-broadband Internet subscriptions per 100 pop.			3.04 Fibre internet subscriptions			7.07 Border clearance efficiency 1–5 (best)		
	Value	**Score**	**Rank/ 141**	**Value**	**Score**	**Rank/ 141**	**Value**	**Score**	**Rank/ 141**	**Value**	**Score**	**Rank/ 141**
Argentina	80.7	NA	60	19.1	38.2	53	0.5	N/A	78	2.4	35.4	100
Bangladesh	37.6	N/A	115	6.3	12.7	88	2.5	N/A	49	4.6	59.6	105
Botswana	77.6	N/A	65	1.8	3.6	105	0.1	N/A	96	51.2	51.2	38
Brazil	88.1	N/Appl.	46	14.9	29.8	61	1.6	N/Appl.	61	2.4	35.2	103
Brunei Darussalam	130	N/Appl.	13	11.9	23.9	70	63	N/Appl.	38	2.6	40.6	72
Burundi	11.4	N/Appl.	138	0.0	0.1	137	0.0	N/Appl.	124	1.7	17.2	136
Cambodia	82.8	N/Appl.	56	1.0	2.0	111	0.5	N/appl.	77	2.4	34.2	109
Cameroon	23.7	N/Appl.	128	0.1	0.1	130	0.0	N/Appl.	177	2.5	36.5	92
Canada	76.7	N/Appl/	67	38.6	77.1	13	4.7	N/Appl.	43	3.6	65.1	18
Chad	4.0	N/Appl.	141	0.0	0.0	141	0.0	N/Appl.	125	2.2	28.8	125
China	95.4	N/Appl.	36	28.5	57.1	32	23.9	N/Appl.	6	3.3	57.1	31
Chile	91.6	N/Appl.	43	17.4	34.7	56	2.2	N/Appl.	52	3.3	56.9	32
Cyprus	80.8	N/Appl.	59	26.4	52.7	41	0.0	N/Appl.	123	3.1	51.3	37
Ecuador	54.7	N/Appl.	98	11.4	22.9	73	1.6	N/Appl.	60	2.8	45.0	49
Egypt	53.9	N/Appl.	100	6.7	13.4	87	0.0	N/Appl.	109	2.6	40.0	76
France	91.6	N/Appl.	42	44.8	89.5	2	5.0	N/Appl.	42	3.6	64.7	19
Gambia, The	36.8	N/Appl.	117	0.2	0.4	127	0.0	N/Appl.	114	2.1	26.9	129
Germany	81.6	N/Appl.	58	41.1	82.2	8	0.9	N/Appl.	72	4.1	77.3	1
Guatemala	16.5	N/Appl.	132	3.1	6.3	99	0.1	N/Appl.	95	2.2	28.9	124
Haiti	30.0	N/Appl.	123	0.3	0.6	121	0.0	N/Appl.	115	2.0	25.8	130
India	37.5	N/Appl.	116	1.3	2.7	110	0.0	N/Appl.	102	3.0	49.1	41
Indonesia	87.2	N/Appl.	52	3.3	6.6	97	1.5	N/Appl.	63	2.7	41.8	61
Israel	106.1	N/Appl.	25	28.8	57.5	31	0.1	N/Appl.	93	3.3	57.9	29
Jamaica	51.2	N/Appl.	103	9.7	19.4	75	2.0	N/Appl.	55	2.4	35.4	101
Japan	188.9	N/Appl.	2	32.2	64.3	23	23.8	N/Appl.	7	4.0	74.8	3
Kazakhstan	77.6	N/Appl.	66	13.4	26.9	65	7.5	N/Appl.	33	2.7	41.6	64
Korea, Rep.	113.6	N/Appl.	21	41.6	83.2	6	31.9	N/Appl.	1	3.4	60.1	25

Malaysia	116.7	N/Appl.	19	8.6	17.1	81	4.6	N/Appl.	44	2.9	47.5	44
Mauritius	65.3	N/Appl.	85	21.6	43.3	48	15.4	N/Appl.	15	2.7	42.6	59
Mexico	70.0	N/Appl.	78	14.6	29.3	62	2.5	N/Appl.	50	2.8	44.2	54
Mozambique	15.1	N/Appl.	136	0.2	0.5	124	0.1	N/Appl.	98	2.5	37.3	88
Nigeria	30.7	N/Appl.	120	0.0	0.1	136	0.0	N/Appl.	116	2.0	24.2	132
Nepal (R4G)	47.5	N/Appl.	105	2.8	5.6	102	0.2	N/Appl.	84	2.3	32.2	117
Qatar	125.9	N/Appl.	15	9.6	19.3	77	8.7	N/Appl.	29	3.0	50.0	39
Russian Federation	87.3	N/Appl.	51	22.2	44.4	47	15.8	N/Appl.	14	2.4	35.5	99
Rwanda	39.0	N/Appl.	114	0.1	0.1	134	0.0	N/Appl.	106	2.7	41.7	63
Singapore	145.7	N/Appl.	6	25.9	51.8	43	23.3	N/Appl.	8	3.9	72.2	6
South Africa	76.0	N/Appl.	69	2.4	4.8	104	0.4	N/Appl.	81	3.2	54.4	34
Switzerland	98.2	N/Appl.	32	46.3	92.7	1	8.2	N/Appl.	31	3.6	65.7	16
Tajikistan	22.8	N/Appl.	129	0.1	0.1	132	n/a	N/Appl.	n/a	1.9	23.1	134
Thailand	104.7	N/Appl.	26	13.2	26.5	66	2.4	N/Appl.	51	3.1	53.6	36
Tanzania	9.1	N/Appl.	139	1.5	3.1	107	0.2	N/Appl.	89	2.8	44.4	53
United Arab Emirates	250.0	N/Appl.	1	31.4	62.8	27	27.7	N/Appl.	4	3.6	65.8	15
United Kingdom	96.9	N/Appl.	34	39.6	79.2	10	0.5	N/Appl.	79	3.8	69.3	11
United States	142.5	N/Appl.	7	35.6	71.2	18	4.2	N/Appl.	45	3.8	69.4	10
Venezuela	54.5	N/Appl.	99	8.7	17.5	80	0.0	N/Appl.	120	1.8	19.7	135
Viet Nam	71.9	N/Appl.	76	13.6	27.2	63	9.9	N/Appl.	26	3.0	48.8	42
Yemen	6.0	N/Appl.	140	1.7	3.4	106	0.0	N/Appl.	125	2.4	35.0	105
Zambia	56.6	N/Appl.	95	0.2	0.5	123	0.0	N/Appl.	105	2.2	29.5	122
Zimbabwe	52.3	N/Appl.	102	1.4	2.8	108	0.2	N/Appl.	85	2.0	25.0	131

Table 6.7: Valuation capacity constraints by country

Country	6.02 Extent of staff training 1–7 (best)			6.03 Quality of vocational training 1–7 (best)			6.05 Digital skills among active population		
	Value	Score	Rank/141	Value	Score	Rank/141	Value	Score	Rank/141
Argentina	3.8	46.9	87	4.8	62.9	27	4.0	50.2	80
Bangladesh	3.3	38.7	127	3.4	39.4	124	3.5	42.5	114
Botswana	4.0	50.1	68	3.8	46.8	91	3.7	44.9	103
Brazil	3.8	47.1	84	3.3	38.6	127	3.1	34.8	133
Brunei Darussalam	4.0	50.8	63	4.5	57.7	49	4.9	64.3	35
Burundi	3.5	42.0	117	4.1	52.5	72	3.2	37.1	127
Cambodia	3.9	48.4	76	3.5	42.1	112	3.6	42.8	112
Cameroon	3.5	41.7	121	4.1	51.4	75	3.9	48.3	85
Canada	4.9	64.4	22	5.1	67.6	15	5.1	67.9	20
Chad	3.0	33.9	135	3.4	39.9	122	2.9	31.5	136
China	4.5	58.3	38	4.5	58.9	41	4.7	61.0	45
Chile	4.1	52.1	56	4.9	65.3	19	4.3	54.4	64
Cyprus	4.1	52.3	54	4.3	55.7	51	4.9	64.3	34
Ecuador	3.6	43.4	107	4.2	54.2	61	3.8	46.0	98
Egypt	3.9	48.4	75	3.2	36.7	129	4.7	61.0	44
France	4.8	62.8	28	4.7	62.1	30	4.5	58.2	54
Gambia, The	3.9	47.7	81	4.2	53.1	68	4.0	50.6	79
Germany	4.9	65.3	20	5.3	71.7	7	5.1	67.8	21
Guatemala	4.3	55.3	47	4.5	57.7	48	3.3	39.1	125
Haiti	2.5	24.2	140	3.0	33.4	138	2.7	28.6	140
India	4.3	55.1	50	4.2	53.3	67	4.4	57.2	59
Indonesia	4.6	60.3	33	4.6	60.1	37	4.5	58.5	52
Israel	4.7	62.5	30	4.6	59.6	40	5.5	75.0	6
Jamaica	4.0	50.4	66	4.6	60.2	36	3.8	47.3	93
Japan	5.3	71.0	9	4.9	65.3	18	4.4	57.2	58
Kazakhstan	3.9	48.3	77	3.8	46.8	90	4.7	61.5	43
Korea, Rep.	4.5	59.2	36	4.8	63.9	23	5.0	66.5	25
Malaysia	5.3	71.0	8	5.1	68.1	12	5.4	72.8	10
Mauritius	4.4	56.8	43	4.3	54.6	57	4.3	55.7	60
Mexico	3.8	47.0	86	4.2	53.9	62	3.8	46.0	99
Mozambique	3.0	32.9	136	3.0	33.6	137	2.7	29.0	139
Nigeria	3.6	44.1	102	2.8	30.5	139	3.4	40.4	122
Nepal	3.5	41.7	120	3.3	38.7	126	3.7	44.5	105
Qatar	4.9	64.8	21	5.1	67.5	16	5.3	72.2	11
Russian Federation	3.9	48.7	74	4.1	50.9	76	4.9	65.8	27
Rwanda	3.8	47.5	82	4.0	50.4	77	4.0	49.4	84
Singapore	5.4	73.3	4	5.4	73.3	6	5.6	76.4	5
South Africa	4.5	58.0	40	3.5	41.0	119	3.3	37.9	126
Switzerland	5.7	79.0	1	6.4	90.8	1	5.5	74.4	7
Tajikistan	3.8	46.0	93	4.3	55.4	52	4.4	57.4	57
Thailand	4.3	55.1	48	4.1	51.6	74	4.3	54.3	66
Tanzania	3.8	46.5	90	4.2	52.8	71	3.9	47.8	90
United Arab Emirates	5.0	66.0	17	4.8	63.3	25	5.3	72.0	14
United Kingdom	4.8	62.7	29	4.9	64.7	20	4.9	65.6	29
United States	5.3	72.3	6	5.2	70.7	8	5.3	72.2	12
Venezuela	3.4	40.4	124	4.3	54.4	59	3.6	42.8	113
Viet Nam	4.0	49.4	73	3.6	44.0	102	3.8	46.1	97
Yemen	2.9	31.8	139	2.7	28.1	140	3.5	42.1	115
Zambia	3.6	43.3	109	3.5	41.0	118	3.5	41.7	118
Zimbabwe	3.8	47.4	83	3.6	43.8	105	3.9	48.3	86

In creating a composite indicator, the thesis applies a uniform weight of 0.5 to each individual indicator per constraint and then combines the value of both:

$\beta = {}_wA + {}_wB + {}_wC + {}_wD$

Where β = *Composite Indicator (CI),*

A = *Indicator 1,*

B = *Indicator 2,*

C = *Indicator 3,*

D = *Indicator 4,*

${}_w$ = *Weight of Indicator.*

In alphabetical order, the thesis uses five countries from the pool of 50 countries, to demonstrate the application of this formula. This process gives us a preliminary composite score of the value of the constraints per country:

Legal and regulatory constraints
Argentina ${}_{0.33}125 + {}_{0.33}118 + {}_{0.33}77 = 105.6$

Bangladesh ${}_{0.33}84 + {}_{0.33}96 + {}_{0.33}93 = 90.09$

Botswana ${}_{0.33}72 + {}_{0.33}39 + {}_{0.33}94 = 67.65$

Brazil ${}_{0.33}141 + {}_{0.33}120 + {}_{0.33}111 = 122.76$

Brunei Darussalam ${}_{0.33}83 + {}_{0.33}60 + {}_{0.33}102 = 80.85$

Customs infrastructure capacity constraints
Argentina $_{0.25}60 + {}_{0.25}53 + {}_{0.25}78 + {}_{0.25}100 + = 72.75$

Bangladesh $_{0.25}115 + {}_{0.25}88 + {}_{0.25}49 + {}_{0.25}105 = 89.25$

Botswana $_{0.25}65 + {}_{0.25}105 + {}_{0.25}96 + {}_{0.25}38 = 76$

Brazil $_{0.25}46 + {}_{0.25}61 + {}_{0.25}61 + {}_{0.25}103 = 67.75$

Brunei Darussalam $_{0.25}13 + {}_{0.25}70 + {}_{0.25}38 + {}_{0.25}72 = 48.25$

Valuation capacity constraints
Argentina $_{0.33}87 + {}_{0.33}27 + {}_{0.33}80 = 64.02$

Bangladesh $_{0.33}127 + {}_{0.33}124 + {}_{0.33}114 = 120.45$

Botswana $_{0.33}68 + {}_{0.5}91 + {}_{0.33}103 = 86.46$

Brazil $_{0.33}84 + {}_{0.33}127 + {}_{0.33}133 = 113.52$

Brunei Darussalam $_{0.33}63 + {}_{0.33}49 + {}_{0.33}35 = 48.51$

See Table 6.8a in the Appendix to this thesis for a complete presentation of the composite score of the weighted constraints all 50 countries, listed in ascending order.

Gonzalez *et al* noted that setting a set of weights for the indicators is an arbitrary exercise and thus, suggested it should be a result of a negotiated procedure within the WTO citing the precedent of negotiated coefficients for the Swiss formula for developing country liberalization in support. While the thesis agrees with this as a pragmatic approach to possibly reaching consensus in the WTO on setting weights for selected indicators, it, however, (for the purpose of this demonstration) assigned a uniform weight to all the indicators to reduce personal bias for any indicator. For a resource-intensive agreement like the CVA, no one constraint should be given primacy over the other. The existence of any one of the three constraints in a country would have the same effect (limiting the implementation of the Agreement in the country) as if all three constraints were simultaneously existent. The difference would only lie in the focus of technical assistance. The point should, however, be emphasized that different weights may be assigned to different indicators to reflect their economic significance, statistical

adequacy, and the availability of data, among others.[104] The purpose of weighting is essential to improve reliability by giving higher weight to components with good quality, that is, indicators that correlate highly with each other and the resultant composite indicator.[105]

For expositional purpose, I extract from the Appendix and present the top twenty countries (from the pool of 50 countries) in order of their ranking per the composite score of each weighted constraint. See Table 6.8b below.

Table 6.8b: Ranking of Countries according to the Composite Score per constraints

Rank	Legal and Regulatory Constraints	Customs Infrastructure Capacity Constraints	Valuation Capacity Constraints
1	Venezuela	Burundi	Haiti
2	Haiti	Chad	Mozambique
3	Brazil	Cameroon	Yemen
4	Yemen	Nigeria	Chad
5	Mozambique	Haiti	Bangladesh
6	Nigeria, Zimbabwe	Gambia, The	Nigeria
7	Ecuador	Yemen	Nepal
8	Chad	Guatemala	Zambia
9	Argentina	Mozambique	Brazil
10	Nepal	Zambia	Burundi
11	Mexico	Venezuela	Cambodia
12	Bangladesh	Zimbabwe	Venezuela
13	Jamaica	Rwanda	South Africa
14	Zambia	Nepal	Cameroon
15	Cambodia	Tajikistan	Zimbabwe
16	Brunei Darussalam	Tanzania	Viet Nam
17	Guatemala	Egypt	Ecuador
18	Cameroon	India	Botswana
19	Viet Nam	Bangladesh	Tanzania
20	Russian Federation	Cambodia	Egypt

The results in Table 6.8b (read in conjunction with Table 6.8a in the Appendix) show some degree of homogeneity across the list where 12 countries that appear in the top 20 are restricted by all three constraints in their implementation of the CVA.[106] These 12 countries lack the capacity requirements vis-à-vis all three constraints' areas to implement the CVA. It is no gainsaying that they may delay the application of the provisions of the Agreement under the tenets of SDT. It is in the consideration of the 18 others that also appear in the top 20 but only in one or two constraint categories

104 Gómez-Limón, J. A., Arriaza, M., and Guerrero-Baena, M. D. (2020). Building a composite indicator to measure environmental sustainability using alternative weighting methods. Sustainability, 12(11), p. 4398; Becker, W., Saisana, M., Paruolo, P., and Vandecasteele, I. (2017). Weights and importance in composite indicators: Closing the gap. Ecological indicators, 80, pp. 12-22.

105 Ibid,

106 The countries are Venezuela, Haiti, Yemen, Mozambique, Zimbabwe, Chad, Nepal, Bangladesh, Zambia, Cambodia, and Cameroon.

(not all three constraints categories), that complications may arise in the selection procedure.[107] For instance, should we treat a country like Ecuador, which is plagued under two constraints categories– legal and regulatory constraints and valuation capacity constraints, in the same way as a country like Mexico, which is only limited under one constraint category– legal and regulatory constraints? Should we disentitle both from SDT provisions, not being constrained in all three constraints' categories? Should we benchmark entitlement to SDT on a country being constrained under at least, two of the three categories? Or would a country be constrained if it is under at least one of the constraints' categories? While these could form important issues for negotiation, the thesis takes the view that being constrained under at least one of the constraints' categories should suffice to entitle a country to SDT. In such a case, assistance should be targeted at helping such a country overcome the particular constraint that it is facing and no more.

The case with a least developed country like the Gambia could be held to either pose important challenges or simply be viewed as instructive, as far as differentiated differentiation is concerned. The Gambia's sensitivity to the chosen threshold is significant. In the list of top 20 countries, it appears under one constraints category– customs infrastructure capacity constraints. If we rather choose a top 25 list, we find that the Gambia appears under two constraints categories– customs infrastructure capacity constraints and valuation capacity constraints. This implies that what constraints the Gambia does, in fact, face in implementing the CVA would vary according to a preferred threshold. However, this should not be too much of a problem, since if we go by the proposal that once a country is shown on the list to be constrained by at least one of the constraints categories, it suffices to entitle that country to SDT. Notwithstanding, such possible scenarios underscore the problem that lies with the arbitrary selection of thresholds. It is with due regard to this that the thesis further proposes the use of some statistical methods to determine the threshold for graduating countries out of the entitlement to delay the application of provisions of the CVA and *ipso facto*, which countries are entitled in the first instance.

Before proceeding to discuss the issue of establishing a graduation threshold, the Gambia presents another interesting issue worth our attention, with respect to legal and regulatory constraints. The Gambia ranks at 29 just behind an industrialized country, like France, and an emerging economy like Kazakhstan, both at 30. It indeed ranks better than some advanced developing countries like Botswana (23), South Africa (23), and even a recently acclaimed developed country, the Republic of Korea (26). A plausible interpretation of this scenario would be that the Gambia has acquired the requisite capacity in this area (possibly, having benefitted from assistance and capacity building support) to implement the CVA.[108] In such circumstance, further assistance,

107 The countries are Brazil, Ecuador, Argentina, Mexico, Jamaica, Brunei Darussalam, Guatemala, Viet Nam, Russian Federation, Burundi, The Gambia, Rwanda, Tajikistan, Tanzania, Egypt, India, South Africa and Botswana.

108 As the TFA suggests, "assistance and support for capacity building" may take the form of technical, financial, or

and capacity building support during a period of delayed application of the Agreement should focus on helping the Gambia to build capacity in the other two constraints' area where capacity is insufficient, that is, customs infrastructure capacity and valuation capacity.

6.5 Establishing a graduation threshold

Differentiated differentiation holds that SDT must be targeted and aimed at helping beneficiary countries to build requisite capacity to overcome specific rule implementation constraints. At once such capacity is built, beneficiaries should be exposed to rule obligation. Put differently, such countries should be graduated out of SDT, including the entitlement to delay the application of CVA provisions. Unlike the arbitrary method used above to select the top 20 (or 25 countries), choosing a graduation threshold in practice, should be undertaken carefully and with objectivity as a guiding principle. The thesis employs a statistically based score threshold procedure to determine the graduation threshold and at the same time, which countries are entitled to SDT in the first instance. Using the 50-country list, the thesis rearranges the countries in ascending order based on each country's average score of the composite of all three weighted constraints. The average score per country provides us with a set of scores that allows us to rank countries according to how much the constraints restrict or limit their capacities to implement the CVA. See Table 6.9 below. Countries in the upper deciles are considered to be better equipped (possessing sufficient requisite capacity) to implement the Agreement.

Table 6.9: Ranking of Countries by the average score of the three weighted CVA constraints

Countries	Legal and Regulatory Constraints	Customs Infrastructure Capacity Constraints	Valuation Capacity Constraints	Average (Common) Ranking Score	Rank
Singapore	1.65	15.75	4.95	7.45	1
Switzerland	10.56	20	2.97	11.18	2
United Arab Emirates	4.62	11.75	18.48	11.62	3
United States	8.58	20	8.58	12.39	4
Japan	26.73	8.75	28.05	21.17	5
Qatar	9.24	40	15.84	21.69	6
Malaysia	8.25	47	9.9	21.72	7
Germany	15.18	34.75	15.84	21.92	8
United Kingdom	18.15	33.5	25.74	25.80	9
Canada	29.04	35.25	18.81	27.7	10
Korea, Rep.	54.45	13.25	27.72	31.81	11
China	31.35	26.25	40.92	32.84	12
Israel	37.29	44.5	25.08	35.62	13
France	43.89	36.75	36.96	39.2	14
Mauritius	40.26	51.75	52.8	48.27	15
Indonesia	36.96	68.25	40.26	48.49	16

any other mutually agreed form of assistance provided. See foot note to Article 13.2 of the TFA.

Table 6.9: Continued.

Countries	Legal and Regulatory Constraints	Customs Infrastructure Capacity Constraints	Valuation Capacity Constraints	Average (Common) Ranking Score	Rank
Chile	54.78	45.75	45.87	48.8	17
Thailand	53.13	44.75	62.04	53.31	18
Kazakhstan	43.89	57	69.3	56.73	19
Brunei Darussalam	80.85	48.25	48.51	59.2	20
Cyprus	70.62	65	45.87	60.50	21
Russian Federation	73.92	52.75	58.14	61.6	22
India	34.32	92.25	58.08	61.55	23
Rwanda	15.55	104.25	80.19	66.66	24
Tajikistan	39.6	98.75	66.66	68.34	25
Viet Nam	74.58	51.75	89.76	72.03	26
Tanzania	50.16	97	82.83	76.66	27
Botswana	67.65	76	86.46	76.7	28
South Africa	67.65	72	94.05	77.9	29
Mexico	92.73	61	81.51	78.41	30
Jamaica	87.78	83.5	64.35	78.54	31
Argentina	105.6	72.75	64.02	80.79	32
Gambia, The	46.86	121.75	75.24	81.28	33
Egypt	72.6	93	81.84	82.48	34
Guatemala	78.54	112.5	72.6	87.88	35
Cambodia	84.15	88.25	99	90.47	36
Ecuador	115.17	70	87.78	90.98	37
Burundi	60.06	133.75	104.28	99.36	38
Cameroon	75.57	131.75	92.73	100.02	39
Bangladesh	90.9	89.25	120.45	100.2	40
Brazil	122.76	67.75	113.52	101.43	41
Zambia	84.81	111.25	113.85	103.3	42
Zimbabwe	116.16	106.5	90.42	104.36	43
Nepal (R4G)	97.35	102	115.83	105.06	44
Venezuela	137.61	108.5	97.68	114.60	45
Nigeria	116.16	126	119.79	120.65	46
Chad	106.26	133	129.69	122.98	47
Mozambique	116.49	111.5	135.96	123.32	48
Yemen	121.11	119	130.02	123.38	49
Haiti	129.36	122.25	137.94	129.85	50

In choosing a threshold, the thesis adopts the Mean of the average scores of the composite weighted constraints for all countries. Countries below the Mean are entitled to delay the application of the CVA and should only be considered for graduation into the general provisions of the CVA on reaching the threshold point. Given the composite nature of the constraints' indicators, this procedure of setting the threshold ensures that primacy is not given to any one of the constraints in the determination of whether a country has the capacity to implement the CVA. Rather, such determination is based on an actual assessment of the combined effect of all existing constraints in a country.

To calculate the Mean, two steps are required:

Step 1: Work out the simple average of the composite scores of the constraints per country

$$\text{Average} = \frac{\textit{Sum of composite of weighted constraints per country}}{\textit{Number of weighted constraints per conuntry}}$$

Using Singapore for illustration: $\text{Average} = \frac{1.65+15.75+4.95}{3}$

$$= \frac{22.35}{3}$$

$$= 7.45$$

Step 2: Combine the average score of each of the 50 countries and work out the average.

$$\text{Mean} = \frac{\textit{Sum of average scores of the composite weighted constraints for all countries}}{\textit{Number of countries}}$$

$$= \frac{7.45 + 11.18 + 11.62 + 12.39 + 21.17 + 21.69 + \ldots + 129.85}{50}$$

$$= \frac{3378.19}{50}$$

$$= 67.56$$

From my calculation, the Mean value is 67.56, which by choice, indicates the threshold. This lies somewhere between Rwanda and Tajikistan with average ranking scores of 66.66 and 68.34, respectively. See Table 6.9 above. From Table 6.9, we find that virtually all the developed countries are ranked in the upper deciles of the table (with high average capacities for implementing the CVA) signifying consistency with WTO policy that these ones do not need SDT. By their default position in Table 6.9, they should be considered as possessing the necessary capacity to effectively implement the CVA. Instructively (and most plausibly giving validation to the objectivity of the thesis' proposal), countries in the upper deciles of Table 6.9 include Singapore, United Arab Emirates, Qatar, China, Korea Republic, Israel, and Brunei Darussalam, which have been cited by the US as 'some of the wealthiest WTO Members' that self-designate

as developing members so they can avail themselves of SDT at their discretion – just like Sub-Saharan Africa.[109] Bacchus and Manak note that in practice, this means that these countries are making fewer trade commitments and assuming less responsibility for meeting their WTO obligations than they are able to (or possess capacities for).[110] This contradicts a fundamental principle of differentiated differentiation, that rule implementation obligation should reflect requisite implementation capacity.

Countries that rank above the threshold score and by default, are at the lower tier of Table 6.9 should be considered to be so limited by the constraints that they are not able to take on the obligation of immediately implementing the CVA. These ones should be entitled to delay the application of the general provisions of the CVA. If any of such countries, at any point in time, drop in rank to the threshold score or below, it should be considered for graduation into the general provisions of the Agreement. Theoretically, a question arises as to what happens if a country that was below the score threshold moves up the rank to the threshold point? Put differently, what happens if a country, which for instance, has graduated out of SDT, is subsequently determined to have lost the capacity that prior qualified it for graduation from SDT? Does it again, become entitled to SDT? In answering this question, it is important to recall the thesis' position that SDT ought to be aimed at supporting developing countries to increasingly take on their WTO obligations. In essence, SDT should be geared towards improving the rule implementation capacities of these countries. The thesis has also made a case for hinging rule implementation on the existence of requisite capacity to implement. It follows that once there is a determination that a country lacks the requisite capacity to implement a rule, then it should be entitled to delay implementation or temporarily halt implementation as the case may require. In other words, it should be allowed SDT in the form of delayed application of the rule. As shown earlier in this chapter, the existence of specific rule implementation capacity in a country is one that is open to factual determination.[111] Geographic considerations/natural disasters, financial crunch, economic recession, or even a health pandemic may be instrumental in depriving a country of erstwhile existing capacity.[112] In such cases, targeted SDT, including technical assistance, should be provided to such countries to build back requisite capacity. Until then, the obligation to implement the rule lies in abeyance.

Two other countries worth noting in Table 6.9 are Mexico and Argentina. Mexico is self-declared as developing in the WTO and is also a member of the OECD. While

109 WTO. (2019). An undifferentiated WTO: self-declared development status risk institutional irrelevance. Communication from the United States WT/GC/W/757, 16 January; European Commission (2018). WTO Modernisation: Introduction to Future EU Proposals. Concept Paper, 18 September, available at https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf. Accessed 22 December 2021, WTO, Geneva, 14 February). pp. 10-11.

110 Bacchus, J., & Manak, I. (2021). The Development Dimension: Special and Differential Treatment in Trade (1st ed.). p. 8. Routledge.

111 See Malone, J. (2002), Defining/developing capacity building in the field of customs valuation, above n 7.

112 United Nations and United Nations Conference on Trade and Development. (2020). World economic situation and prospects. New York, N.Y: United Nations.

recognizing that there is no generally accepted criterion for classifying countries by level of development, the US aligns itself with existing views that membership of the OECD should be a major criterion for developed country status.[113] *Ipso facto*, OECD members like Mexico, Chile, Israel, and the Republic of Korea should be automatically disqualified from entitlement to SDT in the WTO due to their OECD membership.[114] In justifying its claim, the US cites the preamble to the Convention of the OECD that "economically more advanced nations should cooperate in assisting to the best of their ability the countries in process of economic development".[115] A literal interpretation of the US' position is that by virtue of Mexico's membership of the OECD, it is self-admittedly an 'economically more advance nation' which is obviously not entitled to SDT but should rather bear the responsibility of providing assistance and capacity building support to 'developing countries' to take on their trade obligations. Underscoring the point, the US further argues that 'economically more advanced nations' like Mexico should not be allowed to 'self-declare' as 'developing' at the WTO, particularly so, after 'self-declaring' OECD membership.[116] In other words, Mexico should not be allowed to self-declare as a developed country in the OECD and in the same breath, claim self-declared developing status in the WTO. Albeit this thesis does not join the volatile debate on the categorization or re-categorization of developing countries in the WTO, it acknowledges that the developed-developing country divide is too restrictive and fails to capture the diversity in development levels across countries.[117]

Based on available statistics, the World Economic Situation and Prospects (WESP) classifies Mexico as an economy in transition.[118] At US$9,946 in 2019, the country's GDP per capita beat that of most of its peers in the developing world but fall short of the debatable minimum threshold of US$12,000 required for classification as a developed country.[119] The country's 2019 HDI value of 0.779 puts it in the high human development category (positioning at 74 out of 189 countries and territories) but again falls short of the 0.8 minimum value for developed countries in the very high development category.[120] Mexico

113 See WTO. (2019). An undifferentiated WTO, above 110 at 7; Draft General Council Decision: Procedures to Strengthen the Negotiating Function of the WTO, World Trade Organization, WT/ GC/W/764, February 15. See also Nielsen, L. (2011). *Classifications of Countries Based on their Level of Development: How it is Done and How it Could Be Done*. International Monetary Fund. Working Paper WP/11/31, February, p. 3.

114 Ibid.

115 WTO. (2019). An undifferentiated WTO, above 110 at 7. The Convention on the OECD is available at https://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm. Accessed 5 December 2021.

116 WTO. (2019). An undifferentiated WTO, above 110 at 7.

117 Nielsen, L. (2011). *Classifications of Countries Based on their Level of Development*, above n 113.

118 See WESP. (2021). 2021 Report, available at https://www.un.org/en/desa. The UN DESA classifies all countries of the world into one of three broad categories: developed economies, economies in transition and developing economies.

119 See Majaski C. Developed Economy 2019. https://www.investopedia.com/terms/d/developed-economy.asp. Accessed April 6, 2020. See also The World Bank. "GDP (current US$) – Mexico, available at https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=MX; MSCI (2021). Market Classification, available at https://www.msci.com/our-solutions/indexes/market-classification. Accessed 22 November 2021. Some economists believe that US$25,000 is a more realistic threshold.

120 UNDP (2020), Human Development Report 2020. The Next Frontier: Human Development and the Anthropocene. New York, available at http://hdr.undp.org/en/content/human-development-report-2020

meets all the criteria of an emerging market economy, including increasingly becoming more integrated with the global economy, as shown by increased liquidity in local debt and equity markets, increased trade volume and foreign direct investment, and the domestic development of modern financial and regulatory institutions.[121] However, the indicators show that the country is not yet in the developed category.[122]

The average ranking score of Mexico on Table 6.9 – 78.41, indicates that the country lies below the chosen threshold of 67.56 and by implication, lacks the necessary capacity to implement the CVA. Hence, is entitled to delay the application of CVA provisions while it receives assistance and capacity building to acquire the needed capacity. Its membership of the OECD should not operate to deprive it of that entitlement, which is ideally determined based on factual circumstances. Instructively, the US acknowledges that "making a choice not to seek OECD membership is not indicative of [a] country's development status".[123] Inversely, choosing to seek OECD membership should not in itself, be indicative of a country's development status. The defining question should be whether Mexico has the requisite capacity to implement the CVA. That, it is a member of the OECD is immaterial to the determination of that question.

Concerning Argentina, the country's HDI ranks in the very high development category with a value of 0.845 (46 out of 189 countries). Again, the US has suggested that countries ranked in UNDP's 'Very High Human Development' quartile should not be entitled to claim developing status.[124] However, Table 6.9 above suggest that Argentina with an average ranking score of 80.79 is well above the chosen threshold of 67.56 signifying that it lacks the requisite capacity to implement the CVA and hence, is entitled to delay the application of CVA provisions, while also receiving assistance and capacity building to acquire the requisite implementation capacity.

As already indicated, while a non-economic factor, like the HDI[125] may be indicative of a country's level of development, it is by no means a sole or conclusive criterion as other common criteria for determining the economic development status of a country exists, including per capita income or per capita GDP.[126] The concept of human development is much broader than what can be captured by the HDI, or by any

121 Nielsen, U. B., Hannibal, M., & Larsen, N. N. (2018). Reviewing emerging markets: context, concepts and future research. *International Journal of Emerging Markets*.

122 This is not to suggest that there is any one method for determining which countries are to be accepted as developed. Exceeding even the US$12,000 GDP is not an absolute entry ticket to developed status. However, the United Nations Developed Country List (2020) defines a developed country as a sovereign state that has a developed economy and technologically advanced infrastructure when compared to other nations. See World Population Review (2020). Developed Countries List 2020, available at https://worldpopulationreview.com/countries/developed-countries/. Accessed 23 November 2021. According to this definition, several factors determine whether a country is developed, such as the HDI, political stability, GDP, industrialization, and freedom.

123 WTO. (2019). An undifferentiated WTO, above 110 at 7.

124 See Ibid, at 10.

125 The HDI assigns numerical values to different countries as a measure of human prosperity. These values are derived by measuring levels of education, standard of living, and life expectancy. Countries with higher scores on the index are said to be better developed than those with lower scores.

126 See Nkoro, E., and Uko, A. (2019). A critical approach to economic development: Concept, measurement and patterns. International Journal of Research in Business and Social Science (2147-4478), 8(5), 228-236.

other composite index in the Human Development Report (Inequality-adjusted HDI, Gender development index, Gender Inequality Index, or Multidimensional Poverty Index). A comprehensive picture of a country's human development would require an analysis of a broader set of human development indicators and information.[127]

To determine whether a country should assume a rule obligation or be allowed derogation from the rule, less emphasis should be placed on its development status than on whether it has the capacity to effectively implement the rule. As this thesis has repeatedly argued, the existence of requisite capacity to implement an agreement like the CVA is subject to factual determination, including through conducting capacity needs assessments and gap analysis. While it may be more probable, for instance, that the advanced developing or emerging economies possess the necessary capacities to implement a highly technical agreement like the CVA compared to the poorer developing countries and LDCs, such generalization is faulty to the extent that it does not necessarily reflect factual circumstances in those countries.

6.6 Conclusion

Essentially, this chapter demonstrates how SDT can be redirected towards helping developing countries to meet their trade obligations rather than provide them with a permanent cover from rule discipline. The chapter articulates a system that hinges the application of SDT on a set of analytical criteria which, in relative terms, identifies the constraints that countries face in the implementation of trade agreements. The outcomes indicate that we can leverage the use of a composite indicator and a ranking system to gauge the desirability of implementing individual WTO agreements, in this instance, the WTO's CVA. The chapter highlights the implications of weighting the individual indicators of the composite indicator and how such weights may be arrived at. The system also adopts a statistical method to choose a threshold for graduating countries out of SDT– effectively regulating which countries should be entitled to delay the application of the CVA at any one time.

The findings indicate that several countries with acclaimed developing statuses, including Singapore, United Arab Emirates, Qatar, China, Korea Republic, Israel, and Brunei Darussalam may have overcome the general constraints that make implementing CVA commitments challenging and undesirable. Hence, the thesis' proposal offers an objective basis upon which to require these countries and any other in similar positions to implement the CVA without delay. To engender objectivity, the thesis bases the graduation of countries out of SDT and into the general provisions of the CVA on those countries reaching a defined threshold.

This chapter also provides evidence in support of defining the eligibility criteria for

127 For details, see the statistical annex of UNDP (2020), Human Development Report 2020. The Next Frontier: Human Development and the Anthropocene. New York, available at http://hdr.undp.org/en/content/human-development-report-2020. Accessed 10 October 2021.

allowing countries access to the SDT on an agreement-by-agreement basis. The question of whether a country deserves to get SDT or not should be based on the identification of the constraints to which such SDT relates and the distributional implications that enforcement of WTO provisions implies.[128] Constraints ought to be determined on an agreement-specific basis as they vary across agreements. Justifiably, SDT should be geared towards supporting countries to improve their rule implementation capacities rather than encouraging permanent exemption from the rules. Under this approach, graduation from SDT is not horizontal, given that a country may graduate from SDT under one agreement, but may remain eligible for SDT under another agreement. The approach is consistent with a more targeted and needs-based approach to SDT.

128 Gonzalez, *et al* (2011), TRIPS and Special and Differential Treatment, above n 91 at 35.

7

Chapter 7

General discussion and conclusion

7.1 Introduction

This thesis contributes to the debate on recasting the trade and development relationship in the WTO, specifically, reforming SDT to reflect an appropriate relationship between levels of development and the trade liberalization commitments undertaken by different WTO members. The thesis contributes important insights into how we may identify and establish objective and effective criteria that settle and depoliticize the questions of access to SDT and is flexible enough to track developmental needs.

This thesis advances the state of knowledge in three distinct but related ways: Frist, by assessing whether SDT, with and without graduation linked to objective indicators fares comparatively better in achieving the aims of SDT than the existing approaches to SDT which seek to preserve the exemption of countries with uniform criteria across WTO agreements. Second, by examining whether the concept of progressive regulation meets minimum prescriptive requirements reasonably applied to law in general. Third, by demonstrating how meaningful indicators for the progressive assumption of key WTO obligations can be specified across a variety of norms in different agreements of the WTO.

7.2 Answers to research questions

1. *How can countries manage the reality of their different development constraints when committing to trade rules?*

This question interrogates the problem of access to SDT resulting from the lack of a concrete criteria to identify a developing country at the WTO or more aptly, a country with a justifiable need for SDT (except for LDCs). It seeks to provide an answer to the questions of how to accommodate different levels of development, while ensuring that the costs of multilateralism are shared equitably.

Chapter 3 introduces differential treatment as necessary if the differences in the socio-economic development statuses of developed and developing countries is to be taken into cognizance by the rules of the multilateral trading system. It demonstrates the inherent equities and injustice that results when the international law principle of sovereign equality of states is strictly applied to the distribution of rights of members. Formal equality fails to recognize the huge and widening gap that exists between States in the economic and social sphere, and hence, results in injustice a number of times.[1] Accordingly, some differentiation among countries became necessary to introduce equity into the WTO's system of rights and obligations to achieve substantial equality among members at differing levels of development. The thesis in chapter 3 showed that differentiation among members was necessary if the WTO's system of rights and

1 See Lyons, D. (1966). The weakness of formal equality. *Ethics*, *76*(2), 146-148

obligations would be equitable. Traditionally, equity seeks to influence results, arising from the application of a given rule, which is deemed undesirable according to some broader justice, moral or social concerns.[2] Recognizing that the fulfilment of formal equality may not bring about substantive equality, equity aims to provide for remedial measures to the harshness of the application of a rule to all in a similar way. Also acknowledging that inequalities among countries influence their capacity to benefit from the application of a given rule, equity allows for differential treatment by taking into account such inequalities just to bring about substantively equal outcomes.

SDT introduces unequal treatment on the basis of member countries' different capacities to take advantage of the opportunities offered by international trade. SDT is the WTO's own mechanism for achieving genuine equality as opposed to formal equality. Fredman describes differential treatment as not just necessary to balance right and obligations of states, it is a recognition of the point that merely opening up the opportunity for equal engagement in trade through formally equal treatment of the like products of countries, does not take account of the unequal 'starting points' of developed and developing countries.[3] For the purpose of this research, inequality is referred to in terms of countries' opportunities to take advantage of trading opportunities. It does not necessarily mean the absence of factual inequality in trade balances between countries as a country could be well integrated into the global trading system but still have a negative trade balance vis-à-vis another WTO member.

The thesis shows that differentiation is not only contemplated between developed members and developing members but even of more significance, among developing countries themselves. Basing on analysis of GATT legal texts and decision of the WTO dispute settlement body, it identifies how differentiation among developing countries is also intended to ensure an appropriate balance of rights and obligations among members on the issue of which gets SDT. Interpreting paragraph 3(c) of the Enabling clause, the DSB in *EC–Tariff Preferences*, ruled that differentiation among developing countries is allowed in responding to their differing development needs.[4] That is to say, responding to the 'needs of developing countries' may, hence, entail treating different developing countries differently. (Chapter 2). Paragraph 7 of the Enabling Clause clearly affirms the intention of WTO members to treat developing countries differently when it comes to holding them to their trade obligations. Such is to be directly linked with a demonstrable and improving capacity of these countries to participate in international trade. (Chapters 2 and 5)

In allowing exemption from disciplines as a reflection of SDT, paragraph 7 of the Enabling Clause further introduced the principle of graduation, which provided

2 Cullet, P. (1999). Differential treatment in international law: towards a new paradigm of inter-state relations. *European Journal of International Law*, 10(3), 549-582, 557.

3 Fredman, S. (2011). *Discrimination law*, p. 242. Oxford University Press.

4 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC-Tariff Preferences)*, WT/DS246/R, para. 162. Adopted 20 April 2004, as modified by Appellate Body Report WT/DS/246/AB/R.

that with the progressive development of their economies and improvement in their trade situation, developing countries would be expected to participate more fully in the WTO's framework of rights and obligations. Apart from supporting differentiation between developing countries (in terms of their readiness for increased rule obligations), the principle of graduation was established to determine when a country's development situation had improved enough to warrant limiting its access any further to SDT and to introduce it into the WTO's general framework of rights and obligations. No exemptions, opt-outs, or non-reciprocal preferences was intended to last indefinitely. (Chapter 3). No doubt, once incapacity or inequality has become engrained, formally equal treatment will only tend to deepen and perpetuate, rather than to ameliorate, inequality.[5] It is only through a substantive equality approach like taking conscious 'positive action', including differentiating between developing countries, to single out disadvantaged groups to assist them become better able to utilize the opportunities available to all that inequality can be reduced.

> 2. *How can SDT be tailored to respond to countries' heterogenous needs without generating distortions (because of incentives for misrepresentation)?*

This question is essentially one of how to differentiate among developing countries in accommodating their needs, while ensuring that the costs of multilateralism are shared equitably among all members. The aim here is to ensure that while developing countries that justifiably need SDT get it, the advanced developing countries pull their weight in the WTO.

The first thing the thesis investigates is how to determine which needs of [developing] countries is even worth consideration in the first place, particularly, in its chapter 2. Paragraph 3 (c) of the Enabling Clause merely specifies that a 'need' has to be linked to 'development, financial or trade need'. That, in itself, is a very broad term that could fit just about any need. It does not make clear whether the need of a developing country is to be understood in relation to a trade-led development need or it is open to a broader interpretation? However, the thesis finds that the intention of the drafters of the Enabling Clause is that such needs be given the narrow interpretation and so any 'positive action' taken to address such needs should ordinarily make a positive contribution to the trade of the beneficiaries.

Upon undertaking a study of China's successful compliance with its Montreal Protocol obligations in chapter 3, the thesis found that to achieve its objectives as designed, SDT must be geared towards enabling countries to assume their WTO obligations to the fullest extent rather than serve as a basis for permanently exempting countries from rule discipline. The implication here is that access to SDT assumes an

5 Moon, G. (2009). Trade and Equality: A relationship to discover. *Journal of International Economic Law*, *12*(3), 617-642 at 622.

objective basis. Differentiation between developing countries should simply aim to identify which countries lack the requisite capacity to implement an agreement. SDT is then given to that country to enable it to build the requisite capacity to implement the agreement. (Chapter 5). Those countries which are determined to already possess the requisite capacity, do not get SDT in this case. Put differently, access to SDT is on a needs-basis. Chapter 5 of the thesis makes the case for what is basically a rules-based approach to differentiation. The basis for differentiation is to be found in successfully defining objective criteria for eligibility on an agreement-by-agreement [or provision-by-provision] basis.[6] Graduation from SDT is provision-specific rather than an across-the-board one. This means that a country may be graduated from SDT in respect of one agreement but still eligible to SDT under another agreement.

In chapter 5, the thesis proposes an implicit threshold approach to differentiation amenable to the principle of graduation (termed differentiated differentiation) which identifies which countries should be allowed derogation from a particular WTO rule at any given time. The rationale for 'differentiated differentiation' is that SDT should be geared towards supporting countries to improve their rule implementation capacities rather than provide them with a permanent exemption. Accordingly, the assumption of trade treaty obligations by developing countries should be determined by their rule implementation capacity at any given time. To operationalise such modulation of commitments, firstly, we need to determine what constraints developing countries are likely to face in implementing a particular rule.[7] Secondly, we should identify, based on some analytical criteria, the countries that suffer from these constraints and hence, lack the capacity to implement the rule. Targeted SDT, including derogation from disciplines, could then be offered to such countries to overcome the constraint(s). The objective here is to ensure that SDT is targeted at only those countries that justifiably need it. This approach requires that rule implementation obligation is made contingent on a country overcoming a set of identified constraints. That is, the modulation of commitments only kicks in when identified constraints have been overcome. Invariably, countries that fall below a preferred threshold (established using a composite index) would be entitled to SDT while those above the threshold would not be eligible for SDT. (Chapter 4 and 5). Adopting a new evidence-based, case-by-case approach to

6 See Hoekman, B. M., Michalopoulos, C., & Winters, L. A. (2003). *More favorable and differential treatment of developing countries: Toward a new approach in the World Trade Organization* (Vol. 3107). World Bank Publications, available at http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3107. Accessed 31 January 2022; Keck, A., and Low, P. (2004). *Special and Differential Treatment in the WTO: Why, When and How?* p. 8, Staff Working Paper ERSD-2004-03, available at http://www.wto.org/english/res_e/reser_e/ersd200403_e.htm. 31 January 2022; Stevens, C. (2002). *The Future of Special and Differential (SDT) for Developing Countries in the WTO*, IDS Working Paper 163, available at https://www.ids.ac.uk/publications/the-future-of-special-and-differential-treatment-sdt-for-developing-countries-in-the-wto/. Accessed 31 January 2022.

7 Using the TRIPS Agreement, Gonzalez *et al* (2011) identified four possible constraints (economic constraints, access to pharmaceuticals, capacity constraints, and incidence of health outcomes) that make developing countries particularly vulnerable to patent protection enforcement, on which basis they then selected relevant indicators that capture these constraints. Further basing on a combination of the indicators, they were able to draw up a list of countries that were deserving of exemption from TRIPS provisions for patent protection in the pharmaceutical industry.

SDT could ensure both that the concerns of the poorest countries are addressed and that advanced developing countries pull their weight in the organization.

To operationalise a threshold approach to differentiation, the use of analytical criteria to identify constraints that countries face as a result of, or in the process of, rule implementation is central. Gonzalez *et al* note the possibility of a mismatch between the analytical criteria used and actual constraints identified.[8] This acknowledges the fact that the analytical criteria will at best be a proxy for a given constraint. Nonetheless, identifying and using a combined set of indicators to identify possible constraints could be less problematic. A composite indicator will better reflect such constraints vis-à-vis the varied needs of countries.

As complementary, chapter 5 makes a case for improved monitoring of technical assistance delivery. In practical terms, this would require setting up a multi-stakeholder structure to coordinate the implementation of such agreements; developing agreement-specific strategies and action plans to achieve the goals of each agreement; and putting an appropriate regulatory and legislative framework in place to support reforms aimed at achieving the objective of any particular agreement. The case study of China's successful compliance with ODS reduction targets under the Montreal Protocol reveal how the introduction of SDT monitoring and review system could be applied to not only enhance technical assistance delivery but the overall effectiveness of SDT.

3. *How to set the benchmarks to trigger access to SDT and to limit its availability to only those countries that justifiably need it?*

This question required a demonstration of how to define SDT eligibility criteria and an SDT graduation threshold. Successfully defining objective criteria for differentiation and a credible graduation mechanism is key to moving SDT away from open-ended blanket exemptions toward a needs-driven and evidence-based approach that will ensure that SDT is as targeted as possible. The first approach to answering this question was conducting a doctrinal analysis in chapter 4 on some WTO legal texts, including the Agreements on SCM, safeguards, SPS and TRIPS to learn how they set eligibility criteria for access to SDT. Moving away from open-ended blanket SDT, the Agreements mostly use hard criteria to define SDT eligibility, invariably, setting an objective basis for differentiating between developing countries for the purpose of SDT. For instance, on the basis of GNP per capita, the SCM Agreement differentiates among developing countries and categorises them as Annex VII and 'other developing countries'.[9] The former, all LDCs and non-LDCs whose GNP per capita is yet to reach US$1000, are excluded from the application of the prohibition on export subsidies while 'other

8 Gonzalez, J.L., Parra, M.M., Holmes, P. and Shingal, A. (2011), "TRIPS and Special and Differential Treatment – Revisiting the Case for Derogations in Applying Patent Protection for Pharmaceuticals in Developing Countries", Working Paper No. 2011/37, National Centre of Competence in Research.

9 Article 27 of the SCM Agreement.

developing countries', whose GDP per capita is US$1000 and above are only given an 8-year transition period to progressively phase out their export subsidies.

Consistent with a needs-driven and evidence-based approach to SDT, the SCM Agreement also defines a graduation criterion of 'export competitiveness' for Annex VII countries. Whenever an Annex VII country reaches export competitiveness in respect of any product or products, the obligation to phase out export subsidies in respect of such product or products kicks in.[10] Leaving no room for conjecture or arbitrariness, the Agreement further provides that export competitiveness in a product exists if a developing country's exports of that product have reached a share of at least 3.25 percent in world trade of that product for two consecutive calendar years.[11] In other words, it goes further to define a hard and measurable criteria for graduating an Annex VII country out of the category and into the general provisions of the SCM Agreement in relation to export subsidies.

The Safeguards Agreement differentiates between those developing countries whose individual share of the product concerned in an importing country does not exceed 3 percent or not more than 9 percent share when all the qualifying developing countries are taken collectively and 'other developing countries' that do not meet this criterion.[12] It prohibits WTO members from applying safeguard measures against a product originating from developing countries in the former category.[13] When the share of a country in the former category increases above the 3 percent mark or more than 9 percent share when all the qualifying developing countries are taken collectively, the concerned product from that country or countries automatically lose the privilege of being exempted from safeguard measures. In this way, objective criteria are set for the graduation of countries out of SDT under the Safeguards Agreement.

In the case study of China's successful compliance with its obligations under the Montreal Protocol in chapter 4, the thesis finds that the Protocol uses hard criteria to differentiate developing countries whose annual calculated level of consumption of listed controlled substances is less than 0.3 kilograms per capita on the date of the entry into force of the protocol.[14] Also known as 'Article 5 countries', those countries are allowed a 10-year grace period to meet their phase out obligations under the protocol. On the other hand, 'non-Article 5 countries' refer to the rest other developing countries that do not meet the criteria and hence, are not entitled to the 10-year grace period. These 'non-Article 5 countries' are obliged like the developed country signatories, to meet their phase out obligations within a shorter time frame. The study not only provided insight into how economic data may be successfully linked to the assumption of legal obligation in a manner that supports differentiation but precludes discrimination, it

10 Article 27.5 of the SCM Agreement.
11 See Article 27.6 of the SCM Agreement.
12 See Article 9.1 of the Safeguards Agreement.
13 Ibid.
14 See Article 5.1 of the Montreal Protocol.

provided support for the possible effectiveness and non-discriminatory use of the idea of progressive regulation in phasing in developing countries trade obligations. (Chapter 5)

Lastly in chapter 4, the study of the categorization of the LDCs under the UN system revealed that both inclusion and graduation thresholds are defined based on hard and measurable criteria. No arbitrariness is allowed in defining both thresholds, arguably making the LDC category the most non-contentious country grouping in the WTO and the entire UN system.

Having established what an SDT access or eligibility criteria should be like, being able to define an appropriate threshold for graduation is no less important in creating a credible graduation mechanism. The thesis draws inspiration from the example of 'widespread copying' of rental rights under the TRIPS Agreement to articulate an approach for defining thresholds for the purpose of graduation.[15] (Chapters 4). Until 'widespread copying' of rental rights in a country reaches a threshold point where it causes harm to the interest of the owner of a cinematographic work, commercial rental in such country will not be restricted. Likewise, a country's implementation of WTO provisions should be contingent on overcoming a set of identified graduating constraints.[16] Until the country overcomes such constraints, it should not be obliged to implement the provisions.[17]

A composite indicator approach is espoused to set a threshold for graduation on a provision-by-provision basis. (Chapters 4 and 5). In principle, such threshold marks the point at which a country is determined to have overcome given constraints. The thesis demonstrates the operationalization of 'differentiated differentiation' using the WTO CVA. It uses a combined set of indicators to identify possible constraints that countries face as a result of or in the process of implementing the Agreement. The outcomes indicate that we can leverage the use of a composite indicator and a ranking system to gauge the desirability for countries to implement individual WTO agreements like the CVA.

SDT must be targeted and aimed at helping beneficiary countries to build requisite capacity to overcome specific rule implementation constraints. At once such capacity is built, beneficiaries should be exposed to rule obligation. Put differently, such countries should be graduated out of SDT, including the entitlement to delay the application of general provisions of the CVA provisions in the context of the thesis. Chapter 6 of the thesis adopts a statistical method to choose a threshold for graduating countries out of SDT – effectively regulating which countries should be entitled to delay the application of the CVA at any one time.

15 See Cottier, T. (2006). From progressive liberalization to progressive regulation in WTO law. *Journal of International Economic Law*, *9*(4), 779-821 at 816.
16 Ibid, at 807.
17 Ibid.

7.3 Synthesis

In responding to the central research question, Chapters 2 – 6 of the thesis conjointly advance the case for triggering access to SDT and limiting its availability based on predefined threshold specific to the application of definite rules. This is an approach that supports more differentiation between developing countries in the application of SDT and, defining SDT eligibility criteria on a provision-by-provision basis in moving the WTO towards a more targeted and needs-based approach to SDT.

Chapter 2 basically traces the legal and jurisprudential backing for differentiation between developing countries in the WTO, underscoring it as desirable in order to respond to different development needs. Chapter 3 emphasizes the role of differentiation in maintaining an equitable balance in the WTO's system of rights and obligations of members. It goes further to demonstrate how legal indiscipline upsets that balance of rights and also uses the case of China and its successful implementation of the Montreal Protocol to show how a rules-based system that recognises socio-economic differences can benefit SDT reform in the WTO. Chapter 4 demonstrates how to design eligibility criteria for SDT through studying existing GATT/WTO provisions that contained same and also drawing from the designing of LDCs' inclusion and graduation criteria in the UN system. The chapter set out concreate considerations for founding a credible graduation mechanism is, which is key in moving SDT away from open-ended blanket exemptions toward a needs-driven and evidence-based approach. It stoked the idea that graduation should reflect progressive regulation in the sense that it represents the application of single and uniform rules to all countries in a manner that that takes into account differing levels of development, as a matter inherent to the rule itself.

Chapter 5 made the definite proposal of 'differentiated differentiation' as an implicit threshold approach to differentiation which is amenable to the principle of graduation, in that, it identifies which countries should be allowed derogation from a particular WTO rule (as a reflection of SDT) at any given time. Under this approach, graduation from SDT is not horizontal, given that a country may graduate from SDT for a particular WTO agreement, but may remain eligible for SDT under another agreement. The rationale for 'differentiated differentiation' is that SDT should be geared towards supporting countries to improve their rule implementation capacities rather than provide them with a permanent exemption. Accordingly, the assumption of trade treaty obligations by developing countries should be determined by their rule implementation capacity at any given time. Chapter 5 also details concreate implementation steps for differentiated differentiation. Chapter 6 demonstrates the operationalization of the differentiated differentiation approach using the WTO's CVA. It identifies and uses a combined set of indicators to categorize constraints that countries face as a result of or in the process of rule implementation thereby, sufficiently reflecting heterogeneous needs. In concreate terms, the chapter identifies those countries whose capacities are limited

by the constraints and so are not able to implement the CVA. These ones received SDT, including a temporary exemption to implement and technical assistance to help them build the requisite capacity. It also identifies those countries that that are not constrained in any way. These ones are held to their obligation without delay.

7.4 Policy recommendations

A desired approach to the reform of SDT would be to ease tensions around the questions of access to SDT and move the WTO toward an evidence-based, case-by-case approach to SDT, with the goal of making it wholly transitional and aimed at full compliance with members' obligations. This would require a rules-based approach to defining access to SDT as opposed to basing such access on some arbitrary self-designated country status. The thesis makes the following specific recommendations as its contribution to the ongoing debate on the reform of SDT at the WTO:

First, the thesis recommends that the WTO moves away from the volatile debate on country [re]categorization in efforts to enhance the effectiveness of SDT and focus on espousing an issue-based and country-specific approach to SDT. Apart from the unlikelihood that any consensus will be reached among WTO members on recategorization, it is doubtful whether new country categories are what is required to address the main issue with SDT in the WTO, which is managing the implementation and reform process in such a way that the related adjustment costs do not undermine expected gains. This implies that SDT needs to be attuned to assisting developing countries in managing the reform process, and taking advantage of in-flexibility in agreements to sequence and prioritize reforms in the context of an overarching policy framework.[18] The policy framework needed to achieve this objective and the assistance required is typically country-specific.[19] Accordingly, new broad country categories are unlikely to address the concern of 'lack of responsiveness [of SDT] to differing needs' that exist under the current regime.

Second, the WTO should refocus SDT towards assisting developing countries to build necessary capacities to implement WTO agreements rather than merely providing them with exemptions and opt-outs from rule disciplines or merely throwing preferences at them. The assumption is that developing countries, just like developed countries, enter into international trade agreements on the basis that the implementation of such agreements will yield them some benefits.[20] Hence, it is antithetical for SDT to be used under any guise, to shield these countries from their trade liberalization commitments as WTO members. To achieve this, the WTO should promote the 'phasing in of specific

18 Breckenridge, A. (2002). *Developing an Issues-Based-Approach to Special and Differential Treatment. Inter-American Development Bank*. Working Paper, available at https://publications.iadb.org/publications/english/document/Developing-an-Issues-Based-Approach-to-Special-and-Differential-Treatment.pdf. Accessed 31 January 2022.

19 Ibid, at 11.

20 See Wright, W. (2020). How trade openness can help to 'deliver the poor and needy'. *Economic Affairs*, *40*(1), 100-107.

and uniform obligations' in a manner that different levels of social and economic development are taken into account as a matter inherent to the rule (i.e. progressive regulation) as a feasible way to achieve the aims of SDT (and without distorting the balance of rights and obligations of members in the WTO).

Third, financial and technical assistance to assist developing countries implement WTO agreements should be geared at helping developing countries build the capacity to implement their WTO obligations. A good starting point would be to first, assist these countries to better understand the complex WTO agreements; second, assist them to domesticate these agreements, and then assist them to implement the agreements, including strengthening necessary institutional and regulatory structures. International financial and technical assistance should be linked to a developing country's compliance with the procedural requirements of an agreement and its continuous compliance with its obligations under the agreement, as a way of motivating compliance.

Fourth, the thesis recommends a clear linkage between rule implementation and capacity. That is, the obligation to implement an agreement should be dependent on the existence of the capacity to implement such agreement. As the case with the TFA shows, linking implementation to capacity is not just an established issue in the WTO today, it offers insight into how the effectiveness of SDT may be assessed. Article 13.2 of the TFA makes clear that the extent and the timing of implementation of the provisions of the TFA "… shall be related to the implementation capacities of developing and least-developed country Members". In other words, until these countries acquire the necessary implementation capacity, implementation of the provision(s) of the TFA concerned will not be required of them.[21] Such clear linkage between implementation and capacity is a key premise for the success of any agreement.[22]

7.5 Limitations and suggestions for further research

In contributing to the debate on the reform of SDT in the WTO, this thesis makes a case for a rules-based approach to differentiation in the WTO. In doing so, it conceives 'differentiated differentiation' as an implicit threshold approach to differentiation, amenable to the principle of graduation (or more aptly, progressive regulation) which identifies which countries should be allowed to derogate from a rule obligation at any given time. The thesis further demonstrates the operationalization of the differentiated differentiation approach using the CVA. It identifies and uses a combined set of indicators to categorize constraints that countries face as a result of or in the process of rule implementation thereby, sufficiently reflecting heterogeneous needs. It advances the argument that rule implementation must be linked to the existence of capacity to achieve the successful implementation of an agreement. Hence, SDT should be targeted

21 Ibid.

22 Alem, T. (2020). WTO Accession and Developing Countries: Ethiopia in Focus, available at http://dx.doi.org/10.2139/ssrn.3520127. Accessed 28 January 2022.

at assisting countries build such capacity. To further enhance objectivity, the thesis proposes and employs a statistically based score procedure to determine the threshold for graduating countries out of provision-specific SDT. Nevertheless, the thesis reflects on some of its limitations and makes suggestions for future research:

- Determination of indicator weight: While acknowledging that setting weights for the individual indicators in creating a composite index is an arbitrary exercise, the thesis applies uniform sets of weights across the different constraints. Invariably all indicators of the composite index representing the various constraints identified as per the implementation of the CVA are equally weighted. While this was done to exclude any subjective considerations in attaching weights, it is ideal to be able to attach weights which in real terms, reflect the level of the burden of each constraint on countries. This would require an assessment of the effect of each constraint at country level. For instance, in a country like Nigeria, an assessment may show that customs infrastructure capacity constraint weighs more than valuation capacity constraint and each should have its actual weight attached to it. Such varying weights across the indicators and across countries could result in a slightly different ranking of countries by the average score of the three weighted constraints. (See Table 6.9 above). Nevertheless, this would not substantially change the grouping of countries above and below the calculated graduation threshold point.
- Extension of methodology to other WTO agreements: In principle, the methodology proposed by the thesis for differentiating between developing countries for the purpose of SDT, including the use of a composite indicator to ensure that indicators that are used to represent CVA implementation constraints sufficiently reflect the countries heterogeneous needs. While it is not in doubt that this can be generalised to all other WTO agreement, the limited scope of this thesis does not cover its extension to other WTO agreements beyond just the CVA. A good starting point for future research would be to select other agreements to which we can seek to apply the methodology.
- Selection of indicators: In selecting indicators to represent each constraint to the implementation of the CVA, the thesis borrows some standard indicators from the GCI 4.0 (2019), mainly because the author lacks the skills to frame indicators. While the thesis considers those indicators as sufficiently representative of the constraints, for the specific purpose of illustration, it would rather be ideal to have specific indicators designed with regard to the nature, object and purpose of the CVA (ditto for any other agreement in issue) and reflective of the result of an actual implementation assessment. Without such agreement-specific indicators, a researcher would be at liberty to choose indicators from any database by his/her judgement. This could give varying results in the ranking of countries per weighted constraints. For instance, if the thesis had decided to use indicators from the World

Bank's LPI rather than the GCI 4.0 (2019) to represent all three CVA constraints, the country rankings may have differed in some way. However, the results would have still reflected the vulnerabilities and weak capacity of developing countries to implement resource-intensive agreements like the CVA.

7.6 Concluding remarks

A major failing of the current SDT approach has been its usage to exempt developing countries from their WTO obligations instead of helping these countries comply with their trade treaty obligations to support full integration into the global trading system. There is ample evidence to suggest that the gains from SDT have been limited and trade liberalization benefits are not being harnessed either as these countries unwieldly shield themselves from such gains under the guise of SDT. Hence, the need to rethink the current SDT framework at the WTO. With recent calls by the US for a strict definition of a 'developing country' by WTO rules,[23] the EU's proposal for asymmetry in rule obligations amongst developing countries,[24] Norway's call for a "constructive conversation [...] about the development dimension",[25] and Canada's call for a balance between reciprocity and flexibility and more differentiation between developing countries,[26] the urgency for reform cannot be overstated.

The thesis makes a modest contribution to the debate on SDT reform by projecting a improved concept of graduation, namely, progressive regulation – which depicts the application of single and uniform rules in a manner that different levels of social and economic development are taken into account as a matter inherent to the rule. Progressive regulation entails the use of the obligation-specific indicators for triggering progressive assumption of WTO obligations. It responds to phasing in of obligations, rather than defining exemptions and opt-outs. Hence, is consistent with the thesis' proposal on 'differentiated differentiation' which envisages that SDT is geared towards supporting countries to improve their rule implementation capacity rather than provide them with a permanent exemption.

Developing countries need to visualise SDT for what it is– a trade tool to promote development.[27] A broader understanding of the meaning of development is

23 WTO. (2019). An undifferentiated WTO: self-declared development status risk institutional irrelevance. Communication from the United States WT/GC/W/757, 16 January.

24 European Commission (2018). WTO Modernisation: Introduction to Future EU Proposals, European Union Concept Paper, Brussels, 18 September, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5786. Accessed 28 January 2022.

25 WTO. (2019). Pursuing the development dimension in WTO rule-making efforts. Communication from Norway, Canada, Hong Kong, China, Iceland, Mexico, New Zealand, Singapore and Switzerland, WT/GC/W/770/Rev.3, WTO, Geneva, 7 May

26 WTO. (2018). Strengthening and modernizing the WTO: discussion paper. Communication from Canada, JOB/GC/201, 24 September.

27 This is as opposed to be a core development tool. See Ukpe, A., & Khorana, S. (2021). Special and differential treatment in the WTO: framing differential treatment to achieve (real) development. *Journal of International Trade Law and Policy*, 20(2), 83-100.

not only required but needs to be reflected in the design of an alternative approach to SDT to ensure that SDT advances development and not impede it. Reflecting a more comprehensive goal of sustainable development as expressed in the preamble of the WTO Agreement, development should be viewed as an empowering process for individuals and countries.[28] It is this view that should be the guiding light for efforts to promote development at the WTO. This more expansive view contemplates that trade is a pathway to engaging with the challenges and opportunities of the wider world. Thus, trade becomes a means to promote the broadest fulfilment of both individual and national potential.[29] Again, the focus of SDT should be on more inclusion and not exclusion. SDT 'should enable rather than exempt'!

28 Bacchus, J., & Manak, I. (2021). *The Development Dimension: Special and Differential Treatment in Trade*. Routledge.; Bacchus, J. (2004). *Trade and Freedom*. CMP Publishing.

29 Ibid.

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Appendix

Table 6.8a: Ranking of Countries according to the Composite Score per constraints – List of 50.

Country ranking per indicator	Legal and administrative capacity constraints	Customs infrastructure constraints	Valuation capacity constraints
1	Venezuela	Burundi	Haiti
2	Haiti	Chad	Mozambique
3	Brazil	Cameroon	Yemen
4	Yemen	Nigeria	Chad
5	Mozambique	Haiti	Bangladesh
6	Nigeria, Zimbabwe	Gambia, The	Nigeria
7	Ecuador	Yemen	Nepal
8	Chad	Guatemala	Zambia
9	Argentina	Mozambique	Brazil
10	Nepal	Zambia	Burundi
11	Mexico	Venezuela	Cambodia
12	Bangladesh	Zimbabwe	Venezuela
13	Jamaica	Rwanda	South Africa
14	Zambia	Nepal	Cameroon
15	Cambodia	Tajikistan	Zimbabwe
16	Brunei Darussalam	Tanzania	Viet Nam
17	Guatemala	Egypt	Ecuador
18	Cameroon	India	Botswana
19	Viet Nam	Bangladesh	Tanzania
20	Russian Federation	Cambodia	Egypt
21	Egypt	Jamaica	Mexico
22	Cyprus	Botswana	Rwanda
23	Botswana, South Africa	Argentina	Gambia, The
24	Burundi	South Africa	Guatemala
25	Chile	Ecuador	Kazakhstan
26	Korea, Rep.	Indonesia	Tajikistan
27	Thailand	Brazil	Jamaica
28	Tanzania	Cyprus	Thailand
29	Gambia, The	Mexico	Argentina
30	France, Kazakhstan	Kazakhstan	Russian Federation
31	Mauritius	Russian Federation	India
32	Tajikistan	Mauritius, Viet Nam	Mauritius
33	Israel	Brunei Darussalam	Brunei Darussalam
34	Indonesia	Malaysia	Chile, Cyprus
35	India	Chile	China
36	China	Thailand	Indonesia
37	Canada	Israel	France
38	Japan	Qatar	Japan
39	Germany	France	Korea, Rep.
40	United Kingdom	Canada	United Kingdom
41	Rwanda	Germany	Israel
42	Switzerland	United Kingdom	Canada
43	Qatar	China	United Arab Emirates
44	United States	Switzerland, United States	Germany, Qatar
45	Malaysia	Singapore	Malaysia
46	United Arab Emirates	Korea, Rep.	United States
47	Singapore	United Arab Emirates	Singapore
48		Japan	Switzerland
49			
50			

Summary

The current framework for special and differential treatment (SDT) in the World Trade Organization (WTO) lacks any objective criteria to identify a developing country. This results in unfettered access to SDT for any who self-designate as a developing country. This, in turn, undermines the ability of the system to respond to the needs of its poorest members, or to ensure that the advanced developing countries pull their weight in the organization. To address this problem, this thesis identifies and establishes objective and effective criteria that settle and depoliticize the questions of access to SDT and are flexible enough to track developmental needs.

The central research question that this thesis answers is: how can the WTO determine access to SDT in an objective manner, while balancing the rights and obligations of its members and accounting for divergent levels of development? The three sub-questions to address this question are: 1) how can countries manage the reality of their different development constraints when committing to trade rules?, 2) how can SDT be tailored to respond to countries' heterogenous needs without generating distortions (because of incentives for misrepresentation)?, 3) how to set the benchmarks to trigger access to SDT and to limit its availability to those countries that justifiably need it? In answering the research questions, the thesis employs qualitative research methods, including literature (document) review in law and trade economics, doctrinal legal analysis of GATT/WTO treaty texts and case law, and case studies in international environmental law.

In chapter 2, the thesis sets the context for the entire research by first tracing the trade-development link and underscoring poverty alleviation as a major sustainable development goal as far as the WTO is concerned. The chapter opens with a theoretical discourse on the effect of globalization on growth opportunities in countries, including whether the gains from trade liberalization necessarily translate into reducing inequality among (and within) countries and hence, poverty reduction. Whether globalization results in rising inequality or reduces inequality would depend on whether the poor are also able to take advantage of opportunities created by it and benefit therefrom. The evidence indicates that this will not happen automatically. Governments have a strategic role to play in directing trade liberalization towards increased equality, inclusive growth and overall, economic development. In a bid to delimit the nebulous concept of development, the chapter reviews various conceptions of the concept from three perspectives: theoretical; substantive; and rights based. Drawing from the preamble of the WTO Agreement, it distils the pursuance of economic development in a sustainable manner as a main objective of the WTO. The chapter finally reviews the situation of developing countries vis-à-vis the development provisions of the GATT/WTO system and the sub-optimal ways in which the system sought to further their economic development. It concludes that the system's permission of non-reciprocity as a development strategy rather limits the opportunities for developing countries to reap the gains of trade liberalization.

In Chapter 3, the thesis undertakes a more focused study of the effects of the

development strategy based on non-reciprocity on the trade and development interests of developing countries, using the erstwhile non-reciprocal EU-ACP trade relations as a case in point. Examining how the rules of the multilateral trading system are shaped to address the special needs of poor countries, it distils two broad goals of SDT: introducing equity into the trading system and improving market access for developing country products. The goals aim to establish a balance between the non-discriminatory market access that the MFN and national treatment rule guarantee WTO members and the need to assist disadvantaged members (with capacity constraints) to be able to enjoy the rights established by the rules. With the WTO currently lacking the desired balancing mechanism, the strict application of those rules has introduced certain inequities into the WTO system as exemplified in the pervading inequality among WTO member countries in their levels of engagement in international trade. SDT recognizes that the fulfilment of formal equality may not bring about substantive equality. Hence, equity calls for provision for remedial measures to the harshness of the application of a rule to all in a similar way. In acknowledgement that inequalities among countries influence their capacity to benefit from the application of a given rule, it allows for differential treatment by taking into account such inequalities just to bring about substantively equal outcomes. The rationale is not to create permanent exceptions from the rule but a temporary legal inequality to wipe out a factual inequality.

The chapter proceeds to review over three decades of non-reciprocal preferential trade relations between the EU and ACP states and reaches the conclusion that it did not significantly improve market access for ACP exports to the EU as intended while also highlighting the problem with non-reciprocity as a form of SDT. Using a case study of China's compliance with its Montreal Protocol obligations, the chapter makes a case for rebalancing WTO rules to facilitate developing countries' undertaking of greater WTO obligations as opposed to avoiding disciplines, as a more viable development strategy. It concludes that China's experience with Montreal Protocol implementation demonstrates how developing countries could take advantage of differential treatment provisions in WTO agreements to facilitate their compliance with their treaty obligations, hence reap the benefits of their participation. Rather than exemptions and opt-outs or merely throwing preferences at them, it argues that SDT be designed in such a way to provide support to developing countries to build necessary capacities to implement WTO agreements and reap the benefits therefrom.

In its examination of eligibility criteria for accessing SDT in the WTO, chapter 4 deplores the practice of self-designation and largely unfettered access to SDT in a world where countries have significantly different development needs. It argues that the current affairs have proven not only to be politically unacceptable to WTO members, but also undermines the ability of SDT to respond to the diverse development needs of members. It proceeds to explore options to define access to SDT on a more objective basis by examining existing provisions, within and outside the WTO, which allow and

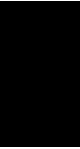
limit access to SDT or other reflection of differential treatment based on predefined eligibility criteria. The chapter examines the WTO Agreements on SCM, Safeguards, SPS and the TRIPS, and the concept of differentiated responsibility between developed and developing countries under the Montreal Protocol, along with the special situation of LDCs in the UN System. It concludes that it is important to set triggers that would allow and limit access to SDT on a provision-by-provision basis, thus ensuring that only countries in need of it get it. It identifies the principle of graduation [or more aptly, progressive regulation] as holding the brightest potential for triggering and administering SDT in such way. Graduation in the WTO needs to move away from merely depicting the classification of different countries to entailing the idea of applying single and uniform rules in a manner that different levels of social and economic development are taken into account as a matter inherent to the rule itself.

Chapter 5 defines the concept and implementation details of a differentiated approach to differentiation among developing countries for the purpose of SDT. The approach lends itself to the reformed principle of graduation which encapsulates the idea of progressive regulation. This is against the backdrop of the insistence by developed countries in the WTO that they would not grant the same concessions to all developing countries without regard to their economic size and diversity. They emphasize that SDT should be limited to only those members who actually need it to be able to fully benefit from their membership in the organization. Also, they have continued to call on advanced developing members to renounce their status as 'developing' and assume their full WTO obligations. In developing a proposal for the reform of the current SDT framework, the chapter reviews four existing theoretical approaches to differentiation in the WTO: country-based approach; rule -of-thumb approach; rule-based approach; implicit threshold approach. Based on the premise eligibility criteria for access to the SDT should be on an agreement-by-agreement basis, the chapter proposes 'differentiated differentiation' as an implicit threshold approach to differentiation. 'Differentiated differentiation' envisages that SDT is geared towards supporting countries to improve their rule implementation capacity rather than provide them with a permanent exemption. Hence, whether a developing country is allowed to derogate from a particular rule is dependent on its capacity to implement the rule at a given time. In practical terms, we would first need to determine what constraints developing countries are likely to face in implementing that rule. Secondly, we would have to identify, based on some analytical criteria, the countries that suffer from these constraints and hence lack the capacity to implement the rule. To ensure that selected analytical criteria sufficiently reflect the heterogeneity of possible constraints, the thesis proposes a combined set of indicators that will serve to identify such constraints. Targeted SDT, including derogation from discipline, could then be offered to the deserving country to overcome the identified constraint(s). This approach not only puts an end to the long-drawn debate on country re-categorization in the WTO, but it also

ensures that only those countries that justifiably need SDT the most get it. To avoid a situation where the SDT framework as proposed is used as an eternal crutch, the thesis advocates for graduating SDT beneficiaries based on the use of a statistically based score threshold procedure to determine the threshold for graduation.

In chapter 6, the thesis demonstrates the operationalization of the differentiated differentiation approach using the WTO's customs valuation agreement. It opens by introducing the CVA – its principles, objective, structure, and valuation methods. It proceeds to identify three CVA implementation capacity requirements and related constraints which serve as basis for the chapter analysis. The chapter articulates a system that hinges the application of SDT on a set of analytical criteria which, in relative terms, identifies the constraints that countries face in the implementation of trade agreements. The outcomes indicate that we can leverage the use of a composite indicator and a ranking system to gauge the desirability of implementing individual WTO agreements, in this instance, the WTO's CVA. The chapter highlights the implications of weighting the individual indicators of the composite indicator and how such weights may be arrived at. The system articulated adopts a statistical method to choose a threshold for graduating countries out of SDT– effectively regulating which countries should be entitled to delay the application of the CVA at any one time. Overall, the system shows how SDT can be redirected towards helping developing countries to meet their trade obligations rather than provide them with a permanent cover from rule discipline.

Chapter 7 concludes the research by summarizing the answers to the research question. It synthesizes the thesis' contribution to knowledge and recommends that the WTO moves away from the volatile debate on country [re]categorization in attempts to enhance the effectiveness of SDT and rather embrace on an issue-based and country-specific approach to SDT – one that draws a clear linkage between rule implementation and implementation capacity.



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Aniekan is an experienced international trade lawyer and business environment reform expert, with expertise in WTO law, private sector development, trade-capacity building, policy research and analysis. He is a member of the Nigerian Bar, the Chartered Institute of Arbitrators (MCIArb), UK, the Society of International Economic Lawyers and the African International Economic Law Network. He holds an LLB from the University of Calabar, Nigeria and an LLM (with distinction) from the University of Dundee, UK – where he was an Ibrahim Shihata Fellow. Aniekan is a regular speaker/resource person at several local and international conferences/workshops. His research interests spans across WTO law, trade and development, public international law, international humanitarian law, conflict of laws, mining and development and arbitration and dispute settlement. He has published several scholarly articles in international journals, including the Journal of International Trade Law and Policy, Journal of African Law, Manchester Journal of International Economic Law, African Journal of International and Comparative Law. He has contributed three chapters to two books publications.

Aniekan is a founding partner at Lex Mercatoria Solicitors, an Abuja-based consultancy, where he regularly provides technical assistance and trade-related capacity building to the private sector, agencies of the Government of Nigeria, development partners in Nigeria, and the ECOWAS Commission.

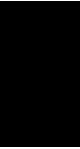
Completed Training and Supervision Plan

Aniekan Iboro Ukpe
Wageningen School of Social Sciences (WASS)
Completed Training and Supervision Plan

Name of the learning activity	Department/Institute	Year	ECTS*
A) Project related competences			
A1 Managing a research project			
Writing research proposal	University of Antwerp and WUR	2013, 2018	6
'Litigating intra-regional trade disputes: national courts vs ECOWAS Community court'	Regional Conference, National Association of Nigerian Traders	2015	1
Reviewed paper on "the Effective Domestication of the ECOWAS Common External Tariff (CET) in Nigeria	National Association of Nigerian Traders	2015	1
Presentation of my research project	Society of International Economic Lawyers, Washington	2018	1
'Legal issues with the Application of the EU-West Africa Economic Partnership Agreement: Considerations for Nigeria'	Nigeria Economic Society	2014	1
WASS Introduction Course	WASS	2021	1
A2 Integrating research in the corresponding discipline			
Transport and Logistic Performance Monitoring and Analysis	USAID, Nigeria	2015	1
Food Safety and Control Systems in Nigeria	USAID, Nigeria	2015	1
Trade Corridor Performance Monitoring	USAID, Nigeria	2015	1
Technical Analysis and Application of Trade Policy Tools I	USAID, Nigeria	2015	1
Trade negotiations	GIZ, Nigeria/USAID, Nigeria	2015	1
World Bank's Tariff Reform Impact Simulation Tool (TRIST)	National Association of Nigerian Traders	2015	1
International trade procedures	USAID, Nigeria	2017	1
Development of a risk management (RM) strategy for the Nigerian Customs Service	USAID, Nigeria	2017	1
Management of the Trade Facilitation Observatory tool in Nigeria,	USAID, Nigeria	2017	1
Management of the Trade Facilitation Agreement's Implementation monitoring tool in Nigeria	USAID, Nigeria	2017	1
Implementation of a post clearance audit (PCA) system by the Nigerian Customs Service	USAID, Nigeria	2017	1
Development of an Authorized Economic Operator (AEO) System for the Nigerian Customs Service	USAID, Nigeria	2017	1
Introduction to international transport and logistics	International Trade Centre	2017	1

Name of the learning activity	Department/Institute	Year	ECTS*
B) General research related competences			
B1 Placing research in a broader scientific context			
National Experts' strategy meeting preparatory to launch of negotiation of the African Continental Free Trade Agreement	Federal Ministry of Trade & Investment, Nigeria/ USAID Nigeria	2015	0.6
Workshop on Trade policy coordination and stakeholders' management	USAID, Nigeria	2015	0.6
National Dialogue on ECOWAS Integration Agenda	National Association of Nigerian Traders	2016	0.6
Research Assistant, developing implementation monitoring tool and observatory tool for the implementation of the WTO's Trade Facilitation Agreement in Nigeria	USAID Nigeria	2016, 2017	6
Mapping of Exporter Experience on Process, Sequence and Cost of Nigeria's Non-Oil Export	DFID Nigeria	2019	4
B2 Placing research in a societal context			
Resource Person, validation workshop on the findings from the "Field Assessment of Time and Cost to Transport Goods along the Lagos-Kano-Jibiya (LAKAJI) Trade Corridor	USAID, Nigeria	2015	1.5
Conducted training for businesses on the implementation of the WTO Trade Facilitation Agreement (TFA) in Nigeria	USAID, Nigeria	2016, 2017	1.5
Organized Workshop on the Development of Indicators for Monitoring and Evaluating the Implementation of Tasks by the National Committee on Trade Facilitation and other Relevant Trade Facilitation Outcomes under the TFA Action Plan.	USAID, Nigeria	2017	0.5
Organized training workshops on project management for members of Nigeria's National Committee on Trade Facilitation	USAID Nigeria	2017	0.5
C) Career related competences/personal development			
C1 Employing transferable skills in different domains/careers			
Project management	Piston & Fusion (PMI Accredited)	2017	1.8
Monitoring and evaluation	Piston & Fusion (PMI Accredited)	2018	1.2
Total			**42.8**

*One credit according to ECTS is on average equivalent to 28 hours of study load



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