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The WTO Non-Agricultural Market Access (NAMA) negotiations and developing countries: In pursuit of the 'development agenda'

Thesis
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by

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Declaration

Except for references specifically indicated in the text, and such help as I have acknowledged, this thesis is wholly my own work and has not been submitted for degree purposes at any other University.

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Abstract

The Non-Agricultural Market Access Negotiations (NAMA) are being undertaken as part of the Doha Round of negotiations. NAMA negotiations are aimed at the trade liberalisation of industrial goods. Pursuant to the 'development agenda' adopted for the Doha Round, the NAMA negotiations also emphasise the development component. Particular emphasis is be made on tariff reductions in products of export interest to developing countries and the negotiations are to take special account of the needs and interests of developing countries, including through less than full reciprocity in accordance with the General Agreement on Tariffs and Trade (GATT) provisions on special and differential treatment (SDT). This research attempts to determine this 'development agenda' through the prism of special and differential treatment as provided for in the NAMA mandate.

An analysis of the SDT provisions in the World Trade Organisation (WTO) and their application within the multilateral trading system reveals that SDT is a very controversial concept. Developing countries have used SDT to escape the strictures of multilateral trading rules and developed countries have used it as a 'carrot and stick' tool, to gain concessions from developing countries in other areas. SDT has further been revealed as a concept whose meaning and content is not very precise. While the provisions in the GATT as well as the Enabling Clause make good political and economic sense, they are not really actionable. This is because the concept is characterised by best-endeavour provisions that lack any legal force and cannot be adjudicated in the WTO Dispute Settlement Body. Developed countries have thus not been called and cannot be called, legally, to account for lack of delivery on their commitments and obligations with regard to SDT. This has effectively constrained the use of SDT as a development tool within the WTO, and, being the only tool being utilised, there needs to be found an alternative way to address development needs in the WTO. The WTO has sought to address this through efforts to amend SDT to make it more precise, effective and operational.

The content and meaning of the 'development agenda' itself in the Doha Round is very elusive and an effort is made in this paper to determine the appropriate meaning of development in relation to the multilateral trading system. Development as an

objective in the WTO is not novel to the Doha Round. The WTO is littered with references to development and the betterment of the human condition in its preamble to agreements and other provisions. Development has to be considered in al its three dimensions: social, political and economical. While this paper does not advocate that the WTO become a fully fledged development institution, it can shape its development agenda in such a way that benefits on the economic front are designed to stimulate socio-economic development as well.

An analysis of the NAMA modalities reveals that mercantilist objectives have triumphed in the negotiations and SDT has been lost by the wayside. Developed countries have sought for radical tariff reductions on the part of developing countries, with meagre flexibilities that are further constrained by requirements that no full sector be excluded from the formula cuts. SDT has not been considered and the commitments are not proportional to the development capacity of most developing countries. This is in direct contradiction to the SDT provisions in the GATT that are supposed to guide the negotiations as well as the provision on tariff negotiations. However, the modalities are not legally contestable because the SDT provisions do not hold any legal suasion.

The NAMA negotiations reveal a development vacuity within the WTO that needs to be resolved by other means other than the traditional SDT. Taking into consideration the evolving power bases and the politics of the membership of the WTO, this is an imperative. This paper proposes that Aid for Trade is the best option available to the WTO system. The concept does find support in GATT/WTO provisions on SDT and can be modified to be more predictable and sustainable.

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Acronyms

AfT	Aid for Trade
AGOA	Africa Growth and Opportunity Act
EU	European Union
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
MFN	Most Favoured Nation
NAMA	Non-Agricultural Market Access
SDT	Special and Differential Treatment
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WTO	World Trade Organisation

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"Openness to international trade accelerates development of poor countries: this is one of the most widely held beliefs in the economics profession, one of the few things on which Nobel Prize winners of both the left and the right agree."

David Dollar and Art Kraay

CHAPTER ONE

INTRODUCTION

1.1 The Purpose of Study

The prevailing economic wisdom is that free trade can be an engine for growth and development.[1] Therefore, countries should liberalise trade in order to reap the benefits of economic growth and development. The World Trade Organisation is an institution that was created to regulate the multilateral trading system and has, over the years, established a plethora of agreements to govern international trade. The WTO system relies heavily on negotiations and, from the General Agreement on Tariffs and Trade (GATT) to the World Trade Organisation (WTO), the now nine rounds of multilateral trade negotiations have sought to liberalise trade.

However, the benefits of such trade liberalisation have been highly skewed in favour of developed countries, leaving developing countries feeling marginalised in the global trading system.[2] Progress in terms of integration into the multilateral trading system has been slow for developing countries. It should be noted, nonetheless, that the involvement of these developing countries in multilateral trade negotiations and in the crafting of the rules and principles governing global trade, at least prior to the Uruguay Round, has been very minimal. This has changed and, in the Doha Round, developing countries played a critical role in defining the agenda for the round, hence the big emphasis on 'development'. This round seeks to address the aforementioned imbalances and asymmetries through a 'development agenda'.

The Doha Development Round was launched in 2001 at the WTO's fourth Ministerial Conference in Doha, Qatar and it is now in its 9th year of negotiations. The round has a very broad, highly ambitious and comprehensive agenda.[3] Whereas in the early years the rounds were concentrated mainly on tariffs, after the fifth round the

[1] Hoekman *et al* "More Favourable and Differential Treatment of Developing Countries: Towards a New Approach in the World Trade Organisation" 2003 World Bank Policy Research Working Paper 3107 1.
[2] Hoekman *et al* "More Favourable and Differential Treatment for Developing Countries" 2.
[3] Doha Ministerial Declaration WTO Doc WT/MIN(01)/DEC/1.

negotiation issues began to expand into other trade barriers such as anti-dumping measures, non-tariff measures, services, intellectual property etc.[4] The Doha Agenda is no different and, if anything, the scope of the negotiating agenda has expanded. The negotiations have, however, been characterised by a 'stop – start' process marked by deadlocks, near collapses, collapses and resumption of talks. Nonetheless, the aim is now to wrap up the negotiations by the end of 2010. Critical to this breakthrough would be an agreement with regards to negotiations in agriculture, non-agricultural market access (NAMA) and services as the major and most contentious work areas. A recent stocktaking exercise in Geneva has seen the Director-General of the WTO, Pascal Lamy, being confident enough to envisage the conclusion of the Doha Round by the end of 2010. This is however conditioned on countries committing themselves and showing enough political will to see the conclusion of the Round.

The Doha Development Agenda seeks to address the correlation between trade and development, and, in essence, this entails addressing implementation related issues and concerns. Paragraph 2 of the Doha Declaration recognises the role played by international trade in the promotion of economic development and the alleviation of poverty. As such, the Doha Declaration, in the same paragraph seeks to place the needs and interests of developing countries at the heart of the Doha programme. While the Doha Round addresses a variety of issues, the two main issues that have dominated the discourse in this round are 'Agriculture' and the 'Non-Agricultural Market Access' (NAMA) negotiations. Agriculture has long been a controversial issue and has been discussed *ad nauseum.* The interest around NAMA, on the other hand is a recent phenomenon, having initially received little attention until the world woke to the potential implications of tariff liberalisation, particularly for developing countries. This interest was also sparked by developed country proposals on tariff reductions that foresaw huge tariff cuts by developing countries.

It seems developing countries have since realised that they have a whole lot to lose if they do not give the NAMA negotiations sufficient attention especially with regard to the formulation of the special and differential provisions. Experience has shown that liberalisation for the sake of liberalisation has not been kind to developing states and

[4] WTO *Understanding the WTO* 2007 16.

care has to be taken to ensure that further tariff cuts under this round are structured to support growth and development in developing countries. Emphasis is placed on developing countries attaining the developmental objectives of the NAMA negotiations as spelt out in the negotiating mandate, through special and differential treatment as embodied in the various GATT/WTO provisions on the same.

This research seeks to investigate the concept of special and differential treatment as well as less than full reciprocity as applied in the NAMA negotiations and whether this approach satisfies the 'development' requirement of the Round. This will entail an investigation of whether the special and differential treatment afforded to developing countries through the NAMA modalities is adequate.

In investigating the above, this paper will also interrogate the concept of special and differential treatment as a legal principle within the WTO and the value accorded to it in the WTO. This stems from the inherent conflict between the principle of special and differential treatment and the objectives of the WTO. The WTO has never been a development organisation and this gives rise to questions on the very legal foundations of special and differential treatment within the WTO. Such questions demand that the paper explore the issue of how best special and differential treatment can be effectuated.

The above are all the issues that this proposed research intends to interrogate and it is expected that in the process the developmental or non-developmental aspect of the NAMA negotiations will emerge.

1.2 Scope of Study

The study is limited to the use and application of special and differential treatment in the NAMA negotiations as well as how the concept is reflected, if it is, in the draft or final modalities. In this process, the paper investigated the concept and evolution of 'special and differential treatment' as a principle in the GATT/WTO and its value. The paper also sought to determine the WTO's responsibility to redress the developmental gap between the developed and developing countries with regard to

the use of special and differential treatment. This was an attempt to add to the debate around the use and benefits of special and differential treatment in the WTO. By and large, the provisions on special and differential treatment in the many WTO agreements seem to be ineffective in redressing the development situation and this study addressed some of the constraints surrounding special and differential treatment. However, reference was made to issues that are incidental but relevant to the use of special and differential treatment as a development tool and these were analysed accordingly.

It should be noted that this paper did not undertake any economic analysis with regard to the subject at hand. Where necessity called for economic authority, reference was made to conclusions drawn from other papers and research. The idea was to undertake a legal analysis of the issue of special and differential treatment as a tool of development within the context of the NAMA negotiations.

The trade negotiations are largely circumscribed by politics and the personalities of the negotiators and chairs of the negotiating committees and, in reverence to that fact, the study limited itself to the facts as they exist in WTO legislation and the NAMA modalities. This was largely so as to avoid getting drawn and bogged down on the politics of the process, particularly as it is an ongoing process. Therefore for the purposes of this paper, there is no analysis of the factors contributing to the recurrent breakdowns in talks or the process of the negotiations. The focus is on the outcome of the negotiations so far, such as the draft modalities.

1.3 Sources and Approach

The bulk of the research was facilitated by desktop research. There is a wealth of literature available on the subject of multilateral trade negotiations in the international trade arena and such research entailed a critical analysis of the relevant treaties, agreements, documents, texts, articles etc. The NAMA negotiations are an ongoing process and updates on the progress were not readily available save for the news items on the WTO website and, where relevant, reference was made to them.

1.4 Structure of thesis

This thesis is structured as follows. Chapter two is an introduction to the issue of non-agricultural market access, focusing on the history, mandate and the factors that shape the NAMA negotiations. An attempt is made to determine the importance of the NAMA negotiations to developing countries. This is partly so as to justify the study and to outline its relevance. Chapter three extends the concept of special and differential treatment (SDT) that is introduced in chapter two as being part of the NAMA mandate. The chapter traces the history of SDT and its evolution through to its current status within the WTO. The strengths and weaknesses of the concept are analysed and an effort is made to link the concept to trade liberalisation under NAMA. Chapter four discusses the NAMA negotiations and the development agenda of the Doha Round. In this chapter, the concept of development as a standalone concept as well as within the WTO context is explored. The idea is to extend this to the NAMA negotiations and the search for the NAMA SDT element that would make for the 'development agenda'. This chapter closes off with an analysis of how development goals can be made more operational in the NAMA negotiations. The recurrent theme in chapters two, three and four is an evaluation of the SDT principle and chapter four also investigates how the development agenda can be better satisfied, through SDT or otherwise. Chapter five is a conclusion of the thesis.

CHAPTER TWO

NAMA: AN OVERVIEW

2.1 Introduction

Although not initially on the table for negotiation when the work programme for a new development round was being debated at Seattle, Non-Agricultural Market Access (NAMA) negotiations have come to take centre stage at the Doha Development Round. They are second only to the agricultural negotiations in terms of importance. Having initially received less attention, the NAMA negotiations have steadily gained prominence by virtue of the significance of further tariff cuts for developing countries. This is especially, for some developing countries, after the disastrous consequences of their initial trade liberalisation drives. The concern on the effects of tariff cuts for developing countries was especially magnified by the very dramatic United States of America proposal that sought radical tariff reductions for all countries across the board in a short period.[5] Several draft modalities texts have been issued over the years. The latest is the December 2008 text, submitted by Ambassador Luzious Wasescha from Switzerland who took over as Chair of the Negotiating Group from Don Stephenson of Canada in October 2008.[6]

The large degree of convergence[7] among member states allowed Wasescha to issue an almost complete text, save for the few issues that are still contentious, such as "case specific issues (Argentina, the Bolivarian Republic of Venezuela and South Africa), non-tariff barriers to market access and the sectoral initiative".[8] On issues such as preference erosion, the Chair took the liberty of suggesting, in his text, a range of possible solutions that the members could discuss at the next Ministerial meeting.

[5] The United States proposal involved significant reductions of tariffs by 2010 and the elimination of all tariffs altogether by 2015. WTO Document TN/MA/W/18.
[6] WTO *Annual Report* 2009 18-19 Available online at http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep09_e.pdf (accessed 31 May 2010).
[7] The issue of convergence on the text of the modalities is highly debatable. A more cautious approach would be to refer to a 'compromise'.
[8] *Ibid.*

This meeting was never convened because of the widely divergent standpoints of members on the outstanding issues.[9]

This chapter discusses the basis of the NAMA negotiations; explores the negotiating mandate as well as outlines the importance of the NAMA negotiations to developing countries.

2.2 Scope of Non-Agricultural Market Access

The meaning of NAMA is very self-explanatory and refers to the negotiations on goods and products that are not related to agriculture, in essence industrial goods. It is all products that are not covered by the Agreement on Agriculture and includes manufacturing products, fuels and mining products, fish and fish products, and forestry products.[10] These are the goods that presently account for over 90% of world trade[11] and hence negotiations on these goods cannot be taken lightly. The main negotiation with regards to NAMA negotiations is on tariff cuts.

Tariff liberalisation is not a new concept as it has been the main motivation for all the rounds preceding the Doha Round. In the Uruguay Round, tariff averages for NAMA products were reduced from 6.3% to 3.8% in the developed country markets while, for developed countries, the main achievement was in getting the developing countries to extend their tariff binding coverage.[12] However, despite all the improvements to market access conditions over the years, tariffs still remain a major source of trade protectionism through tariff peaks, high tariffs and tariff escalation.[13][14]

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[9] *Ibid.*
[10] WTO "A simple guide: NAMA negotiations" Available online at http://www.wto.org/english/tratop_e/markacc_e/nama_negotiations_e.htm (Accessed 31 May 2010). Most of the discussion that follows stems from this webpage.
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] A tariff peak is a substantially high tariff that, when compared to the national weighted average, is three times more than that average. Tariff escalation is the process whereby the tariff on a product increases as the more value is added to the product through further processing while; high tariffs are simply tariffs high enough to discourage trade. de Cordoba and Vanzetti "Now what? Searching for a Solution to the WTO Industrial Tariff Negotiations" 7-8. Paper presented at the Africa Regional Workshop on WTO Negotiations Hosted by TRALAC and the Commonwealth Secretariat, 31 September to 2 October 2005, Cape Town, South Africa,

An ILEAP report provides that tariffs in developed countries show a high level of dispersion and there is a very high degree of tariff peaks on products of export interest to developing countries such as textiles, clothing and leather products.[15] There is a general tendency among developed countries to employ tariff escalation measures to protect some industries and products.[16] A number of countries are also employing non-*ad valorem* tariffs, which are of limited transparency and serve to have a distortive effect on trade due to their price change sensitivity.[17] This phenomenon is spread across developed and developing countries.

Developing countries are also guilty of the inappropriate use of tariffs. Most developing country tariffs are not bound in GATT schedules. For the bound tariffs, the tariff rates are very high although the applied rates are usually quite low. This water level[18] is intended to provide ample policy space for industrialisation purposes.[19] Also, most of the transition economies impose very high tariffs on transport equipment and African countries have a tendency to protect such domestic industries which they consider to be strategic to their growth.[20] The NAMA negotiations intend to eliminate market protection through tariffs.

In addition to tariffs, NAMA negotiators are also concerned with non-tariff barriers, environmental goods as well as special and differential treatment (SDT),[21] as being some of the issues that impact negatively on market access. This paper will focus on tariffs and how their reduction and cuts will be implemented in a way that takes stock of the development needs of developing countries. This includes a study of SDT. The

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http://r0.unctad.org/ditc/tab/events/nama/docs/fullreport-version14nov-p020-067.pdf (Accessed 31 May 2010).

[15] International Lawyers and Economists against Poverty (ILEAP) "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access: An African Perspective" 2004 ILEAP Working Paper 8-9. The narrative that follows on the use of tariffs is based on this paper.

[16] *Ibid.*

[17] *Ibid.*

[18] This refers to the difference between a country's bound tariff level and its applied tariff level. A bound tariff is the maximum tariff that a country has pledged in a WTO schedule and can only be changed subject to compensation being provided to any member that may be adversely affected by such action. An applied tariff is the actual tariff that is being applied by a country on goods coming in from the outside and it is usually lower than the bound tariff rate.

[19] It can also be argued, although prematurely in this section, that the provision for policy space is conducive for developing countries' development needs. This would allow them to implement development oriented policies but this will be discussed later on in the paper.

[20] *Ibid.* These are such industries as textiles, leather, fisheries and other manufacturing sectors.

[21] WTO "Non-Agricultural Market Negotiations" Available at http://www.wto.org/english/tratop_e/markacc_e/markacc_negoti_e.htm#docs (Accessed 31 May 2010).

other issues that the negotiations are concerned with will be discussed only where they are found to be relevant to the main discussion.

2.3 The NAMA negotiating mandate

Although the NAMA negotiations draw their primary mandate from the Doha Ministerial declaration, tariff reduction negotiations are not innovative to the Doha Round. The General Agreement on Tariffs and Trade (GATT) has a history of tariff reduction rounds and the original mandate for tariff reductions is drawn from Article XXVIII *bis* of the GATT. This article provides that contracting parties may, at time to time, sponsor negotiations aimed at reducing general tariffs and other charges on imports and exports.[22] These negotiations are to take into account the *needs of individual contracting parties and individual industries, the needs of less developed countries for a more flexible use of tariff protection to assist their economic development and for revenue purposes.*[23] The Doha mandate, on the other hand, drawn from Paragraph 16 of the Doha Ministerial Declaration, aims to :[24]

> *... to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. ... The negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII bis of GATT 1994 and the provisions cited in paragraph 50 below. ... the modalities to be agreed will include appropriate studies and capacity-building measures to assist least-developed countries to participate effectively in the negotiations.*

There are three crucial elements of the NAMA negotiations to be drawn from the above paragraph:

[22] Article XXVIII: 1 *bis* of the General Agreement on Tariffs and Trade (GATT)
[23] Article XXVIII: 3 (a) (b) *bis* of GATT.
[24] Doha Ministerial Declaration WTO Document WT/MN (01)/DEC/1 November 2001.

- Reducing or as appropriate eliminating tariffs, tariff peaks, high tariffs and tariff escalation and non-tariff barriers on industrial products especially on products of export interest to developing countries;
- Less than full reciprocity in the tariff reduction obligations of developing countries; and
- Conducting appropriate studies and building the capacity of least developed countries so they can participate effectively in the negotiations.

It is interesting to note that the WTO, in its briefing notes, has the first two elements the same as the above, but falls short of mentioning the capacity building.[25] This means that capacity building has been effectively given a back seat in the negotiations. The issue of appropriate studies should have been given more attention and perhaps elaborated, especially considering developing country experiences with structural adjustment programmes in the 1980s and 19190s. Developing countries have requested cost-benefit analysis studies on the impacts of further tariff liberalisation on their economies.[26] The provision on 'appropriate studies and capacity building' is very weak. For instance, the meaning of 'capacity building' is open to debate. Questions could be asked as to how and with regard to what aspects of trade liberalisation. Lack of explicit content will make the provision difficult to effect.

This observation is particularly important because, as Hoekman[27] points out, part of the reason why the WTO suffers from a "development credibility deficit" is because of the implementation problems associated with many of the undertakings made by the developing countries at the Uruguay Round negotiations. Hence, the only way that the Doha Development Round can live up to its name is if implementation and capacity constraints for developing countries are addressed. 'Appropriate studies' therefore must precede capacity building.

[25] WTO "Briefing Notes: Non-agricultural Market Access" Available online at http://www.wto.org/english/tratop_e/dda_e/status_e/nama_e.htm (Accessed 31 May 2010).
[26] Mbekeani "The Doha Agenda – Challenges for SADC Countries" 2002 (1) Southern African Trade Research Network (SATRN) Quarterly Bulletin 3.
[27] Hoekman "Economic Development and the WTO after Doha" 2002 World Bank Policy Research Working Paper 2851 3.

Developing countries played a critical role in crafting the agenda for the whole negotiating round. These countries insisted that the round have a pro-development agenda to rectify the past failures of the multilateral trading system that have marginalised their economies.[28] Getting 'development' into the agenda of the round was just one important milestone. The second milestone was the developing countries' insistence that the WTO confront the interface between 'trade' and 'development', in the global trading system. This is expected to rectify the mistakes of the Uruguay Round and the plethora of agreements adopted therein that developing countries have struggled to implement.[29]

A reading into the overall objective of the Doha Round as well as the NAMA negotiating mandate reveals that, from a WTO perspective, the issue of development can only be championed through the tool of SDT. Therefore, a critique of the WTO's commitment to development would be grounded in the value and strength of the SDT provisions in the WTO agreements. Hence, it calls for an interrogation of the meaning of the concept as afforded it by the WTO as well as an interrogation of the meaning of development.

Although the language used in paragraph 16 of the Doha Declaration is mandatory, it is made subject to other GATT/WTO provisions. Therefore, the approach to the special needs of developing countries in these negotiations is largely dependent on the language of those other provisions. This will, however, be discussed in the next chapter.

Paragraph 50 of the Doha Declaration, with reference to the overall work programme of Doha, reiterates the obligation to;

> "*... take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in: Part IV of the GATT 1994; the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing*

[28] Hammouda *et al* "Non-agricultural market access (NAMA) negotiations in WTO: Modalities for a Positive post-Hong Kong African Agenda" 2002 Africa Trade Policy Centre Work in Progress (34) 1.
[29] *Ibid.*

Countries; the Uruguay Round Decision on Measures in Favour of Least-Developed Countries; and all other relevant WTO provisions".

It is clear from the above that the core of the mandate for the NAMA negotiations revolves mainly around tariff reductions. The special needs and interests of developing serve as the guiding tool in the tariff liberalisation. There is a general complaint that developing countries gave much more than they could afford in the previous tariff cuts under the Uruguay Round. Developed countries maintained protection in sectors of export interest for developing countries while developing countries were forced to reduce their own market barriers against developed countries.[30] It is interesting to discover what motivates developing countries in these negotiations.

2.4 Developing country interests in the NAMA negotiations

It has come to be accepted as economic wisdom that trade liberalisation is key to economic growth. A number of countries are said to have benefited from opening up their trade.[31] Liberalisation of trade will reduce discrimination against tradable sectors, enable specialisation according to comparative advantage, boost imports and exports increase inward investment and trigger major productivity gains: all of which will increase economic growth.[32] While unilateral liberalisation of trade is preferable, the mercantilist nature of world trade makes multilateral liberalisation the best option for liberalising trade and securing market access for developing countries in other markets.[33]

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[30] Garcia "Beyond Special and Differential Treatment" 2004 (27) *Boston College International & Comparative Law Review* 298. This idea will be discussed further in Chapter 3.

[31] Chile, Colombia, Egypt, Ghana, India, Israel, Korea, the Philippines and Turkey in a study by the National Bureau of Economic Research as well as Argentina, Brazil, Chile, Colombia, Greece, Indonesia, Israel, Korea, New Zealand, Pakistan, Peru, the Philippines, Portugal, Singapore, Spain, Sri Lanka, Turkey, Uruguay and Yugoslavia in a World Bank study. Legraine "Why NAMA Liberalisation is Good for Developing Countries" 2006 *The World Economy* 1349 – 1350. See also Lamy "The Challenge of Integrating Africa into the World Economy" in Clapham *et al* (eds) *Regional Integration in South Africa: Comparative International Perspectives* 2001 15.

[32] Draper *et al* (eds) *The Political Economy of Trade Reform in Emerging Markets: Crisis or Opportunity?* 2009 239. See also Sally *The Political Economy of Trade Liberalisation: What lessons for Reform Today?* 2007 Trade Policy Report 18, and Australian Government *South-South Trade: Winning from Liberalisation* 2004 20-21.

[33] Legraine *The World Economy* 1350 – 1351.

The need to maintain high tariffs as a measure of protection for infant industries is rubbished in the face of the failure of the many import-substitution and state-interventionist policies implemented by India, most Latin-America and Africa that failed to achieve their development goals, flatly stating that there is no causal link between protective tariffs and development.[34]

Developed countries, especially the QUAD,[35] are notorious for their protectionist tendencies, especially on products of export interest to developing countries and this tariff protection is used in conjunction with contingency instruments such as anti-dumping duties and safeguards.[36] This protection afforded to developed country industry costs developing countries in excess of the official development assistance flows.[37]

Other examples of protectionist behaviour in developed countries include major disparities in the tariffs applied among the developed countries themselves and those applied on developing country products. The average weighted tariff rate applied by Organisation for Economic Cooperation and Development (OECD) countries on developing country exports on a most-favoured nation (MFN) basis is four times what they apply among themselves. This trend applies even to tariff reductions; where tariffs on industrial exports from fellow developed countries were cut by half, the reduction for exports from developing countries were cut by one third.[38] With regard to certain labour-intensive products where developed country industries cannot compete with developing countries, tariffs applied can be as high as 900%. Trade preferences granted to developing countries usually exclude such sectors where developing counties have a comparative advantage.[39]

This trade protectionism has been exacerbated by the global financial crisis. A WTO report shows that a variety of trade-distorting measures, tariff and non-tariff, have

[34] *Ibid.*
[35] This refers to the USA, Japan, Canada and the EU.
[36] Hoekman "Economic Development and the WTO after Doha" 10.
[37] *Ibid.*
[38] Hammouda *et al* "How the Doha Round Could Support the African industry?" African Trade Policy Centre 2007 (Forthcoming in *Journal of Economic Development*) 4.
[39] *Ibid.*

been imposed on merchandise trade.[40] Also, the report finds that there has been an increase in trade remedy initiations since the advent of the crisis. Other commentators have also alluded to the possibility of increased litigation at the WTO due to such protectionist reactions to the financial crisis.[41]

It is clear from the above that developing countries have a stake in ensuring that developed countries take a massive cut in their tariffs so as to ensure adequate market access for products of export interest to developing countries. This is the objective of the NAMA mandate. This is especially so as, especially for African countries, they have come to depend heavily on such "non-traditional, non-agricultural exports as textiles and fish products" and they are forced to pursue an active industrial market access agenda at the WTO.[42]

Developing countries are also notorious for tariff peaks with some countries are reported to have tariff peaks of over 200% for some products.[43] This is especially of concern as South – South trade is said to be gaining greater prominence, now accounting for about two-fifths of developing country trade.[44] Events on the global stage, both economic and otherwise, are calling for a diversification of trade markets and point towards the need to encourage and promote South-South trade. First it was the financial crisis[45] and then more recently, the volcanic ash eruption in Iceland that grounded air traffic in and out of Europe for a week.[46] The air traffic disruption saw African horticultural producers lose millions of dollars because they had no other market to send their produce to, being entirely dependent on the European market.

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[40] "Report to the TPRB from the Director-General of the Economic and Financial Crisis and Trade Related Developments" WTO Document WT/TPR/OV/W/2 Paragraph 37 Available at: www.tradeobservatory.org/library.cfm?refID=105042 (Accessed 31 May 2010)

[41] Bouet and Laborde "The Cost of a Non-Doha" November 2008 Briefing Note: Obama – Biden Transition Project Avaialble at: http://otrans.3cdn.net/d83fe6b9aec5da4510_t7m6brfrj.pdf (Accessed 31 May 2010).

[42] ILEAP "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access" 6.

[43] Hoekman "Economic Development and the WTO after Doha" 11.

[44] Australian Government 9. The same report also states that around 70 per cent of tariffs faced by developing countries are applied by other developing countries.

[45] Biacuana "China-Africa Trade and the Global Financial Crisis" Available at: http://www.saiia.org.za/diplomatic-pouch/china-africa-trade-and-the-global-financial-crisis.html (Accessed 31 May 2010).

[46] Dube and Biacuana "Trade Lessons for Africa in the Aftermath of the Flight Disruptions" Available at: http://www.saiia.org.za/diplomatic-pouch/trade-lessons-for-africa-in-the-aftermath-of-the-flight-disruptions.html (Accessed 31 May 2010).

At the same time, tariff reductions undertaken by developing countries pose the risk of: losing them a significant portion of their national revenue; reducing their industrial and development policy space; and thus limiting their potential to diversify products through expanded and new industries.[47] Developing countries are thus in the unenviable position of having to balance their two divergent needs; the need to maintain tariffs for policy purposes as against the need to reduce tariffs to encourage development, South-South trade and also in the spirit of the negotiations. Reciprocity is what motivates the trade liberalisation negotiations. One could argue, though, that the gap should be filled by SDT, although it is hard to imagine developed countries giving concessions for free.[48] It is a delicate balance that cannot be easily attained, particularly if developing countries fail to craft a credible development agenda *vis-a-vis* the NAMA negotiations.

One issue of concern, and one that warrants that developing countries ensure the success and completion of the NAMA negotiations, is the proliferation of regional trade agreements, particularly in the context of free trade agreements concluded by developing country groupings with developed country groupings. This paper does not seek to debate the benefits or disadvantages of regionalism versus multilateralism but simply to state that, such regional agreements, in the context described above, might be used by developed countries to attain further access to developing country markets through bigger tariff cuts than would probably be reached at NAMA level. A successful negotiation of NAMA would reduce the chances of such circumvention by developed countries and ensure that such tariff cuts in the spirit of free trade agreements are, at least, minimal because the bound rate at WTO level is not that low.

It is good to see that the experience gained from the Uruguay Round consequences has made them more aware of the complexities of unstructured trade liberalisation, undertaken in the spirit of concessions with pure disregard for implementation capacity and other country-specific ground constraints. These are constraints such as lack of productive capacity, inadequate infrastructure and technologies as well as

[47] ILEAP "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access" 6; Shafaeddin "NAMA as a Tool of De-industrialisation of Africa" 2009 Institute of Economic Research, University of Neuchatel, Switzerland 17. Available at: http://mpra.ub.uni-muenchen.de/15050 / (Accessed on 31 May 2010).

[48] "... to receive concessions, a country has to give concessions." Fingers and Winters "Reciprocity in the WTO" in Hoekman *et al* (eds) *Development, Trade and the WTO: A Handbook* 2002 54.

other supply-side constraints.[49] Opening up of markets within the developing countries could, "... accelerate deindustrialisation and lead to intensification of agro-industrial trade while diminishing the traditional industrial sectors."[50] Gitonga posits that 70% of Africa's merchandise exports consist of unprocessed goods and NAMA could improve industrial market access opportunities for products that Africa does not generally produce. NAMA is therefore about tariff reductions for competitive producers.[51] However, even as they push for the development agenda in the NAMA negotiations, developing countries should be careful find an appropriate balance between their needs and compromise while at the same time pushing forward the development agenda.

Developing countries also need to cure their own institutional deficiencies in order to garner benefits from trade liberalisation. These are such deficiencies as political disorder, macro-economic instability, insecure property rights, rampant government intervention and high external protection. One suggestion that can be made is that developing countries pursue the concept of 'developmental states'. Effort can be made to protect markets and to maintain restrictive trade policies but the general mindset currently is stuck on trade liberalisation. The term of 'developmental state' has o precise definition but it has reference to the East Asian countries where the states were market interventionist but only to the extent that such intervention was towards creating a market based and internationally competitive economy. State intervention for economic development was therefore outward oriented and supported trade liberalisation.[52]

Apart from the issue of tariffs, which is at the core of the NAMA negotiations, developing countries also have an interest in these negotiations through the potential reduction and removal of other non-tariff trade-restrictive and trade-distorting

[49] ILEAP "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access".
[50] Gitonga "The Doha Development Round: Where is African Industrial Development" Available at: http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=43113&cat_id=1059 (Accessed 31 May 2010).
[51] *Ibid.*
[52] Qobo, "The Developmental State Debate in South Africa" in Draper and Alves *Trade Reform in Southern Africa: Vision 2014?* 2009 55-59.

measures and policies employed by developed countries.[53] These measures and policies create market access barriers for developing countries.

2.5 Conclusion

The NAMA negotiations seek to reduce and eliminate tariffs on industrial goods but with particular emphasis on products of export interest to developing countries. Such tariff liberalisation will take into consideration the special needs and interests of developing countries. This will ensure tariff liberalisation in developed countries especially on tariff peaks and tariff escalation. These are detrimental to the development of developing countries in that they constrain product diversification and industrialisation and reduce trade opportunities for developing counties..

In as much as developed countries need to open up markets more, it has been established that developing countries should also consider liberalising their own markets. This is especially because South-South trade is growing and trade protectionism in developing countries has detrimental effect on that trade. Ultimately, the development agenda in the NAMA negotiations will be defined by trade liberalisation by both developed and developing countries. However, liberalisation by developing countries would have to be fully cognisant of their development levels, hence the ‘less that full reciprocity’ in the negotiations.

[53] ILEAP “Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access 6.

CHAPTER THREE

SPECIAL AND DIFFERENTIAL TREATMENT IN THE WTO

3.1 Introduction

The Doha Round has reignited the debate around the meaning and content of 'special and differential treatment' (SDT) of developing and least developing country members of the WTO. SDT provisions have largely been ineffective and of little practical use in the WTO. As such, the naming of the Doha Round as the 'developmental' round calls for, among other things, an analysis and reconsideration of the SDT provisions. This chapter will attempt to unravel the controversies around the nature and concept of SDT. The origins and nature of SDT will be interrogated, followed by an assessment of its application in the multilateral trading system.

3.2 Meaning of 'special and differential treatment'

It is the opinion in this paper that the basic starting point for any discourse on the concept of SDT in the WTO needs to be understood in the context of the function of the WTO. The WTO is a successor to the GATT and has incorporated the GATT treaty as part of its Single Undertaking. In its preamble, GATT 1947 mentions the need to raise standards of living and ensuring full employment through reciprocal free trade. Obviously, developing countries were not a priority[54] and GATT was simply about non-discriminatory trade among equals.[55] There is thus an inherent conflict

[54] This is despite the fact that 11 out of the 23 founding members of GATT would have been considered developing countries. Michalapoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 2000 World Bank Policy Research Working Paper 2388 2. The rest of this section draws from this paper.

[55]However, GATT was a compromise after the failure to establish the International Trade Organisations (ITO) and the charter to the ITO contained a provision for the use protectionist trade measures wiuth a view to the establishment, development or reconstruction of a particular industry, provided the other contracting parties agreed to it. This provision was later incorporated into GATT as an amendment in 1948. *Ibid.*

between the WTO and SDT. SDT was a compromise made along the way as the WTO evolved.

Soon after the establishment of GATT, developing countries began to realise that the trade liberalisation policies were not conducive to their development and perpetuated the trade pattern where they were commodity suppliers and importers of manufactures. Developing countries therefore needed the system to change if they were to develop and expand their industrialisation as well as eliminate balance of payment problems.[56] They sought remedy in protectionist trade strategies such as: the use of import substitution to promote industrialisation; use of export subsidies to promote exports; and, the use of trade controls for balance of payment purposes.[57] According to Michalopoulos, this gave rise to requests for changes in the trading system in four main areas: the creation of trade preferences for developing countries; non-reciprocal or less than full reciprocity in trade relations between developed and developing countries; flexibility for developing countries in the application of trade rules; and, the stabilisation of commodity markets.[58] SDT was also a response to the decolonisation period and an acknowledgement of the economic vulnerabilities of the newly independent states, the wealth inequalities as well as an attempt to re-distribute global wealth through the multilateral trading system.[59]

The principle of SDT was thus born and it seeks to address the conflict between trade and socio-economic development[60] or at least achieve a point of convergence. SDT seeks to give a broader meaning to trade other than an exchange of products based on comparative advantages. "It was conceived in acknowledgement of the fact that developing countries (were) at ... very different stages of economic, financial and technological developments and therefore had entirely different capacities as compared to developed countries in taking on multilateral commitments and obligations."[61]

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[56] Michalapoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 2000 World Bank Policy Research Working Paper 2388 3.
[57] *Ibid.*
[58] *Ibid.*
[59] Lichtenbaum "Special Treatment " versus "Equal Participation:" Striking a balance in the Doha negotiations" 2002 (17) *American University International Law Review (Am. U. Int'l L. Rev.)* 1003
[60] Lichtenbaum *Am. U. Int'l L. Rev.* 1009.
[61] "Preparations for the fourth session of the Ministerial Conference: proposal for a framework on special and differential treatment" WTO Document WT/GC/W/442 19 September 2001 Par 1 as quoted

The underlying rationale for special and differential treatment is grounded in the belief that trade liberalisation under the most favoured nation (MFN) dispensation is not conducive for growth and development and developing countries need protection from external competition.[62] It is an acknowledgement of the skewed production capacities underlying world trade and the fact that developed countries could easily take over the trading world by virtue of their advanced technology and production capacities. SDT therefore seeks to protect developing countries and their economies and allow them to grow at a pace proportionate to their development level.

The Agreement establishing the WTO, in its preamble, seeks to ensure that developing countries secure a share in the growth of international trade commensurate with the needs of their economic development. This signifies that by the time the GATT changed to the WTO, SDT was firmly entrenched as a principle. Another paragraph in the preamble refers to trade being pursued with a view to raising standards of living and ensuring full employment. This is an implicit reference to 'development'. However, the fact that 'development' is not explicitly mentioned may have certain implications which are discussed in the next chapter.

The WTO has more than 155 SDT provisions under its fold, which provisions form the 'development' element of the WTO.[63] The WTO Secretariat has classified the various 'special and differential treatment' provisions into six categories:[64]

(i) provisions aimed at increasing the trade opportunities of developing country Members.

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in Ewelukwa "Special and Differential Treatment in International Trade Law: A Concept in Search of Content" 2003 (79) *North Dakota Law Review (N.D. L. Rev.)* 834.

[62] Hoekman "Operationalising Policy Space in the WTO: Beyond Special and Differential Treatment" (8) *Journal of International Economic Law* 406.

[63] The International Centre for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD) "Special and Differential Treatment" 2003 1 (13) *Doha Round Briefing Series* 1.

[64] "Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions" WTO Document WT/COMTD/W/77 25 October 2000 Par 3 Available at http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (Accessed on 31 May 2010).

(ii) provisions under which WTO Members should safeguard the interests of developing country Members.

(iii) flexibility of commitments, of action, and use of policy instruments.

(iv) transitional time periods.

(v) technical assistance.

(vi) provisions relating to least-developed country Members.

The above is the extent to which SDT has pervaded the WTO system. However, the presence of such provisions does not equate application. The failure of SDT is what has inspired developing countries to push for a development oriented agenda in the Doha Round. The lack of convergence between what is stated on paper and the actual application of SDT has made the issue on of the most contested in the WTO.

3.3 WTO provisions on special and differential treatment

A detailed journey motif of the concept would reveal many phases and processes as the concept evolved but, for the purposes of this paper, there are only two phases: pre-Uruguay Round and post Uruguay, which includes, of course, the current Doha Round. Prior to the Uruguay Round, SDT has two principal components: "protection of developing country markets and access to developed country markets".[65] Post-Uruguay, the adoption of the Single Undertaking, which meant developing members acceding to all GATT/WTO Agreements, necessitated the addition of a third element; that of "delayed implementation" of the agreements that the developing countries had bound themselves to, and this was because of the capacity problems that the developing countries would face in trying to implement the agreements.[66]

3.3.1 Pre-Uruguay

3.3.1.1 GATT Article XVIII

This Article is entitled "Governmental Assistance to Economic Development" and, while it does not specifically mention developing countries, it refers to countries

[65] Lichtenbaum *Am. U. Int'l L. Rev.* 1009.
[66] Lichtenbaum *Am. U. Int'l L. Rev* 1013 -1014.

whose economies, "... can only support low standards of living and are in the early stages of development ..." essentially 'developing' countries. Paragraph 2 of this article allows developing countries to "maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry" and "to apply quantitative restrictions for balance of payments purposes ..." This gives permission to developing countries to withdraw or modify concessions previously made to other contracting parties in the interest of the establishment of a particular industry.[67] However, while at first glance this appears to give developing counties much leeway with their tariff bindings, it is still subject to the provisions of Section A of the same Article which calls for negotiation with affected members with whom the tariff was negotiated in the first instance and, such modification might require a compensatory adjustment to the affected members and this compensatory adjustment has to be given at the time of modification. This stops the ball right in its tracks. It might also explain why, as of October 2000, this provision had never yet been invoked by any developing country member since the WTO came into force.[68]

The whole negotiating process is a long one and, it is hard to imagine a developing country that needs to raise tariffs to protect an industry that is under threat, having enough resources to compensate other GATT members for the modification of tariffs. The Doha Round is in its ninth year of negotiations and it is highly improbable that developing countries would still afford to renegotiate when they want to withdraw concessions. Essentially, this Article gives with one hand and takes away with the other. This provision on negotiations and the resultant compensation is mandatory and it makes trying to take advantage of Article XVIII a daunting task and effectively renders it inoperative.[69] Nonetheless, this Article is the first GATT attempt to accommodate developing country needs through the renegotiation of tariff bindings, balance of payment escape clauses and the imposition of quantitative restrictions in order to establish and develop infant industries.

[67] Ewelukwa *N. D. L. Rev* 845.
[68] WTO Document WT/COMTD/W/77 9.
[69] Lee "Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in the WTO" 2007 St John's University School of Law 5 (Forthcoming in: 6 *Asper Review of International Business and Trade Law* June 2007).

This provision has not been very successful in furthering the development objectives of developing countries within the trading system. Lichtenbaum places the blame for this on the developing countries themselves for having used the provisions of Article XII[70] as well as Article XVIII extensively to escape the impact of GATT provisions and also to maintain tariff protection for their industries with the result that this prevented them from obtaining any concessions from developed countries as they were actively keeping up trade barriers to their own markets and thus there could be no productive engagement or negotiations; also, such extensive use of the above provisions resulted in distorted domestic resource allocation, rent seeking by domestic industries and had an adverse impact on growth and development.[71]

3.3.1.2 Article XXVIII *bis*

Paragraph 16 of the Doha Ministerial Declaration, the NAMA mandate, refers specifically to Article XXVIII *bis* as a guiding factor in the negotiations. This Article specifically alludes and applies to tariff negotiations. The Article calls for negotiations, from time to time, that are aimed at reducing and eliminating tariffs, but with regard to the varying needs of individual contracting parties. Article XXVIII: 3 provides that the negotiation shall take into account: "the needs of individual contracting parties and individual industries; 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; and all other relevant circumstances including the fiscal, developmental, strategic and other needs of the contracting parties concerned". The language of this provision is mandatory and obliges WTO members to bear in mind and reflect the above three elements in the modalities produced in the NAMA negotiations. Developing countries are specifically selected for favourite treatment.

[70] These provisions deal with"Restrictions to Safeguard Balance of Payments".
[71] Lichtenbaum *Am. U. Int'l L. Rev.* 1017-1018.

3.3.1.3 Part IV of GATT - Articles XXXVI – XXXVIII

This part is titled "Trade and Development" and was added as an amending protocol to the GATT in 1965. It has been hailed as an important development on the part of GATT for finally recognising the intrinsic link between trade and development and addressing those issues within an international trade environment.[72] Incorporating it into the GATT text afforded it a kind of 'legal' relevance. Paragraph 1 of Article XXXVI outlines the differences between developed and developing countries and the reasons why developing countries need SDT and recognises that international trade, "... as a means of achieving economic and social advancement should be governed by such rules and procedures ... as are consistent with the objectives set forth in this Article".

Paragraph 4 notes the continued dependence of developing countries on exports of a limited range of primary products. In paragraph 1(a), Article XXXVII exhorts developed countries to accord high priority to products currently or potentially of particular export interest to developing countries. These two provisions find reincarnation in the NAMA mandate which calls for the reduction and elimination of trade barriers particularly on products of export interest to developing countries. However, the provisions of paragraph 1(a) of Article XXXVII while mandatory on the face of it, are constrained by the qualification, "... except when compelling reasons, which may include legal reasons, make it impossible ..." The derogation from the provisions for 'compelling reasons' is fundamentally flawed as it essentially allows developed countries to simply legislate against the provisions of Article XXXVII.[73] Paragraph 8 of the Article XXXVI provides that developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries. An interpretive note to this provision provides that developing countries are, in the same vein, not expected to make trade negotiation contributions that are inconsistent with their individual development, financial and trade needs.[74] This principle should

[72] Ewelukwa *N. D. L. Rev* 846.
[73] Lee "Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation" 6.
[74] Ad Article XXXVI of GATT.

ideally apply in the NAMA negotiations, if the negotiations are to apply the 'less than full reciprocity' concept referred to in the mandate.

Article XXXVII: 1 binds developing countries to increase the trade opportunities of developing countries as well as safeguard developing country interests in trade. However, the binding nature of this provision is illusionary since the provision also allows developed countries to exempt themselves from such provisions.

The Part IV provisions have also been criticised for not having any legal power or force to bind members to any concrete obligations[75] and for being largely "declaratory rather than obligatory" as it does not come with any enforceable sanctions.[76] Developed countries, specifically the European Union and the United States, have not really taken the provisions of Part IV to account and have literally rendered it inoperative through their continued use of trade barriers, particularly non-tariff barriers, on products of particular interest to developing countries as provided for in Article XXXVII.[77] Article XXXVII provides that developed countries shall "give active consideration to the adoption of other measures designed to provide greater scope for the development of imports from less developed contracting parties" and "have special regard to the trade interests of less developed contracting parties when considering the application of other measures under this Agreement to meet particular problems". The above provision has also been incorporated into the Anti-Dumping Agreement[78] but developed countries still continue to impose anti-dumping and safeguard measures without regard for developing country interests. They also do it in the full knowledge that the provision gives exemption for 'compelling reasons'.

In critiquing the above three provisions, Articles XVIII, XXVIII: 3 (*bis*) and Part IV, Whalley opines that these provisions have no "self-contained and self activating 'hard' legal obligation" but merely constitute formal statements on non-reciprocity[79] that cannot be litigated upon and hence cannot be enforced. The most significant contribution made by Part IV to the special and differential treatment debate was its

[75] Ewelukwa *N. D. L. Rev* 846.
[76] Lee "Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation" 6.
[77] Lichtenbaum *Am. U. Int'l L. Rev.* 1017.
[78] WTO Document WT/COMTD/W/77 17.
[79] Whalley "Non-discriminatory Discrimination, Special and Differential Treatment under the GATT for Developing Countries" 1990 (100) *The Economic Journal* 1318.

attempt to define the concept of 'non-reciprocity' through the interpretive note to Article XXXVI: 8.[80]

3.3.1.4 Generalised System of Preferences (GSP)

This is a product of the United Nations Conference on Trade and Development (UNCTAD) which adopted the (GSP) in 1965[81] allowing developed countries to grant trade preferences to developing countries of their choice. This deviated from the allowances of GATT Article I which only recognised and allowed trade preferences accruing from a past colonial relationship between a developed country and a developing country. In order to effectuate the GSP, it was granted a waiver in respect of Article I by the GATT contracting parties.[82]

The GSP system has three objectives: to expand exports and export earnings of developing countries by opening up developed country markets to them; to provide an alternative source of export earnings for developing countries by weaning them away from commodities and raw materials whose price instability contributes to chronic trade deficits, and encouraging export oriented industrialisation;[83] and to accelerate their rates of economic growth[84] As a consequence of these objectives, it is a built in requirement of the GSP waiver that such preferential tariffs would only apply to manufactures and semi-manufactures. The GSP was therefore meant to encourage industrialisation and trade development. The NAMA negotiations also seek to encourage product diversification for developing countries through the reduction and eliminations of tariff escalation which constrains developing country industrialisation. The three basic guiding principles of GSP were:

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[80] Keck and Low "Special and Differential Treatment in the WTO: Why, When and How?" 2004 World Trade Organisation Staff Working Paper ERSD-2004-03 5.
[81] United Nations General Assembly Resolution 21 of 1968.
[82] Waiver for Generalised System of Preferences GATT Document L/3545 1972. Authority for the waiver was drawn from Article XXV: 5 of the GATT which provides that in exceptional circumstances, the GATT contracting parties may waive an obligation imposed by GATT on any member by a two-thirds majority of the votes cast, provided that such majority consists of more half the WTO member countries.
[83] Kofele-Kale "The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System" 1987 -1988 (18) *California Western International Law Journal (Cal. W. Int'l L.J.)* 303.
[84] CUTS International *South Asian Positions in the WTO Doha Round: In Search of a True Development Agenda* 2007 243.

- "Generality – a common scheme to be applied by all preference giving countries to all developing countries;
- Non-discrimination – all developing countries to be covered and treated equally under the scheme; and
- Non-reciprocity – beneficiaries do not have to make corresponding concessions in exchange for preferences granted."[85]

There are a number of criticisms that can be directed at the GSP system of preferences. First and foremost, it is a purely voluntary initiative that is administered by the trade preference granting state and is thus subject to the whims of that states' constituencies, especially the domestic industry.[86] There is no certainty of continued market access and developed countries can 'graduate' the developing countries to which they administer the GSP system.[87] Two most popular examples of the GSP system would be the European Union (EU) GSP system and the United States of America's (USA) African Growth Opportunity Act, popularly known as AGOA. The United States' GSP system is characterised by "unilateralism, conditionality and exclusion of the articles deemed "import sensitive".[88] The unilateralism is defined by the unstable nature of the preferences that are highly dependent upon domestic considerations and the constituents with most political power.

The system is conditional upon a number of considerations that have not yet been resolved at WTO level. Sometimes these provisions are external to trade such as human rights and labour; and sometimes such preferences are dependent upon 'equitable' market opening on the part of the recipient country and a variety of other conditionalities. These only serve reinforce the developmental divide that would force recipient countries to accept them for the sake of improved market access. It also defeats the spirit and purport of the GSP system as originally devised. These GSP have been used to create a facade of trade preferences but in actual fact the granting countries always seek something in return. Schemes that call for reciprocal market access albeit limited are very suspect. GSP schemes can be equated to goodwill giving

[85] *Ibid.*
[86] Lichtenbaum *Am. U. Int'l L. Rev.* 1015.
[87] Michalapoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 10.
[88] *Ibid.* The discussion that follows on the characteristics of the system also draws from this paper.

and goodwill can never be conditioned, and should not be conditioned otherwise it is not goodwill at all. The GSP schemes therefore have been degenerated into mere mini-trade negotiations where developed countries offer 'expanded' market access in exchange for something else. In its history the GSP schemes have only benefitted a few developing countries that are positioned to take advantage of the trade opportunities created for some particular products. This is because these schemes are not opened to all products as the granting states also try to protect some of their sectors. Therefore, the GSP system is only important for some countries, for some products and for only some of the time.[89]

Also, because the GSP is entirely voluntary and the recipient countries are at the sole discretion of the grantor, without any direction as to the scope and content of the preferences, its application is uneven.[90] There are issues with the legal validity of the waiver itself and it is highly unlikely that it would be able to withstand legal scrutiny should any party decide to litigate on the matter. Article XXV (5) of the GATT calls for waivers only in exceptional circumstances and given the huge number of developing countries in the WTO, the exceptionality of their circumstances is highly debatable.[91] Scope for such litigation is created when granting states decide to create superficial graduating indices to exclude certain developing countries from their GSP schemes. This is despite the guiding principles of generality and non-discrimination that should apply to GSP schemes.

The GSP has the potential to restrict trade liberalisation on an MFN basis by developed countries, especially in sectors such as agriculture and with regard to tariff peaks.[92] Developed countries are said to have regard the GSP as an alternative to substantial multilateral tariff liberalisation.[93] Developing countries also encourage this trend through their acceptance of the distorted preferences that exclude products of

[89] Michalapoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 9.
[90] Ewelukwa *N. D. L. Rev* 846.
[91] *Ibid.*
[92] Hoekman "Operationalising policy space in the WTO: Beyond Special and Differential Treatment" 2005 (8) *Journal of International Economic Law (J. Int'l Econ. L.)* 408.
[93] Michalapoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 9.

their export interest. The few preferences granted act as compensation for the distortive trade policies that protect sensitive sectors for developed countries.

3.3.1.5 The "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries"

The "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", commonly known as the Enabling Clause is the legal basis that was created for the GSP waiver in 1979. This was adopted at the Tokyo Round. It provides a permanent legal basis for trade preferences granted to developing countries and gives legal certainty to the provisions of Articles XVIII, XXVIII: bis (3) and Part IV of the GATT.[94] Most importantly, the Enabling Clause allows developing countries to discharge their GATT obligations in a manner only proportionate to their developmental capacity. It also provides for the creation of regional trade agreements among developing countries where they do not have to satisfy the stringent requirements of GATT Article XXIV, which regulates the creation and operation of regional trade agreements.

With reference to trade agreements between developed and developing countries, the Enabling Clause provides that developed countries should not expect full reciprocity for the concessions that they grant and should be sensitive when seeking concessions from developing countries. In total, the Enabling Clause provided for,[95] (i) the preferential market access of developing countries to developed country markets on a non reciprocal, non discriminatory basis; (ii) 'more favourable' treatment for developing countries in other GATT rules dealing with non-tariff barriers (iii) the introduction of preferential trade regimes between developing countries; (iv) and the special treatment of least developed countries in the context of specific measures for developing countries. There is also provision for developed countries to consider

[94] Paragraph 1 of the Enabling Clause.
[95] Paragraph 2 of the Enabling Clause; Michalapoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 8 and Kofele-Kale *Cal. W. Int'l L.J* 320.

other differential and more favourable treatment for developing countries under the provisions of GATT but not provided for in the Enabling Clause.[96]

The use of such preferential treatment is however circumscribed by the paragraph 3 provisions which call for SDT to: facilitate and promote the trade of developing countries and not to raise barriers for other WTO members; not constitute a barrier to multilateral trade liberalisation; and, must respond positively to the development, financial and trade needs of developing countries.

Paragraph 5 and paragraph 6 speak to the issue of reciprocity where developed countries do not expect reciprocity for trade commitments made by them to developing countries and exercise the utmost restraint in seeking concessions from developing countries. These provisions legitimatise the non-trade related demands made by developed countries when granting trade preferences to developing countries under GSP schemes. For example, the US, in its AGOA scheme, demands that Sub-Saharan countries establish: a market based economy; the rule of law and political pluralism; economic policies to reduce poverty; a system to combat corruption and bribery; protection of workers' rights; and elimination of barriers to trade and investment.[97]

The main shortcoming of the Enabling Clause is that it gave formal voice to the GSP preferences but failed to remedy the shortcomings of the GSP schemes nor did it create any legally binding obligations for developed countries with regard to SDT. The Enabling Clause gave legal voice to the discretionary and permissive nature of SDT and failed to extend the concept any further legally.[98]

The Enabling Clause also introduced the notion of 'graduating', where developing countries would graduate into more binding obligations as their economic and trade situations improved. This concept of graduating created more problems than solutions. While SDT is fundamentally aimed at the improvement of developing

[96] Kofele-Kale *Cal. W. Int'l L.J* 320-321.
[97] Garay and Cornejo " Rules of Origin and Trade Preferences" in Hoekman *et al* (eds) *Development, Trade and the WTO: A Handbook* (2002) 115.
[98] Michalapoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 7-8.

countries and therefore inherently carries with it a graduating element – the lack of definitions complicates matters and gives more leeway to developed countries to be discriminative in their application of the GSP preferences. Developing countries are not defined under the WTO, leaving the countries to define themselves as such and leaving the developed countries to make the final decision through the application of GSP schemes.

With regard to the unilateral nature of GSP schemes, paragraph 4 instructs the developed countries to notify other WTO members when they wish to modify or withdraw preferential concessions. However, this provision further states that the grantor state shall furnish the WTO members with information relating to such action as it 'deems' appropriate. In essence it is really at the discretion of the grantor states whether they want to provide more information.

The biggest criticism on the Enabling Clause and one that follows with every provision on SDT is that its provisions are not mandatory and do not impose obligations to perform on developing countries. Lee aptly sums it up by saying that "... the Enabling Clause enables developed countries to provide preference for developing countries, but it does not obligate them to do so".[99] As mentioned above, no new obligations on the part of developed countries were created. Paragraph 1, the main provision of the Enabling Clause, only provides that developed countries 'may ...' indicating the volitional nature of the provisions. Effectively the Enabling Clause merely summates what the totality of the other SDT provisions provide for.[100]

3.3.1.6 Short critique of pre-Uruguay SDT

What can be derived from the pre-Uruguay SDT provisions is that there was an acceptance generally of the need and potential of SDT with regard the development. SDT could have been a most indispensable tool for growth but the provisions were insufficient. It seems they were designed with the mind that developed countries

[99] Lee "Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in the WTO" 7.
[100] Michalapoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 8.

should not be forced to assist developing countries if they did not want to. This is evident in the language employed in the provisions and the lack of effective sanction for failure to adhere to the provisions. The language does not direct any action and is merely encouraging the granting of preferences by developing countries.[101] Developing countries can be held at ransom to give concessions that they cannot afford just so they can get trade preferences to assist them in their development.

Despite the legal vacuity of the various SDT provisions, in the period leading up to the Uruguay Round, developing countries had made substantial inroads in ensuring a trade agenda that was geared towards development.[102] Developing countries were permitted to maintain infant industry protection; they were not required to reciprocate the trade concessions granted to them by developed countries in multilateral trade negotiations; they were allowed to use subsidies to support their exports; they had preferential access to developed country markets through the GSP; and they had a new Fund to support commodity stabilisation schemes.[103] All this was dealt a blow by the Uruguay Round. Where there is an expectation of progress with each new trade round, in terms of SDT the Uruguay round was, to all intents and purposes, a rolling back of the progress of SDT.

3.3.2 Post-Uruguay

There are a significant number of SDT provisions that were created during this period, relating to specific agreements. For the purposes of this paper, it is not feasible to consider all of them and this section will only concentrate on the general changes to the landscape with regard to SDT, particularly the changes that were brought about by the 'Single Undertaking Principle'.[104]

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[101] Lichtenbaum *Am. U. Int'l L. Rev.* 1014.
[102] Michalapoulos "The Role of special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 9.
[103] *Ibid.* The Fund refers to the Common Fund for Commodities (CFC) that was established after negotiations with UNCTAD. The Fund's objectives are: to finance international buffer stocks and internationally co-ordinated national stocks; and, financing measures for commodity development and promoting co-ordination and consultation on commodity issues.
[104] The 'Single Undertaking Principle' means that, 'nothing is agreed until everything is agreed'. Every item on the agenda is an indivisible part of a whole and nothing can be agreed separately. Mbekeani "The Doha Agenda – Challenges for SADC countries" 2002 (1) *Southern Africa Trade Research Network, Quarterly Bulletin* 1.

The Single Undertaking Principle is significant because it changed the import of SDT. Whereas prior to Uruguay, SDT was a tool for development, post Uruguay it became a tool for the provision of adjustment tools to assist developing countries implement WTO agreements.[105] The intention was not so much to facilitate trade capacity but rather to facilitate adjustment to trade rules. Developing countries had to adopt all of the trading agreements, which included many 'behind the border' policies, and this greatly reduced their national policy space and significantly weakened the SDT provisions.[106] SDT post-Uruguay then signified a departure from traditional non-reciprocity, where developing countries could maintain different levels of obligation, to reciprocity that is qualified by different implementation periods or what has been termed 'limited non-reciprocity'.[107]

Several reasons have been put forward to explain why developing countries capitulated to the developed country demands that there be a Single Undertaking approach:

- This was the period of massive failures of the import-substitution policies that developing countries had tried pursuing as well as the failed regional economic integration efforts;[108]
- developing countries needed more enhanced market access into developed country markets in sectors such as agriculture and they were willing to forego non-reciprocity for better market access;[109]
- the Single Undertaking was a choice between accepting everything and leaving the GATT system. It was a choice between loss of all market access and market access with more onerous obligations;[110]
- some developing countries in Asia and Latin America had undergone rapid growth and economic expansion and were now better equipped for fuller participation and more obligations;[111]

[105] Ismail *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* 2007 4.
[106] *Ibid.*
[107] Garcia "Beyond Special and Differential Treatment" 2004 (27) *Boston College International & Comparative Law Review* 297.
[108] *Ibid.*
[109] *Ibid.*
[110] Hudec "GATT and the Developing Countries" 1992 *Columbia Business Law Review* 97.
[111] Keck and Low "Special and Differential Treatment in the WTO: Why, When and How?" 6.

- this was a period of realignment of economic thinking, particularly in the United States,[112] that favoured the 'Washington Consensus' .[113] Linked to this, is the fact that many developing countries were also introducing stabilisation and economic adjustment programmes that were encouraged and supported by the World Bank and the International Monetary Fund, usually as loan conditionalities. These structural adjustment programmes usually involved the tariffication of quantitative restrictions, tariff reduction, elimination of subsidies and the liberalisation of foreign exchange markets.[114]
- the need to revamp the trading system and root out protectionism, especially in the agricultural and textile sectors.[115] While preceding trade negotiation rounds had managed to reduce tariffs significantly, there was still the problem of tariff escalation by developed countries. Tariff escalation worked to restrain the diversification of developing country industries as the processed goods market was highly protected.[116] An argument was made in that period that the SDT provisions and the flexibilities allowed for developing countries had in fact encouraged developing countries to pursue disastrous development policies that were driven by protectionism and import substitution;[117]
- also, some developed countries wanted to bring into the fold, some areas that were not traditionally covered by the trading system such as investment, intellectual property rights and trade in services;[118] and

[112] *Ibid.*
[113] This is the term used to describe the totality of the economic advice that was being given to Latin America by Washington based institutions. The policies were: fiscal discipline; redirection of public expenditure priorities toward fields offering both high economic returns and the potential to improve income distribution, such as primary health care, primary education, and infrastructure; tax reform (to lower marginal rates and broaden the tax base); interest rate liberalization; a competitive exchange rate; trade liberalization; liberalization of inflows of foreign direct investment; privatization; and deregulation (to abolish barriers to entry and exit) and secure property rights. Centre for International Development, Harvard University "Washington Consensus" Available at: http://www.cid.harvard.edu/cidtrade/issues/washington.html (Accessed 31 May 2010).
[114] Michalapoulos "The Role of special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 11.
[115] Keck and Low "Special and Differential Treatment in the WTO: Why, When and How?" 5; Michalapoulos "The Role of special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 9.
[116] Michalapoulos "The Role of special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 9.
[117] *Ibid.*
[118] *Ibid.*

- lastly, there seemed to be a growing dissatisfaction with the low levels of developing country commitments in the trading system and some developed countries felt that developing countries needed to take on more obligations.[119]

The adoption of the Single Undertaking strengthened and deepened the multilateral trading system, which naturally created greater potential for the integration of developing countries into the system.[120] There are two particularly important reasons to support this assertion: the development of the dispute settlement system and the extension of trade rules. The dispute settlement system gave greater credence to decisions of the dispute settlement panels and would work to protect developing countries from the powerful developed countries.[121] The extension of trade rules to sectors previously unregulated such as agriculture and textiles and clothing also had the potential of creating significant market access for developing countries.

Garcia describes the capitulation of developing countries as a grand bargain that turned bad.[122] The developed countries were supposed to expand market access for developing countries, in exchange for developing countries adopting new regulations in trade related issues such as intellectual property, subsidies and services.[123] The end results of Uruguay were that developed countries still managed to maintain their protection in the agricultural and textile sectors, which protections the NAMA negotiations are still grappling with today. Developing countries, on the other hand, lost their domestic policy space, their market protections and adopted new legal obligations that were expensive to implement.[124]

A variety of factors contributed to the generally negative perception of Uruguay today. Some of the problems, ironically, stem from the very development differentiation that exists among the WTO members. This development differentiation also differentiates the power balance within the WTO. As such, the standards that are

[119] *Ibid.*
[120] Michalapoulos "The Role of special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 13.
[121] *Ibid.*
[122] Garcia *Boston College International & Comparative Law Review* 297. See also Hoekman *JIEL* 410.
[123] *Ibid.*
[124] Garcia *Boston College International & Comparative Law Review* 298.

written into WTO agreements start from developed country status quo, with the end result that the developing countries have to bear the larger share of the implementation burden.[125] It has to be borne in mind though, that some of the Uruguay round agreements that formed part of the Single Undertaking had been negotiated by developed countries by themselves. Developing countries had been effectively excluded from this process by the non-reciprocity principle which saw them pick and choose which agreements they wanted to be part of. Developed countries are thus the standard formulators while developing countries are the standard receivers and they have to implement. SDT was then written into every Uruguay Round agreement in order to cure this fundamental imbalance. It was assumed that longer implementation periods and the technical assistance promised by developed countries would cure the imbalances and allow the developing countries to reap the same benefits from these agreements as developed countries. It can therefore also be concluded that SDT post-Uruguay was a negotiated outcome otherwise the developed countries were not keen on it.

The single biggest complain with regard to the Uruguay Round agreements relates to the inability of developing countries to implement the obligations they assumed. Finger and Schuler have attempted to sum up the implementation related issues and concerns that developing countries have faced since signing the Uruguay Round Agreements.[126] They undertake a study of the customs valuation agreement, sanitary and phyto-sanitary standards and intellectual property rights in an effort to illustrate the magnitude of implementation problems that, clearly, adjustment measures such as extended implementation periods cannot remedy. Keck and Low attribute this problem to the Uruguay Round set-up where the agreements were presented to developing countries as *fait accompli* and because of that, not all the agreements were consistent with developing countries' national economic interests and development priorities.[127]

[125] Hoekman *J. Int'l Econ. L.* 410.
[126] Finger and Schuler, "Implementation of Uruguay Round Commitments: The Development Challenge" 2000 (23) *The World Economy* 19.
[127] Keck and Low "Special and Differential Treatment in the WTO: Why, When and How?" 6.

The above leads to one conclusion: the developed countries drive the agenda of the trading system and therefore development is not at the core of their agenda. This is not to say that developing countries do not play a role in undermining their own development aspirations through misguided standpoints in the negotiating rounds. The non-participation of developing countries in previous trade negotiations and the principle of non-reciprocity meant that developed countries were only negotiating concessions on products of export interest to themselves and therefore products of export interest to developing countries remained highly protected.[128]

However, the unequal power balance remains a major stumbling block. This unequal power balance is also perpetuated by SDT, ironically. The WTO has to find a delicate balance between SDT and the concept of 'equal partners' in the trading system. 'Equal partners' implies a level playing field which is one of the principles that apply to the negotiations. How that level playing field is achieved or how the partners can be equal when some of them get special treatment is a thorny issue albeit with a relatively easy answer. The concept of 'equal partners' and 'level playing field' should guide the application of SDT. There is already a recognition of the different needs of developed and developing countries as well as the skewed benefits of trade liberalisation and SDT should be used to achieve equality of trading partners and to ensure a level playing field.

Nonetheless, tracing the history of special and differential treatment, it has never been a concept willingly conceded to developing countries. One needs go no further than the language in which special and differential treatment is couched. The best-endeavour clauses that accompany most of the provisions cannot be legally challenged at the WTO dispute settlement body (DSB). The WTO DSB is one of the improvements that came out of the Uruguay Round but its effectiveness when it comes to SDT is constrained by the non-binding nature of the SDT provisions. Lack of implementation of SDT by developed countries or behaviour that is contrary to SDT by developed countries cannot be litigated. This rendered the DSB totally useless when it comes to advancing the development interests of developing countries. At the same time, the Uruguay results show the folly of non-involvement in

[128] Michalapoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 7; Hoekman *J. Int'l Econ. L.* 409.

trading negotiations – developing countries had previously not been deeply involved with the negotiations and thus they lacked the experience and capacity to negotiate.[129]

3.3.2.1 Critique of post-Uruguay SDT

Three main concerns have emerged with regard to the applicability of special and differential treatment.[130] Firstly, developed countries do not accord the same level of importance to special and differential treatment as is accorded in the various trade agreements. Secondly, the fundamental premise of special and differential treatment is being questioned, with differing views on whether less trade liberalisation actually promotes development. Thirdly, the technical assistance and capacity building commitments have been made without adequate planning and therefore their implementation has not been effective.

The Warwick report identifies two main problems: that there is, "no guarantee of an appropriate balance of rights and responsibilities within the system" because of the non-binding and best endeavour nature of the provisions; it assumes a certain level of homogeneity among developing countries such that they the same SDT can be applied to them – a one size fits all approach.[131] Closely linked to the second problem is also the assumption that the capacity and structural constraints being faced by developing countries can be addressed within a certain period of time.

Implementation issues are the biggest problem faced by developing countries since adopting the Uruguay Round agreements. There are three types of implementation issues post-Uruguay:[132] ensuring developed countries deliver on their technical assistance and capacity building promises and commitments; the inability of developing countries to implement Uruguay Round agreements prior to the expiry of the phase-in periods; and, the substantive content of the agreements, some of which is unsuitable for the development objectives of developing countries. For the purposes

[129] Garcia *Boston College International & Comparative Law Review* 298.
[130] Michalopoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 24.
[131] The Warwick Commission *The Multilateral Trade Regime: Which Way Forward? Report of the First Warwick Commission* 2007 40.
[132] Hoekman and Kostecki *The Political Economy of the World Trading System – The WTO and Beyond* 2001 398.

of the NAMA negotiations, the most important element is that of the delivery on technical assistance and capacity building promises to remedy supply side constraints.

Also, post-Uruguay, SDT has also come to be identified more with GSP preferences. While there are some significant problems that are inherent in these preferences, their effectiveness as tools of special and differential treatment has been slowly eroding over the years. This is due to two reasons: the gradual multilateral reduction and elimination of tariffs through a succession of trade negotiating rounds as well as unilateral liberalisation; and the mushrooming regional trade arrangements that are fast beginning to define the global trading system.[133] Multilateral tariff reduction creates preference erosion. Regional trade agreements have seen a very unprecedented proliferation over the years. Where the multilateral trading system seems to be floundering, the regionalism[134] process seems to be flourishing. Somehow, these trading arrangements seem to have gained more favour with developing countries and rendered the preferences less desirable.[135]

Although this cannot be said with absolute certainty, with some countries having benefitted from them, trade preferences under GSP are generally not suited for development.[136] As previously mentioned in this paper, GSP preferences are unilateral and therefore subject to the whims of the preferences giver. This means that GSP preferences are not guaranteed and can be withdrawn at any time. Dependency on GSP preferences will sometimes mean that a country will specialise in those products

[133] Michalopoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 24; Keck and Low "Special and Differential Treatment in the WTO: Why, When and How?" 13.
[134] The 'region' itself, as traditionally defined, refers to a geopolitical or geostrategic region but the process of a more integrated world has turned it into a rather complex entity that pays no heed to geography. BM Russet *International Regions and the International System - A Study in Political Ecology* 1969 7.
[135] Michalopoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 24 and Keck and Low "Special and Differential Treatment in the WTO: Why, When and How?" 13. Michalopoulos goes so far as to say that under the EU preference system, being a GSP recipient is actually worse off than being in a regional trading agreement. GSP preferences are actually at the lowest rung of the preference ladder in the EU.
[136] Lesotho's textile sector has benefitted immensely from the AGOA preferences through the relaxed rules of origin. Lesotho exported $321million worth of goods to the USA in 2002 while exports to the EU for the same year were only 14 million euro. Lesotho had duty free access to both markets except for the fact that AGOA offered liberal rules of origin while the EU had restrictive rules of origin hence the massive difference in export quantities. (Brenton, Flatters and Kalenga "Rules of Origin and SADC: The Case for Change in the Mid-Term Review of the Trade Protocol" 2005 World Bank Africa Region Working Paper Series 83.

that are subject to preferences, which products they might not have a comparative advantage in. If preferences are taken away after a country has established such specialised production, it will be left with an overcapacity that it cannot utilise.[137] Preferences can therefore work to the disadvantage of developing countries.

3.4 Conclusion

This chapter has shown that SDT is a virtual dead letter in the WTO. It cannot be enforced and it cannot be litigated upon. The provisions on SDT seem to have claw-back clauses that restrict their full potential and benefits. SDT is also made ineffective by the legal vacuity that characterises the various SDT provisions in the GATT. The exultations on developed countries to act in the best interests of developing countries are just that – moral suasions with no legal back-up and dependent on the goodwill of developed countries.

Of particular note in this chapter, is the fact that with the erosion of preferences, the only applicable SDT to the NAMA negotiations seems to be the Articles

[137] Keck and Low "Special and Differential Treatment in the WTO: Why, When and How?" 12.

CHAPTER FOUR

THE NAMA NEGOTIATIONS AND THE DEVELOPMENT AGENDA

4.1 Introduction

The Doha Round is grounded in the theory of development. After Uruguay, this is the round that is supposed to deliver for developing countries. The outcomes of this round are supposed to reflect the development aspirations of developing countries as well as serve as a vehicle to attain economic growth and development. This chapter seeks to address the co-relation between the NAMA negotiations and development, through the prism of special and differential treatment. This will involve an interrogation of the concept of 'development'. The NAMA modalities as they currently stand will be discussed, with a view to determining how they feed into the development agenda. This will be rounded off by discussion on how the 'development agenda' can be best pursued in the NAMA negotiations.

4.2 The meaning of development

Development is the banner of the Doha round and the main source of contention in the negotiations. However indiscriminately and oftenly the word is used, there exists no standard definition. Where developing countries complain that agreements and provisions are against their development interests, this is not explained. The 'development *how*' question has not been fully explored. It is taken for granted that everyone means the same thing at the same time.

Development is thus an ideology that is operationalised upon conflicting contestations of meaning that ultimately shape the form of intervention in a manner compatible with political mobilisation.[138] The definition of development thus becomes a function

[138] Schwartz "Development in World Trade Law" 2009 (4) *Journal of International Commercial Law and Technology* 50.

of its intended purpose. In a critique of the United Nations (UN), Emmerij defines development as the idea that all countries could purposefully pursue policies of economic and social advance, which over time would rapidly improve the welfare and living standards of their populations.[139] This leads to another aspect of the development that is lacking in the WTO - the development crisis in the developing countries.

More than a billion of the world's population lives in poverty and this is mostly in developing countries.[140] In the 1960s, high rates of economic growth in developing countries came with mounting social and socio-economic problems like poverty, unemployment and inequalities in income distribution.[141] Economic growth can therefore not be equated to development. Development strategies should be more appropriately designed to combine economic growth, productive employment creation and to meet the basic needs for the entire population.[142] There is a growing recognition that markets cannot be left to their own devices if they are to contribute to development – markets will not create conditions for their own success separate from local content. The focus on economic growth has to be expanded and decentralised to be inclusive of the pursuit of human development. Therefore, there should be an equal consideration of "political, social and legal development".[143]

The above is highlighted by the Millennium Development Goals (MDGs) which call for a global partnership in resolving the global development deficit. With particular reference to trade and development, the MDGs call for an open trading and financial system that is rules based, predictable and non-discriminatory albeit fully cognisant of the "special needs" of developing countries. These special needs relate to

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[139] Emmerij "Has the UN Faced up to Development Challenges" in le Pere and Samasuwo (eds) *The UN at 60 – A New Spin on an Old Hub* 2006 105.
[140] Sevilla "The WTO Doha Development Agenda: What is at Stake" 2007 (25) *Berkeley Journal of International Law* 426.
[141] Emmerij *The UN at 60 – A New Spin on an Old Hub* 109. Quoting from Seers (Seers "The Meaning of Development" *International Development Review*) Emmerij provides,

> *The questions to ask about a country's development are: What has been happening to poverty? What has been happening to inequality? What has been happening to unemployment? If all three of these have become less severe, then beyond doubt this has been a period of development of a country concerned. If one or two of these central problems have been growing worse, especially if all three have, it would be strange to call the result 'development' even if per capita income doubled.*

[142] Emmerij *The UN at 60 – A New Spin on an Old Hub* 111.
[143] Schwartz *Journal of International Commercial Law and Technology* 50.

development aid, debt relief for developing countries and enhanced duty-free and quota-free access to developed country markets.[144]

The Doha 'Development Agenda', in addition to being a reflection of developing country discontent with the multilateral trading system, was also a result of a call by the international community for trade's active role in development and reducing poverty.[145] It has been emphasised by development organisations that reduced poverty in developing countries and achieving economic development. The social unrest created by poverty has resulted in many conflicts across the world, thereby increasing the likelihood of illegal activities and terrorist activity. The lack of integration of developing countries into the mainstream global economy has an adverse impact on global peace and stability. Trade is a critical vehicle for such integration.[146] The challenge for the international trading system therefore, is to integrate economic objectives with development objectives that encompass a social agenda.

While the Doha Round has sought to highlight development concerns for all issues under negotiation, the concept of development is not new to the WTO. There is nothing unique about the Doha Round in its efforts to integrate development into the trade agenda. The very history of SDT is an illustration of the strides made to accommodate development objectives. The problem is that SDT has never been adequate to address such development needs and objectives because it has never been fully effectuated.

The preamble to GATT 1994 refers to, "raising standards of living"; "ensuring full employment and a large and steadily growing volume of real income and effective demand"; "developing the full use of the resources of the world and expanding and expanding the production and exchange of goods". The Marrakesh Agreement, in its preamble, intends for developing countries get a share in the growth in international trade commensurate with the needs of their economic development. The Doha Development Agenda seeks to address the correlation between trade and development as provided for in paragraph 2 of the Doha Ministerial Declaration. The development

[144] Schwartz *Journal of International Commercial Law and Technology* 51.
[145] Cho "Doha's Development" 2007 (25) *Berkeley Journal of International Law* 169.
[146] *Ibid.*

seeks to put the needs and interests of developing countries at the heart of the work programme and ensure that people gain from the "increased opportunities and welfare gains" generated by the WTO. This is to be achieved through enhanced market access, balanced rules and well targeted, sustainably financed technical assistance and capacity building programmes.

'Development' is a constant thread running through the WTO. The WTO has sought to address development through SDT, firstly seeking to achieve equality and enhanced economic development through non-reciprocity and then later through limited non-reciprocity that sought to address implementation concerns.[147] The WTO also works on a system of fundamental principles: the most favoured nation principle;[148] national treatment;[149] negotiated free trade; a predictable trading system; fair competition and encouraging development and economic reform.[150] All these principles are also designed to ensure equal development of all participant states in the WTO through transparency of the system and equal participation. Where countries cannot participate at an equal level, SDT is designed to be the leveller.

The emphasis on SDT within the WTO means that the concept of development is linked to the status interaction between developed and developing countries. This means that a country's designation as a 'developing' country automatically entitles it to 'needs' that developed countries are not entitled to or rather do not have.[151] This of course leads to a debate as to the nature and content of such 'needs'. This is because such needs as identified by an individual developing country could easily be a developed country's needs too, albeit to a different extent. Also, developing countries are at different stages of economic or otherwise development, hence the 'graduating' debate in relation to SDT. The best example would be that of India, China and Brazil who are even upsetting the traditional power balance within the WTO and in international economic affairs because of their tremendous economic growth over the

[147] Schwartz *Journal of International Commercial Law and Technology* 52.
[148] This principle is embodied in Article 1:1 of the GATT and provides that any advantage, favour, priviledge or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for territories of all other contracting parties.
[149] This principle is found in Gatt Article III and demands that products of foreign origin be treated in the same way as like domestic products once they have entered a country's borders.
[150] World Trade Organisation *Understanding the WTO* 2008 11-12.
[151] Schwartz *Journal of International Commercial Law and Technology* 53.

years. There cannot be a single definition of "needs" that could encompass all the developing countries at all their different development stages. This has been identified in this paper as one of the major weaknesses of the SDT concept. It does not differentiate between developing countries and does not even identify what constitutes developing countries.

The WTO in its agreements refers to: special needs; individual development; financial and trade needs; administrative and institutional capacity needs; economic development needs; and the need to "secure a share in the growth in international trade commensurate with the needs of their economic development".[152] The WTO Appellate Body has defined such "needs" of developing countries as being the "development, financial and trade needs of developing countries".[153] A very conspicuous disability of this definition is that it uses the word development to define special needs. Bearing in mind that the "special needs" of developing countries are geared towards development, this definition falls short.

Inability to implement agreements is single biggest issue that came out of the Uruguay Round, and the complaint by developing countries that longer transition periods could not remedy the lack of capacity and supply constraints facing developing countries is still an issue today. The WTO seeks to address this through capacity building although the budget for capacity building initiatives is severely limited. Capacity building will ease developing country participation in the global trading system, allow them to trade more effectively and thus enable them to raise living standards and alleviate poverty. Capacity building therefore sums up the concept of 'development' by linking economic and social agendas. It incorporates: building human, institutional and infrastructure capacity; trade financing for development; development through "Aid for Trade"; and transfer of technology and development.[154]

In short, the WTO does have development objectives but there is no explicit effort to effectuate such objectives. The focus, through SDT, is on economic development,

[152] *Ibid.*
[153] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* Adopted 20 April 2004 WT/DS246/AB/R.
[154] Schwartz *Journal of International Commercial Law and Technology* 53.

based on the premise that development can be equated to a simple increase in a country's gross domestic product. This can be traced back to the mercantilist and capitalist nature of the WTO and the trade negotiations which are basically a parallel of barter trade. It is difficult to see a true and genuine development finding a comfortable resting place in such institution. There has been a failure to effectuate SDT to accelerate developing countries economic growth.

There is even a resistance to strengthening SDT provisions within the WTO framework. It is doubtful that the WTO can continue to ignore social concerns and still find relevance among the majority of its members. The longstanding "trade and ..." debate only finds support with issues that are in the best interests of developed countries, issues that can be used in the imposition of trade barriers. These are such issues that have found their way into the WTO such as intellectual property and services. The drive is now focused on Singapore issues as well as human rights, labour and the environment. The fact that developed countries can support the inclusion of issues in the WTO that are only incidental to trade and will not support the strengthening of SDT provisions for the development of developing countries is indicative of the uneven power balance in the WTO and how it affects development objectives.

To that end, Ismail proposes a development agenda within the WTO that focuses on four issues: fair trade; capacity building; balanced rules; and good governance.[155] Fair trade is inspired by the fact that the benefits of trade liberalisation have been highly skewed in favour of developed countries, partly due to the differences in economic power and levels of development but also due to the unfair trade policies of developed countries. A very controversial example currently is the developed countries' insistence on maintaining inefficient and ineffective protectionist policies in the agricultural sector. The goal of fair trade would be to ensure that the WTO marshals a global economic policy aimed at liberalising global markets and removing the distortions created by developed countries.[156]

[155] Ismail *Mainstreaming Development in the WTO – Developing Countries in the Doha Round* 2007 20-22. The discussion that follows draws from this book.
[156] *Ibid.*

Capacity building as a development goal is driven by the fact that increased market access on its own is inadequate to push an export driven growth. Developing countries face a range of supply side constraints such as lack of infrastructure, low research and innovation capacity, lack of access to finance and a poor investment environment. High adjustment costs and the fiscal impacts of trade liberalisation make most developing countries reluctant liberalisers. If these supply-side deficiencies can be cured then there would be more room for the effective integration of developing countries into the global economy. To this end, Ismail calls for the creation of a global trade adjustment fund that would assist developing country deal with the huge adjustment burden and short term fiscal impact of trade liberalisation.[157]

There is an argument, with huge support from developed countries; that the phenomenon of globalisation has created the need to regulate on issues incidental to trade. These are such issues as environment; consumers; animals and human health and food safety. Ismail contends that the above issues merit serious consideration but; if they were to be regulated on under the WTO, such regulations would need to take into account the needs of developing countries. Therefore the rules would have to:[158]

- ensure that the relative costs and benefits of these rules for developed and developing countries are considered and appropriate and appropriate levels of flexibility built into the agreement;
- bear in mind that the interests and norms of developed and developing countries may not converge entirely and thus the creation of new standards would need to be negotiated, with their development impact made transparent and linked to the implementation capacity of developing countries; and
- take into consideration that developed countries had recourse to a range of development instruments that allowed their judicious intervention in the market to enhance their economic development and this opportunity should not be denied to developing countries.

Good governance in the WTO is a necessary requisite if the WTO is to maintain its relevance with developing countries. There has been a complaint that the decision

[157] Ismail *Mainstreaming Development in the WTO* 21.
[158] *Ibid.*

making procedures of the WTO are neither inclusive nor balanced. There needs to be an effective counter-balance to the EU and the USA. Although the WTO has been relatively more successful than the other economic governance institutions in terms of a democratic decision-making system, there is still great room for improvement and this should be part of the WTO's development agenda.

Ismail's formulation of a WTO development agenda is quite inclusive but has one elementary flaw. In building up to his four elements, Ismail tries to limit his argument to a development agenda that is strictly trade oriented and promotes the interests of developing countries in the trading system. This approach is attributed to the implicit recognition that the WTO is essentially a trade negotiating body and not a development institution.[159] However, in his discussion on the need for balanced rules, Ismail opens the door for the "trade and ..." debate and essentially opens the door for social concerns to be administered through the development agenda of the WTO. If there is potential for the environmental concerns to be legislated under the WTO, then there certainly is potential for poverty concerns to be considered as well.

Nonetheless, this paper does concede that although it probably in the best interests of the WTO in the long run to fully effectuate its development agenda as enshrined in various provisions in its agreements, this will not be achieved for as long as SDT remains contentious. In line with the meaning of development as outlined in this section, SDT becomes but a secondary part of the development agenda.[160] However, the piecemeal approach to development and the manner of its progression in the WTO has ensured that the debate on development in the WTO is premised on making the SDT provisions more effective and precise. This approach is evident in the Doha Ministerial Declaration. Paragraph 50 of the Ministerial Declaration provides that the negotiations and other aspects of the work programme shall take fully into account the principle of special and differential treatment for developing countries and it lists the various provisions that legislate on SDT. This approach to development in the WTO has consistently guaranteed that development remains on the margins of the WTO.

[159] Ismail *Mainstreaming Development in the WTO* 17.
[160] The following is an extension of an idea presented by Ismail. Ismail *Mainstreaming Development in the WTO* 15.

Within the WTO therefore; "Development is thus regarded as an afterthought, as a 'nice to do' or, at worst an optional extra."[161]

There are two options that can be pursued by the WTO: to abandon completely the development agenda; or to proceed with the development objectives and give them more substance. Given the number of developing country members in the WTO, and the current emphasis on trade, it is highly unlikely that the development agenda can be abandoned. That leaves the option of reform in the WTO so as to better accommodate development. Faizel provides that the WTO lacks clarity as to its goals and objectives which are often confused with its main functions of trade liberalisation and rules creation.[162] Such clarity will help the WTO transform from an institution driven by mercantilist agendas to a development oriented institution that is aligned with the changing dynamics in its membership. Also, the clarity and change will help rebalance the WTO and move it away from its perceived developed country bias.[163]

4.2.1 SDT and the development agenda

Since the development agenda in the WTO and the Doha Round seems to be grounded in SDT, there is need to enquire as to the appropriateness of such an approach. The NAMA mandate has been discussed in the second chapter of this paper and it was established that development with regard to the NAMA negotiations would be achieved through SDT.

4.2.2 The Doha mandate on SDT

The Doha Ministerial Declaration in paragraph 2 makes reference to enhance market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity building programmes as having important roles to play in ensuring that developing countries gain from the increased opportunities and welfare gains that the

[161] *Ibid.*
[162] Ismail *Reforming the World Trade Organisation: Developing Countries in the Doha Round* 2009 121.
[163] *Ibid.*

multilateral trading system generates. It is from this provision that the attitude of the Doha Round was crafted, putting development concerns at the forefront.

On implementation related issues and concerns, the Doha Declaration provides, "We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them."[164] Paragraph 27 goes further and, with regard to trade facilitation, provides "... the Council for Trade in Goods shall review and as appropriate clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994and identify the trade facilitation needs and priorities of members, in particular developing and least developed countries." The Doha Declaration recognises technical assistance and capacity building as co-elements of the development dimension but limits this assistance to helping developing countries adjust to WTO rules and implement obligations.[165] Furthermore, paragraph 50 of the Doha Ministerial declaration also provides that all negotiations under the Doha Round take account of the SDT principles embodied in Part IV of GATT, the Enabling Clause and all the other relevant WTO provisions.

The Declaration also provides that the members reaffirm that the provisions for special and differential treatment are an integral part of WTO agreements.[166] Furthermore, "... all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational."[167] The Decision on Implementation Related Issues and Concerns provides in paragraph 12 on cross-cutting issues that the Committee on Trade and Development is to;

- consider the legal and practical implications for developed and developing country members of converting special and differential treatment measures into mandatory provisions and to identify those provisions that should be made mandatory;
- examine additional ways in which special and differential treatment provisions can be made more effective and ways in which developing countries may be assisted to make best use of special and differential treatment provisions;

[164] Paragraph 12 of the Doha Ministerial Declaration.
[165] Paragraph 38 of the Doha Ministerial Declaration.
[166] Paragraph 44 of the Doha Ministerial Declaration.
[167] *Ibid.*

- consider how special and differential treatment may be incorporated into the architecture of WTO rules.

The paragraph also reaffirms that the nature of preferences granted to developing countries pursuant to the Enabling Clause must be generalised, non-reciprocal and non-discriminatory.

It is clear from the above that the Doha Round has a distinct development bias. The above constitutes a general agreement that SDT as it currently stands has not contributed much to its intended objectives in the WTO. Considering that there is an agreement specific approach to SDT as well as a general approach, there lies an opportunity for divergence and incoherence in the ensuing SDT provisions. Nonetheless, through the Doha mandate, developing countries expect to get more out of the various SDT provisions scattered across WTO agreements by making them more effective and operational and most importantly, mandatory.

The Trade Negotiations Committee[168] in 2002 decided that the SDT mandate under the Doha Round would be addressed through Special Sessions of the Committee on Trade and Development (CTDSS).[169] The CTDSS has not made much progress due to a few fundamental differences between developed and developing countries, such differences mostly stemming from different interpretations of the NAMA mandate as well as the principles and objectives of SDT.[170]

Developing countries contend that the mandate on SDT and a review of the language implies a shift in the balance of members' rights and obligations. This view is not shared by developed countries who maintain that the CTDSS is not a negotiating forum and therefore cannot change members' rights and obligations. Any proposal that seeks such changes should be considered at the negotiating table.[171] Developed countries proposed a discussion of the broader 'principles and objectives' of SDT

[168] This is the body responsible for overseeing the negotiations under the Doha Round.
[169] International Centre for Trade and Sustainable Development and International Institute for Sustainable Development "Special and Differential Treatment" 2003(13) *Doha Round Briefing Series - Developments Since the Fourth Ministerial Conference*.
[170] S Wha Chang "WTO for Trade and Development Post Doha" 10 *Journal of International Economic Law* 553 at 558.
[171] ICTSD and IISD "Special and Differential Treatment"

before discussing agreement specific proposals because, in their view, SDT is about transitioning developing countries into the WTO unitary system. Developing countries, on the other hand, argued that the basic principles and objectives were already codified in Part IV and they just needed to be given legal standing.[172]

There is also the issue of transition periods, on which both groups differed radically in opinion. Developed countries argued for automatic extension rights at the request of individual developing countries while for developed countries, extensions are an exception to the basic rights and principles and therefore formal requests for such have to be made through negotiating bodies under the relevant WT bodies. Developed countries have argued for differentiation of and 'graduating' of developing countries while developing countries would, in the words of Michalopoulos, like to pretend they are all the same,[173] even the advanced developing countries that are capable of assuming full obligations under the WTO. There is agreement, however, between both developed and developing countries that there should be a monitoring mechanism although there are divergent views on the nature of such mechanism.[174]

The divergent positions on SDT by developed and developing countries both have merit but ultimately, they are geared to serve developed country or developing country interest only, to the exclusion of and without due consideration of the rights of others. Developed countries have chosen to interpret the Doha mandate too narrowly because ultimately, if the SDT provisions are to be made 'precise, effective and operational' as well as being made mandatory, this will have an impact on the rights and obligations of WTO members.[175] If half the current non-binding obligations on SDT are made mandatory it would entail a fundamental shift in trading relations and the bulk of the obligations would most likely fall on developed countries. From that standpoint, it is therefore understandable why developed countries would not want a shift in the balance of rights and obligations. The status quo serves the developed countries well because then there is more scope for the manipulation of GSP schemes for political ends as well as other abuses as is the situation currently.

[172] Wha Chang "WTO for Trade and Development post-Doha" 2007 *Journal of International Economic Law 558.* The rest of the discussion draws heavily from this article.
[173] Michalopoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 26.
[174] ICTSD and IISD "Special and Differential Treatment"
[175] Wha Chang *J. Int'l Econ. L*. 563.

SDT provisions have, as the developed countries rightly point out, always been meant to integrate developing countries into the multilateral trading system. However, such provisions have not managed to achieve the objective of assisting developing countries attain standard of economic development that would allow them to integrate fully into the multilateral trading system. Allowance should also be made for the fact that trade is not fully liberalised as the multilateral system has loopholes that allow developed countries to maintain trade distortive and discriminatory policies.[176] These policies work to protect developed country domestic industries from developing country exports. Full integration of developing countries into the multilateral trading system will not be possible with these trade distortive policies in place. If SDT is to indeed play the role of assisting developing countries integrate fully, then developed countries need to dismantle their policies. This would allow more market access for developing country products and assist them with economic development.[177]

Developing country positions, on the other hand, assume a position that SDT is an end all solution to their problems. They emphasise too much the protectionism that the SDT provisions allow. In their approach to SDT, they seek to protect trade protectionism. One of the problems that have been raised with regard to SDT is the blanket application of provisions on all developing countries. This is particularly true of the Uruguay Round implementation periods that did not take cognisance of the different levels of economic development pertaining across developing countries. This has resulted in a situation where developed countries pretend they are extending GSP preferences to all developing countries[178] but then proceed to employ artificial indices that they use to 'graduate' countries out of their GSP schemes.

If SDT provisions were indeed to be made more effective and operational, the concept of 'graduating' developing countries should be considered with more merit. After all, it is fundamentally implicit in the whole concept of SDT. The WTO Appellate Body has found that the use of the word "commensurate" in the preamble of the Marrakesh

[176] *Ibid.*
[177] *Ibid.*
[178] Michalopoulos "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation" 26.

Agreement;[179] is a recognition by the WTO of the different needs of developing countries according to their levels of development and particular circumstances.[180] The purpose of SDT is to assist countries to develop economically so they can engage at an equal level with their developed country counterparts. It is a transitionary measure, with the view that countries will graduate out of SDT once they have developed.

4.3 The NAMA Negotiations

The NAMA negotiations have undergone many processes and seen a few modalities been circulated. However, for the purposes of this thesis, attention will only be paid to: the July 2004 framework as the document prescribing the parameters all modalities, present and future; the Hong Kong Ministerial Declaration because a choice of tariff reduction formula was made and an important milestone was achieved for development through the linking of the ambitions in NAMA and agriculture; and the July and December 2008 modalities as the latest modalities in the negotiating process.

4.3.1 The July 2004 Framework

Agreement on the framework of the NAMA negotiations in the Doha Round was reached on 1 August 2004.[181] The framework is basically an agreement on the shape and constitution of the future modalities for the NAMA negotiations. There are two particular pronouncements that were made in this Framework that are relevant – the kind of formula to be used in the NAMA modalities and the frameworks on the special and differential treatment of developing countries.

[179] Paragraph 3 of the Preamble to the Marrakesh Agreement Establishing the WTO.
[180] Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* Adopted 20 April 2004 WT/DS246/AB/R.
[181] This framework is also known as the Doha Work Programme.

4.3.1.1 The formula

Paragraph 4 of the Framework provides that WTO members, "... recognize that a formula approach is key to reducing tariffs, and reducing or eliminating tariff peaks, high tariffs, and tariff escalation." Furthermore, such formula approach should consider a "...non-linear formula applied on a line-by-line basis which shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments."[182] With a formula approach to tariff reductions, there is clearly a horizontal approach to tariff reductions by all countries across the board. Such a horizontal approach is then emphasised through the adoption of a non-linear formula. This means that tariff cuts will specifically target high tariffs than low tariffs, and this is supposed to harmonise the tariff structures of each WTO member.[183] The non-linear approach has been criticised for the fact that it targets high tariffs, which are mostly prevalent in developing countries and therefore developing countries would have to bear the brunt of the trade liberalisation in the NAMA negotiations.

The framework also provides for certain 'elements' regarding the formula, some of which are:[184]

- product coverage shall be comprehensive without *a priori* exclusions: This provision is drawn from the Doha mandate on non-agricultural market access in Paragraph 16. The effect of this is that all officially listed non-agricultural products will be subjected to the application of the reduction formula.[185] This approach is a complete departure from the Uruguay Round tariff reductions which were limited to the national average. Developing countries have complained that the approach of comprehensive product coverage will limit their policy space as "it takes their right to decide on which sector liberalise and at what point in their developmental stage they consider appropriate and

[182] Paragraph 4 of Annex B of the General Council Decision of July 2004 WTO Document WT/L/579.
[183] African Trade Policy Centre "The Multilateral Negotiations on Non-Agricultural Market Access" 2005 *ATPC Briefing* (4) 1.
[184] Paragraph 5 of Annex B of WTO Document WT/L/579.
[185] ILEAP "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access" 38.

feasible to do so".[186] However, the problem with limiting tariff reductions to the national average is that the only way to achieve a substantial reduction on tariff peaks, high tariffs and tariff escalation is through a product by product basis.[187] This makes the exact formula used and the SDT provisions even more important.

- tariff reductions or eliminations shall commence from the bound rates: This is direct correspondence to the fact that developing countries have high bound tariffs but apply significantly low tariffs. Therefore, tariff cuts from the applied level would diminish their policy space with regard to industrial policy.[188]
- tariff reductions for unbound tariffs will commence at two times the MFN applied rate in the base year:[189] This particular provision implies developing countries (unbound tariffs are also mostly prevalent in developing countries) reducing the applied tariffs without having bound them first and it is hard to envisage such a happening. This is especially as one of the objectives of the NAMA negotiations is to increase the level of tariff lines subject to bindings.[190]
- credit shall be given for autonomous liberalisation by developing countries: Most developing countries undertook unilateral tariff liberalisations under the World Bank/International Monetary Fund Structural Adjustment Programmes and they wanted those tariff liberalisations to be taken into account in the negotiations. Therefore credit shall be given for such tariff reductions but this only applies if the tariffs were bound on an MFN basis in the WTO since the conclusion of the Uruguay Round. Nonetheless, it seems as though the issue of 'binding' is not really as relevant because a universal approach to liberalisation is being taken *vis – a - vis* a request-offer approach.[191]

[186] Otto "Differential Impacts of Tariff Reduction Commitment of Developed and Developing Countries: Results of a Product by Product Simulation Using the Swiss Formula" Ghana Trades Union Congress 29.
[187] *Ibid.*
[188] ILEAP "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access" 38.
[189] Paragraph 5 of WTO Document WT/L/579.
[190] ILEAP "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access" 41.
[191] ILEAP "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access" 38.

4.3.1.2 SDT provisions

From the formula provisions discussed above, there does not seem to be any specific SDT provisions that can be picked out with regard to developing countries. This is especially of concern since the formula will determine the level of tariff reductions applicable to both developed and developing countries. Nonetheless, Paragraph 8 of the Framework provides for longer implementation periods for developing country participants in the NAMA negotiations. The following flexibilities are provided for:

> *a) applying less than formula cuts to up to [10] percent of the tariff lines provided that the cuts are no less than half the formula cuts and that these tariff lines do not exceed [10] percent of the total value of a Member's imports; or*
> *b) keeping, as an exception, tariff lines unbound, or not applying formula cuts for up to [5] percent of tariff lines provided they do not exceed [5] percent of the total value of a Member's imports.*

The above provisions imply three choices for developing countries:[192] they can apply not less than half the general formula cuts to a (larger) percentage of tariff lines; they can keep a (smaller) percentage unbound; or, they can choose not to apply the formula to a (smaller) percentage of tariff lines. Whatever choice a developing country makes with regard to the available flexibilities, paragraph 8 further provides that such flexibility should not have the effect of excluding entire HS chapters.

The above provisions on developing countries do contain some ambiguities that leave a door open for contentious negotiations with regard to the flexibilities. It is not clear whether the tariff lines left unbound under (b) above would be fully exempt from formula application or if it would be treated as any other unbound tariff to be reduced as according to Paragraph 5 of the Framework.[193] Also, with regard to the 5 percent of tariff lines on which a developing country may choose not to apply formula cuts, it is unclear whether such tariff lines are exempt from a formula cut only or from all kinds of tariff reduction.[194] Nonetheless, a reading drawn from the comparison of the tariff

[192] ILEAP "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access" 45.
[193] *Ibid.*
[194] *Ibid.*

line exclusions provided for in paragraphs 8 (a) and 8 (b) would reveal that there is more room for tariff line exclusions if modest flexibilities are used.[195] With more flexibilities as provided for under 8(b), the tariff lines to be excluded are also less. It would make more sense therefore, for developing countries to choose the 8(a) flexibilities which would allow them to reduce the general formula cut by about 50 percent on 10 percent of tariff lines.

Paragraph 13 of the Framework also calls upon developed country members who so decide to consider the elimination of low tariffs. This provision is reminiscent of almost all the SDT provisions in the GATT. Where such provisions have a bearing on developed countries in the sense of imposing an obligation on them, such obligation is not given any legal backing. The obligations are thus not binding on developed countries. In the same vein, paragraph 13 is also couched in best endeavour language and developed countries can choose to disregard it if they so wish.

Paragraph 15 of the framework speaks to paragraph 16 of the Doha mandate which calls upon the modalities for the NAMA negotiations to include appropriate studies and capacity building for developing countries to assist them to participate more effectively in the negotiations. Paragraph 15 of the framework therefore 'recognises' that appropriate studies and capacity building shall be an integral part of the modalities and calls upon participants to continue identifying such issues to improve participation in the negotiations. Paragraph 15 can also be regarded as an extension of the Doha mandate in that, where the Doha mandate refers to such appropriate studies and capacity building in relation to least developed countries only, the framework does not make such distinction.[196]

Lastly, paragraph 16 of the framework makes reference to the revenue effects on developing countries that will result from the non-reciprocal preference erosion that will result from the NAMA negotiations. The negotiating Group is thus instructed to take into consideration the particular 'needs' of such affected member countries.

[195] ILEAP "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access" 45 -46.
[196] ILEAP "Key Issues in the Doha Round Negotiations on Non-Agricultural Market Access" 46.

4.3.2 The Hong Kong Ministerial Conference of December 2005

While the July Framework on the NAMA negotiations had sought to reduce the target of reaching full agreement to a framework agreement, the Hong Kong Ministerial sought to make advances on the framework agreement.[197] Although the Hong Kong Ministerial cannot be said to have achieved any major development in the NAMA negotiations, two significant decisions were made. These are the choice on formula to be used for tariff cuts as well as the decision to link the ambition in market access negotiations in agriculture to that in NAMA negotiations.

Paragraph 14 of the Ministerial Declaration provides that the member countries have chosen to adopt a Swiss formula with coefficients at levels which shall reduce or eliminate tariffs in particular on products of export interest to developing countries; and take into full account the special needs and interests of developing countries, including through less than full reciprocity. The Swiss formula is as follows:

$$T= (a.\ t)/\ (a+t)\ and$$

$$R=t/\ (a+t)$$

"T" is the new tariff rate; "t" is the initial tariff rate; and "a" is the constant coefficient; while "R" is the rate of tariff reduction.[198] Shafaedin has identified the following characteristics of the Swiss formula that are relevant for 'development' purposes:[199]

- the coefficient (e.g. 15), determines the *maximum* tariff rate possible under the formula irrespective of the country's present tariff rates and level of industrialization;
- the lower the coefficient, the higher will be the rate of reduction in tariff;
- for a given coefficient, the higher the initial tariff rate, the higher the rate of reduction in tariff;

[197] Ismail *Mainstreaming Development in the WTO* 8.
[198] Shafaedin "The Political Economy of WTO with Special Reference to NAMA Negotiations" Paper Prepared for Presentation at the Conference on the Political Economy of International Organizations, Geneva January 29-31 2009 27.
[199] *Ibid.*

- for high tariff rates the rate of reduction in tariffs is higher than when a simple linear formula is applied (in which case the same percentage reduction is applied to all tariff lines); and,
- in a certain range of low tariff rates, the formula will lead to lower rates of percentage reduction than those generated by a tariff-independent linear reduction.

It is clear from the above that the rate of tariff reduction is very dependent on the value of the coefficient used in the formula. The higher the co-efficient used, the less the tariff reduction and the opposite is also true. This means therefore that in order for the NAMA modalities to achieve "less than full reciprocity in reduction commitments" for developing countries, there must be a lower coefficient for developed countries and a higher coefficient for developing countries.[200] With regard to tariff reductions under the sectoral initiative, paragraph 16 of the Hong Kong Ministerial provides that participation in such sectoral initiatives must be on a non-mandatory basis.

The second important milestone achieved in the Hong Kong Ministerial was the tying of the level of ambition in the agricultural and NAMA negotiations. Paragraph 24 of the Hong Kong Ministerial declaration instructs the negotiators to ensure that there is a comparably high level of ambition in market access for Agriculture and NAMA. This high level of ambition is to be achieved in a balanced and proportionate manner consistent with the principle of special and differential treatment. This is a very significant achievement for developing countries especially as the agricultural sector has been a very contentious area. Developed countries have managed, despite all the trade rounds concluded since the GATT, managed to keep the agricultural sector massively protected. This protection they achieve through trade distortionary agricultural subsidies and they continue to resist calls for the liberalisation of the agricultural sector. The effect of this provision is that developing countries can give only as much market access as the developed countries are willing to give in the agricultural negotiations. Both developed and developing countries have effectively held themselves hostage in these negotiations. Developed countries want increased

[200] Otto "Differential Impacts of Tariff Reduction Commitment of Developed and Developing Countries" 31.

market access in NAMA while developing countries also need the agricultural subsidies imposed by developed countries removed. This could work to achieve low ambition in both negotiations or high ambition in both negotiations.

Both the July Framework and the Hong Kong Ministerial Declaration worked to reduce the negotiation issues in the NAMA negotiations. They set out the framework for the negotiations, albeit without elaborating on the substantive nature of the provisions, but still defining the parameters around the negotiations and thus limiting the issues. Several modalities have been drafted by various chairs of the negotiating committees, each one rendering the previous modalities redundant. For the purposes of this paper, the relevant modalities are the July 2008 modalities and the December 2008 modalities as the two most recent modalities to date. These modalities will be assessed in terms of the flexibilities that they provide for developing countries and whether they live up to the development challenge set by the Doha mandate.

4.3.3 The July 2008[201] and December 2008 modalities[202]

These are the last modalities presented to the WTO members on the NAMA negotiations. The December 2008 modalities were drawn largely from the July 2008 modalities and the improvements were less than modest.

The July 2008 draft modalities present three ranges of coefficients in the formula for developing countries – three choices on flexibilities. Developing countries can choose from three different ranges: a (19-21) co efficient; a (21-23) coefficient or a (23-26) coefficient. The December 2008 modalities improved upon them by selecting the middle number for each range. The range is now 20, 22 or 25.

[201] The discussion on the July 2008 modalities is based on "Draft Modalities for Non-Agricultural Market Access" WTO Document TN/MA/W/103/REV.2 and "The July 2008 NAMA Modalities Made Simple" Available at: http://www.wto.org/english/tratop_e/markacc_e/guide_jul08_e.htm (Accessed 31 May 2010).
[202] The discussion on the December 2008 modalities is based on " Draft Modalities for Non-Agricultural Market Access" WTO Document TN/MA/W/103/Rev.3 6 December 2008 and "The December 2008 NAMA Modalities Made Simple" Available at: http://www.wto.org/english/tratop_e/markacc_e/guide_decl08_e.htm (Accessed 31 May 2010).

A choice of the lowest coefficient, 20, entitles a developing country to protect 14 percent of its tariff lines for sensitive products provided that these tariff lines do not exceed 16 percent of the total value of its NAMA imports. The cuts should be no less than half of the agreed formula reduction. Alternatively, the developing country can keep 5 percent of tariff lines unbound or excluded from tariff cuts provided they do not exceed 7, 5 percent of the total value of NAMA imports. The middle coefficient, 22, means a developing country can keep 10 percent of its tariff lines from the full effect of the formula cuts, provided they do not exceed 10 percent of the total value of NAMA imports. Alternatively, the developing country can keep 5 percent of its tariff lines unbound or exclude them from tariff cuts provided they do not exceed 5 percent of the total value of NAMA imports. Choice of the highest coefficient leaves a developing country with absolutely no flexibilities; all tariff lines are subjected to the formula reductions.

With regard to unbound tariffs, the July 2008 modalities provided for a mark up of 25 percent on the applied rate to form the basis of the tariff cuts, provided the average does not exceed 28, 5 percent. The December modalities improved the average to 30 percent.

A late introduction to the NAMA negotiations, the anti-concentration clause was first introduced to the modalities in July 2008, but without any figure attached to it. The December 2008 modalities introduced the figures of 20 percent of tariff lines or 9 percent of the value of imports in each HS chapter to be subject to the full formula reduction. This is to ensure that no entire sector is excluded from tariff reductions.

Sectoral negotiations aim to reduce or eliminate tariffs over and above the formula reductions in certain product sectors and participation in these negotiations is mandatory. The July 2008 modalities however linked participation of developing countries in the sectoral negotiations to increased flexibilities in the application of formula cuts.

The modalities text has been criticised for being imbalanced and for failing to respect the ‘less than full reciprocity’ requirement. The coefficients cut bound tariffs deeply to the extent that they reduce applied tariffs and thus restrict the policy space for

developing countries' industrial development.[203] The flexibilities provided for have double constraints in the percentage of tariff lines and trade volumes.[204] Also, the coefficient 8 for developed countries reduces the average bound tariff for the EU, US and Japan by 28 percent while a choice of the coefficient 22 for a developing country would reduce the average tariff lines of India, Brazil, Indonesia and Venezuela by 60 percent. At the same time, estimates indicate that the majority of NAMA tariff lines for developing countries applying the formula would be less than 12 to 14 percent.[205] This creates a reverse SDT where developed countries reduce tariffs more than developed countries.

Developing countries have protested at the inclusion of the anti-concentration clause in the modalities at such an advanced stage of the negotiations. The aim of the anti-concentration clause is to ensure that developing countries apply tariff reductions to all sectors without any exclusion. Developing countries are prohibited from omitting sectors from tariff liberalisation. This is also a source of further erosion of tariff preferences beyond the formula reduction prescribed by the modalities.[206] The attempt to link sectoral negotiations to increased flexibilities is also blatant effort to further reduce flexibilities for developing countries and make them undertake tariff cuts beyond the requirements of the modalities. Developed countries are insisting that developing countries participate in at least one or two sectoral initiatives. The link between sectoral participation and flexibilities has been taken out of the December 2008 flexibilities and will be further negotiated. However, it looks set to be a bone of contention.

An analysis of the above modalities would reveal that they have failed drastically to live up to the development agenda. This analysis is based on the WTO viewpoint of the development agenda being satisfied through SDT and is not based on what is

[203] Khor "Analysis of the New WTO Agriculture and NAMA texts of 6 December 2008" 2009 *TWN Trade and Development Series* 37 Third World Network 5 Available at: http://www.twnside.org.sg/title2/t&d/tnd37.pdf (Accessed 31 May 2010).
[204] South African Statement to the World Trade Organisation (WTO) Trade Negotiating Committee by the Minister of Trade and industry - Mandisi Mpahlwa Geneva 25 July 2008 Available at: http://www.polity.org.za/article/sa-mpahlwa-world-trade-organisation-wto-trade-negotiating-committee-30072008-2008-07-30 (Accessed 31 May 2010)
[205] M Khor "Analysis of the New WTO Agriculture and Nama Texts" 6.
[206] Awoko " Note on Non-Agricultural Market Access (NAMA)" Nama Focal Point of the African Group in the WTO, Geneva Available at: http://www.uneca.org/atpc/egm0909/mama.pdf (Accessed 31 May 2010)

economically good for the developing countries. The analysis is within the WTO's own prescriptions. Based on the SDT provisions analysed in the previous chapter, the NAMA modalities do not affect the XVIII provisions as these provisions can still be utilised by developing countries regardless of the NAMA outcome. Article XXVIII *bis* on the other hand, requires the needs of developing countries to be taken into consideration during the tariff negotiations. This provision has been completely disregarded. Bearing in mind that the world is only just recovering from an economic slump, the wisdom of requiring drastic tariff cuts from developing countries is questionable. This is especially as the developing countries were suffering the effects of a problem created in the developed countries and their commodities export prices were severely affected which affected their economies. Now the developed countries want them to undertake drastic tariff reductions.

Article XXXVII calls upon developed countries to accord high priority to products of export interest to developing countries and paragraph 8 of Article XXXVI provides that developed countries do not expect reciprocity for commitments made by them to developing countries in trade negotiations. This has not been the case in the NAMA negotiations. Developed countries have demanded high tariff cuts and accorded meagre flexibilities to developing countries which flexibilities are further restricted if a developing country wants to utilise the maximum possible coefficient. The sectoral negotiations were originally meant to be a voluntary endeavour but the recent developed country insistence that sectoral participation be linked to flexibilities leaves a lot to be desired. It would seem that developed countries are out to get as much market access out of the developing countries as possible. The same also applies for the anti-concentration clause.

An interpretive note to paragraph 8 provides that developing countries should not be expected to make contributions that are inconsistent with their individual development, financial and trade needs. This paper does not deny that there are developing countries that should probably undertake the tariff cuts as prescribed in the modalities, like the advanced developing countries. However, in the race to get those particular countries to liberalise, developed countries have sought modalities that are detrimental to the development and economic wellbeing of the other developing countries that are needing of flexibilities. This problem goes to the root of the

classification and differentiation problem in the WTO where all developing countries are treated the same as is they had the same needs.

Agricultural trade is much distorted due to the huge subsidies that developed countries provide for their farmers. While advocating for developing countries to dismantle their tariffs, developed countries continue with domestic support and export subsidies, forcing developing country farmers to compete with highly subsidised imports.[207] In the NAMA negotiations, developed countries have aggressively pursued an agenda that seeks to attain tariff cuts of historically unprecedented levels but, this zealousness is not evident in the agricultural negotiations where they seek to maintain their protectionist measures.[208] The July 2004 framework sought to link the ambition in these two negotiations. Somehow this has not been achieved as there is inconsistency between the agriculture and the NAMA texts. In agriculture, the draft modalities include flexibilities for developed countries that are not comparable to the flexibilities afforded developing countries in NAMA. Whereas in agriculture the negotiation process is bottom up and captures all the members' views, the NAMA text is highly circumscribed and prescriptive.

There is no provision on 'appropriate studies' while the provision on technical assistance is volitional. This has always been a shortcoming of SDT since the Uruguay round. The mention of appropriate studies and capacity building indicates a recognition of the importance it carries but countries do not seem to want to be bound to such obligations. This is a very serious flaw in the modalities and will be explained in more detail in the next section.

The principle of SDT, which should guide the NAMA negotiations, has not been adequately reflected in the NAMA modalities and it seems the negotiations have been overtaken by market access interests alone. It can be said with certainty, therefore that there is no SDT in NAMA and, by extension; the development agenda has not been adequately fulfilled.

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[207] Otto "Differential Impacts of Tariff Reduction Commitment of Developed and Developing Countries: Results of a Product by Product Simulation Using the Swiss Formula" Ghana Trades Union Congress.

[208] Alves, Draper and Khumalo *Africa's Challenges in International Trade and Regional Integration: What Role for Europe?* 2009 SAIIA Occasional Paper 32.

4.4 Rescuing the "development agenda" from the NAMA negotiations

It is clear from the above discussion on the NAMA modalities that somehow the development agenda got lost along the way. The question now is whether the development agenda in the NAMA negotiations can be rescued or if not, how best development can be achieved within the WTO.

The preferred method of achieving the development agenda in the NAMA negotiations is the SDT route. SDT has been explained in depth in the previous chapter along with the rationale behind it. The effectiveness of SDT has been curtailed by the non-binding and largely best-endeavour nature of the SDT provisions in the WTO agreements. This is one critical defect of the SDT element in the WTO. Effort in the Doha Round with regard to SDT is primarily to make it more precise, effective and operational. This implies making the SDT provisions legally binding. Since SDT largely involves developed countries making concessions in the interest of developing countries, strengthening the SDT provisions involves creating legal obligations for developed countries. It has already been established in the SDT negotiations that developed countries are not in favour of any changes to SDT that change the legal balance of rights and obligations for countries.

Nonetheless, according to the language employed, existing SDT provisions fall into the following categories: provisions employing purely discretionary language; "best endeavor" clauses; de facto nonbinding or "fake mandatory" provisions; and mandatory provisions.[209] In pursuance of the above, there are two types of changes that can be made to make SDT provisions more precise, effective and operational. This can be done through, "changing purely discretionary terms into mandatory terms; and changing de facto nonbinding provisions into truly mandatory provisions".[210] While this might be possible with some provisions on market access, some of them provisions cannot simply have their language altered into more mandatory terms without creating legal nonsense and gibberish.[211]

[209] Garcia *Boston College International & Comparative Law Review* 311.
[210] Garcia *Boston College International & Comparative Law Review* 313.
[211] Keck and Low "Special and Differential Treatment in the WTO: Why, When and How?" 7.

A good example would be the Enabling Clause where simply changing the word 'may' to 'shall' in paragraph 1 will simply create more questions than answers as there are many sub-sections to this paragraph.[212] Another problem is that some of the SDT provisions are intentionally vague, with the intention not to create any legally binding obligations on developed countries. Therefore, simply changing the language may make the best endeavour clauses mandatory but without actually mandating anything. The content itself is usually vague, exhorting developed countries to exercise some vague level of care or attention and creating standards that are not justiciable.[213] Simply changing the language runs the risk of mandating empty provisions. Such reform as aimed at strengthening SDT therefore runs to the deep of the SDT provisions and will need an overhaul of some of the provisions to give more clarity to the content. The above discussion is based on the far off possibility that the SDT provisions are given more legal authority.

On the other hand, developing country proposals in the SDT negotiations have largely focused on the following four concepts:[214]

- calls for improved preferential access to industrialized country markets;
- exemptions from specific WTO rules, implying either greater freedom to use restrictive trade policies that are otherwise subject to WTO disciplines, or exemptions from rules requiring the adoption of common regulatory or administrative disciplines;
- making promises to provide technical and financial assistance to help developing countries implement multilateral rules binding, and thus enforceable; and
- expansion in development aid to address supply side constraints that restricted the ability of firms to take advantage of improved market access.

With regard to the first two concepts, there are two schools of thought: one advocating developing country trade protectionism and the other calling for trade

[212] Garcia *Boston College International & Comparative Law Review* 313.
[213] *Ibid.*
[214] Hoekman *et al* "More Favourable and Differential Treatment of Developing Countries: Toward a New Approach in the World Trade Organisation" 2003 World Bank Policy Research Working Paper 3107 23 -24.

openness. The debate is highly polarised and the issues can be debated to the death. However, a case has been made and established in this paper for trade liberalisation.[215] The only issue is that such trade liberalisation has to be supported and should be proportionate to a country's development level. This involves acceptance of trade liberalisation and the opening up of markets by developing countries. Trade restrictive policies should not be employed merely because a country is a developing country but they should be justifiable and be used for genuine development purposes. Clearly, developing countries need to embrace trade liberalisation more but markets should not be liberalised all at one. The preference erosion that will result from the Doha Round and the significant cuts that are being envisaged signal the end of a protectionist era in trade in industrial goods.

Another fact to consider is that traditional SDT, particularly with regard to the GSP schemes, has resulted in significant discrimination among developing countries and uneven gains from SDT.[216] This has also encouraged recipient countries to oppose trade liberalisation and created an unpredictable and unstable trading system.[217] Also, one unintended consequence of SDT has been its implication that trade liberalisation is bad for developing countries, legitimising the argument for protectionism.[218]

Hoekman *et al* recommend various ways in which development can be achieved in tariff liberalisation.[219] Their first recommendation is that there should be a binding commitment made by developed countries to abolish export subsidies and NTBs and to reduce MFN tariffs on labour intensive products of export interest to developing countries to less than 5% in 2010. This should be on a staggered basis but with tariffs eventually reaching zero in 2015, to coincide with the target date for the achievement of the Millennium Development Goals. Developing countries should also partake in this trade liberalisation exercise on the basis of a formula approach that reduces the variance in tariffs substantially and gives credit for past unilateral trade liberalisation.[220]

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[215] See Chapter Two of this thesis.
[216] B Hoekman"Making the WTO More Supportive of Development" 2005 *Finance and Development* 15.
[217] *Ibid.*
[218] McCulloch *et al* (eds) *Trade Liberalisation and Poverty: A Handbook* 2001.
[219] Hoekman *et al* "More Favourable and Differential Treatment of Developing countries" 7 -11.
[220] *Ibid.*

The above recommendation is basically the NAMA negotiating mandate, slightly modified. The fact that the above should even be a recommendation demonstrates the distance that the NAMA negotiations have deviated from the initial mandate. Nevertheless, this recommendation assumes that MFN reduction in tariffs has the greatest impact on development. Such approach is supposed to induce a removal of 'reverse SDT' where developed countries maintain protection for their products through high tariffs, tariff peaks and tariff escalation.[221] This ties with Mitchell's observation that products of export interest to developing countries appear to be particularly sensitive for developed countries as well and hence their liberalisation always faces domestic opposition in developed countries.[222] Reciprocity is especially important as the current dispensation that is defined by asymmetries is the result of non-reciprocity in past trade negotiations.[223] The experience with GSP schemes also serve to caution against SDT in tariff liberalisation. MFN tariff liberalisation thus becomes the most effective way for products of export interest to developing countries to gain market access in developed countries.

Trade liberalisation is necessary for development but is not adequate on its own. It needs to be complemented and, as the WTO reaches beyond trade policy, across the border and extends into domestic policy; SDT as defined post-Uruguay should be extended as well. In a development model, the appropriate question for the WTO to ask is how it can facilitate development and not how to ease adjustment to WTO rules, which is what SDT currently does.[224] Two basic principles should guide the development facilitation process: fairness, especially with regard to developing countries; and comprehensiveness, which means the issues covered under the development agenda should encompass all trade related constraints faced by developing countries.[225] This should be aimed at enabling developing countries to take advantage of the opportunities presented by increased market openings.

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[221] *Ibid.*
[222] Mitchell "A Legal Principle of Special and Differential Treatment for WTO Disputes?" Forthcoming in 2006 (5) *World Trade Review* 8.
[223] See chapter three of this thesis.
[224] Garcia *Boston College International & Comparative Law Review* 300.
[225] Stiglitz "Two Principles for the Next Round, or, How to Bring Developing Countries in From the Cold" in Hoekman and Martin (eds) *Developing Countries and the WTO: A Proactive Agenda* 2001 11.

Trade capacity building through technical and financial assistance should be strengthened by linking such activities to the national process through which development aid is provided at the country level.[226] Developing countries are sometimes unable to take advantage of market access offered in developed countries because of lack of supply capacity, the high cost operating environment as well as failure to comply with health and safety standards that apply in developed country markets. If developing countries are to benefit from NAMA liberalisation, then the elimination of supply side constraints and redress of other matters is a necessary precondition.[227] Development assistance can go a long way towards creating the institutional and trade capacity needed to garner benefits from increased trade and market access.[228] Such development assistance should also address the adjustment costs associated with trade liberalisation.

Maximising the benefits of trade capacity assistance requires the identification of national priorities which should be embedded in a national development plan or strategy.[229] This is particularly important because trade policy should be part of a whole in terms of development policies and not an end in itself.[230] The NAMA mandate calls for modalities that include appropriate studies and capacity building measures to assist least developed countries to participate effectively in the negotiations.[231] The July framework extends this provision to all developing countries. Keck and Low advise that the best starting point for any trade negotiations is for developing countries to link negotiating positions on liberalisation commitments, WTO rules and SDT to a "clear and cogently argued identification of development needs and priorities".[232] Only then can development be pursued with purpose and only then can technical assistance and trade capacity building be truly beneficial. Technical assistance at the WTO is currently severely limited by budgetary constraints and is mostly limited to training programmes for government officials to assist them with the implementation of WTO obligations and cannot be recommended to meet developing countries' needs.

[226] Hoekman *et al* "More Favourable and Differential Treatment of Developing Countries" 7-11.
[227] WTO Document WT/COMTD/W/143/Rev.3.
[228] Hoekman *et al* "More Favourable and Differential Treatment of Developing Countries" 7-11.
[229] *Ibid.*
[230] Keck and Low "Special and Differential Treatment in the WTO: Why, When and How?" 9.
[231] Paragraph 16 of Doha Ministerial Declaration.
[232] Keck and Low "Special and Differential Treatment in the WTO: Why, When and How?" 9

This paper has identified Aid for Trade (AfT) as the most effective tool that the WTO can utilise to achieve the development agenda. Aid for Trade encompasses a few broad categories in its application:

- trade policy and regulations – this involves assisting developing countries to participate in multilateral trade negotiations, to understand trade agreements and in mainstreaming trade policy and technical standards, trade facilitation, support to regional trade arrangements and human resources in trade;
- trade development – business development and activities aimed at improving the overall trade climate, facilitating access to trade finance and the promotion of trade in productive sectors;
- infrastructure – building trade related infrastructure like transport, energy and communications;
- building productive capacity through industrialisation and product diversification; and
- trade related adjustment which is designed to help developing countries meet the adjustment costs of trade policy reform.

The above is a comprehensive form of SDT which recognises the domestic impediments faced by developing countries in liberalising trade. The 2005 Hong Kong Ministerial endorsed Aid for Trade and formally created a WTO work programme on Aid for Trade.[233] Paragraph 57 of the Hong Kong Ministerial Declaration provides that Aid for Trade will not be a substitute for the development benefits that will accrue from a successful Doha outcome. AfT will, instead, serve to complement the Doha Development Agenda.

However, since AfT is a donor initiative and is currently funded by international financial institutions and multilateral agencies, concerns do arise as to its effectiveness for development purposes. These concerns relate to: the adequacy of donor commitments and whether the development promises will be met; the degree to which AfT will reflect developing country rather than donor priorities; coherence among the donor agencies coordinating AfT; and the possible link of AfT to

[233] WTO "Aid for Trade and the WTO Work Programme" Available at http://www.wto.org/english/tratop_e/dda_e/background_e.htm (Accessed 31 May 2010).

negotiating positions for developing countries.[234] With particular regard to the NAMA negotiations, the biggest concern would be that of developed countries using AfT as a threat to force developing countries into making further concessions.

To suit AfT to the needs of developing countries, it needs to be modified from its current form. The proposal in this paper is that AfT be recognised as a form of SDT and actually be adopted as the only form of SDT within the multilateral trading system. This has a dual purpose. It serves to eliminate the controversies around the reform of the traditional SDT and the unwillingness of developed countries to have the rights and obligations of WTO members vis-*a-vis* SDT altered. SDT as is currently understood will be done away with. The principle has only been of limited value to the majority of developing countries anyway. Secondly, it introduces a more comprehensive form of SDT that is generally agreed upon and is an idea spearheaded by developed countries themselves. However, this comprehensive form of SDT does not include market access. As the name says; it is 'aid *for* trade'. There would be no need therefore, for tariff liberalisation negotiations to try a foster a development agenda when, at the end of the day, all that countries want is enhanced market access.

Adoption of AfT by the WTO will entail all countries also adopting the core disciplines of the WTO and accepting trade liberalisation as the main vehicle for development. It should be noted here that the proposal is not for trade to be the end-all but rather, that trade be used as a vehicle for the achievement of development. The WTO will effectively be able to pursue its core mandate while catering for the development needs of its majority members. The opening up of markets should not be too much of a concern because such trade liberalisation will be supported by AfT. The department responsible for the administration of AfT will also be responsible for determining just how much a developing country can liberalise. An important corollary to this should be that WTO members have no say in such determinations. Therefore, such countries that are exempted from the general application of tariff liberalisation should not have to seek waivers from the WTO members.

[234] The Warwick Commission *Report of the First Warwick Commission* 2007 41 – 42.

The prevailing mindset among WTO members is that SDT and development is grounded in market access. This is wrong. There is no value to market access if the recipient country is not equipped to take advantage of such market access. Also, SDT in market access, especially with regard to the various GSP schemes, has been accompanied by superfluous graduating indices. With AfT, graduation is built into the system because every country is considered on the basis of the trade capacity situation pertaining within its borders. Developing countries will finally not be treated as a generic group.

Part IV of the GATT, in paragraph 7 of Article XXXVI, calls upon the WTO to engage and collaborate with other international government bodies, organs and agencies of the UN system whose activities relate to trade and the economic development of developing countries. Ismail puts forward that such collaboration should also include collaboration on trade policy coherence with the other Bretton Woods institutions. It would also include a revival of UNCTAD to its former glory and effectiveness in championing the interests of developing countries.[235] In addition, Article 11:5 of the Marrakesh Agreement establishing the WTO, the WTO is called upon to engage with other international institutions to ensure greater economic policy coherence. These are the same institutions that are part of the AfT initiative. A partnership with these and other UN organisation plus the multilateral agencies could be structured in such a way that the funds for AfT are diverted to the WTO's Committee for Trade and Development which will them administer the funds according to a developed country's needs. The importance of 'appropriate studies' in this case cannot be overemphasised.

Other sources of funding for AfT could be the developed countries. Hoekman proposes that developed countries could make a legally binding commitment to transfer a share of the gains realised from trade liberalisation to developing countries. This could be a share of the revenue collected on goods that are due to be liberalised over time.[236]

[235] Ismail *Reforming the World Trade Organisation* 121.
[236] Hoekman *Finance and Development* 19.

4.5 Conclusion

The development crisis facing developing countries makes it an imperative that the WTO makes a priority of development concerns in the same way that it prioritises trade liberalisation and the regulation of trade. Development cannot be considered in isolated patches but needs to be approached as a whole if any effort is to be effective and the WTO cannot simply consider economic growth to be the end all of development.

The development objectives of the NAMA negotiations have been analysed in this chapter and found to be wanting. Trade liberalisation and market access imperatives took over the negotiations and the mercantilist nature of the negotiations did not help matters at all. It is clear that the development mandate of the NAMA negotiations will not be achieved through negotiations. The conditions currently prevailing ensure that there is no support for developing countries in their trade liberalisation process. Just as the liberalisation of the 1980s and 1990s failed, NAMA negotiations will lead to the same drastic consequences. The tariff cuts being proposed are radical but with no consideration of developed countries' developmental and technological needs. The NAMA modalities as they currently stand are not conducive for development, in whatever format. The modalities show that the negotiations have been strictly commercial, with developed countries also seeking enhanced market access in developing country markets. The constraints in flexibilities were probably aimed at the advanced developing countries such as Brazil, India and China, but, true to the nature of the WTO, there was no differentiation among developing countries. As a consequence, China and Botswana would implement the same modalities and be subject to the same flexibilities.

There has to be an alternative. The reform of SDT also seems to be deadlocked and it is not too farfetched to say that the issue of making SDT more effective and operational will not be resolved soon. The alternative is having all countries adopt trade liberalisation and market opening and have developing countries supported in their market opening initiatives. This support would be focused on remedying the supply side and other external and internal constraints that prevent developing

countries from achieving the full benefits of trade. This support is best embodied in the AfT initiative. SDT as it currently stands should be abandoned and replaced by AfT.

CHAPTER FIVE

CONCLUSION

The NAMA negotiations are circumscribed by a development agenda that is the hallmark of the whole Doha Round trade negotiations. This agenda seeks to address the developmental gap between developed and developing countries. This gap has created an imbalance in the multilateral trading system where the benefits of trade liberalisation are highly skewed in favour of developed countries. As a result, developing countries have become wary of trade liberalisation.

This wariness also stems from the disastrous trade liberalisation initiatives that some of the developing countries undertook during the rush of the Washington Consensus. Some of the trade liberalisation resulted in deindustrialisation and a reduction in the standards of living for the people of those developing countries. But, even before the trade liberalisation drives inspired by the Washington Consensus, there was a general uneasiness with trade liberalisation among the developing countries. The financial and technological differences between developed and developing countries create an economic vulnerability in the developing countries. This vulnerability makes these countries unable to withstand the competition from developed country imports. This is the basic rationale supporting SDT. SDT is supposed to give advantages to developing countries that would make them equal to developed countries.

In recognition of the economic vulnerability of developing countries, the WTO makes mention of development objectives in various provisions, although its primary function and purpose remains the removal of trade barriers and the regulation of international trade. A reading of the various provisions relating specifically to developing countries reveals that the WTO sees SDT as the primary vehicle to achieving development. SDT also serves to address the economic vulnerabilities of developing countries. To that end, the WTO has a number of SDT provisions that date back to the days of the GATT.

The development agenda in the NAMA negotiations can thus be pursued in the content of the various SDT provisions. This fact is also echoed in the NAMA negotiating mandate which calls for consideration of the special needs and interests of developing countries through the principle of less than full reciprocity. This less than full reciprocity is to be achieved through the vehicle of the various SDT provisions in the WTO. The development agenda in NAMA is therefore defined by the consideration given to SDT in the NAMA negotiations and outcome.

There is a problem, however, with such an approach. It is acknowledged that the concept of SDT as it currently stands is weak, hence the mandate of the Special Session of the Committee on Trade and Development to investigate the possibility of strengthening SDT provisions. The SDT provisions as they currently stand in the WTO are legally void and cannot be adjudicated in the DSB. They are therefore illusionary. The development agenda is thus based on an elusive concept whose content is not entirely tangible.

Nonetheless, an analysis of the NAMA modalities against the SDT provisions as they currently stand reveals that SDT has not been considered in these negotiations. The development agenda was thrown out of the window as developed countries sought for increased market access to developing country markets. While an effort was made in the 2004 Framework to link the ambition in NAMA to the ambition in agriculture, in an effort to ensure significant tariff cuts by developed countries, the NAMA modalities are not reflective of this. The flexibilities provided are severely limited and constrained by the anti-concentration clause and the attempts by developed countries to link sectoral negotiations to the flexibilities.

This research has identified a fundamental problem to the concept of SDT when it implies that trade liberalisation is bad for developing countries. This has contributed to an anti-trade liberalisation mindset that gets alarmist whenever there are tariff cuts to be made. It is found that, given the nature of the trade negotiations and the reciprocity involved, it is good to liberalise trade. The benefits of trade liberalisation have also been illustrated by the East Asian countries that benefitted greatly from opening up their markets. SDT should not seek to protect developing country markets entirely, but only to the extent that they are vulnerable and will benefit from such

protection. Such SDT should not be an exception but rather the norm. It has also been shown that the current inequities in the multilateral trading system are also the result of the non-reciprocal nature of SDT prior to the Uruguay Round.

In pursuance of trade liberalisation and the benefits of such, this paper proposes a new type of SDT. This SDT does not place emphasis on the protection of developing country markets as is done currently but rather emphasises trade liberalisation. It seeks to cure the market deficiencies that deter developing countries from benefiting from trade liberalisation. These are such constraints as supply side constraints, lack of adequate and appropriate infrastructure and trade and economic expertise, among others. It is a holistic approach that aims to assist developing countries to participate fully in the global trading system. This new form of SDT is embodied in Aid for Trade.

AfT will encourage fuller trade liberalisation from developing countries and strengthen the multilateral rules system. When developing countries are enabled to liberalise their tariffs, and are more willing to concede tariff reductions and eliminations, so will developed countries reduce their tariffs. This is especially with reference to products of export interest to developing countries. Trade liberalisation that is supported by domestic reforms in developing countries will enhance and strengthen the multilateral trading system.

The NAMA modalities do not support development because SDT in its current form prioritises market access in developed countries and protectionism in developing countries. This is only appropriate if there is no support for domestic reform that should accompany trade liberalisation. AfT remedies that. In pursuit of AfT therefore, a recommendation is made to abandon SDT in its current form and modify AfT to make it more fitting to the WTO.

Such modification would entail the WTO taking ownership of AfT in order to prevent donor interests and priorities overriding developing country interests and other concerns. The provisions in the WTO for collaboration with other international organisations should be effected and extended to multilateral organisations as well. The idea is that the funds that are used by such organisations and institutions to

mobilise AfT could be channelled towards the WTO. The WTO Secretariat would then be responsible for operationalising AfT and, it is appropriately placed for such a role.

When AfT has been subsumed by the WTO, only then can development be fully realised and it would not matter that the NAMA negotiations are gravitating towards onerous tariff reduction commitments for developing countries. Otherwise, currently, the development agenda has proven to be elusive in the negotiations hence it is almost non-existent in the NAMA modalities.

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