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Establishing a Legal Framework of Special and Differential Treatment under the WTO; Definitive Rights for Developing Countries

By

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DECLARATION

I, Mbakiso Magwape, hereby declare that the work contained in this thesis is my own original work and has not previously in its entirety or in part been submitted at any other university for a degree.

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ABSTRACT

Special and Differential Treatment (S&DT) under the World Trade Organization (WTO) has been pivotal in aiding Developing Countries adapt to WTO rules. S&DT provisions under WTO law, afford Developing Members favourable or preferential treatment over Developed Countries. The provisions currently spans across numerous Agreements on areas which include a number of broad categories, specifically; provisions aimed at increasing trade opportunities through market access, provisions requiring WTO Members to protect the interest of Developing Countries (protective measures), provisions on flexibility of commitments, provisions that allow longer transitional periods to Developing Countries, provisions on technical and financial assistance, and provisions specifically for Least Developed Countries.

Preferential treatment derogates from the fundamental WTO principle of non-discriminatory treatment. The provisions, scattered across numerous WTO Agreements and legal texts, have been of paramount importance in increasing Developing Countries' share of global trade. Notwithstanding the importance of the provisions, the current Multi-lateral Trade System (MTS) contains multiple, ineffective, non-specific, non-binding and complex S&DT provisions, which do not serve the original purpose envisioned by the developmental objective for Developing Countries under the WTO. This objective is to ensure that Developing Countries secure a share in the growth in international trade commensurate with their financial and economic development needs.

The inconsistent, non-binding and ineffective S&DT rules has resulted in little use and ineffective application of a considerable number of preferential provisions, which has resulted in low trade-gains for Developing Countries. There is currently no codified legal Framework for S&DT for Developing Countries under the WTO rules. Specifically, there is no established universal or dedicated Agreement or binding set of rules that establish the scope, extent of rules, application and modalities.

This thesis aims to establish a legal S&DT framework for Developing Countries in order to ensure the "precise, effective and operational" application of S&DT as it has been stated in Paragraph 44 of the Declaration of the 4th Session of the Ministerial Conference. It examines the development of the concept of S&DT under the MTS and various areas of international law. The thesis further establishes WTO objectives regarding S&DT, examines the provisions specifically as it pertains to trade in goods, and develops a conceptual framework for S&DT under the MTS. Such a framework, which attempts to create legally binding, precise, effective and operational S&DT, should be established in line with the existing S&DT provisions under WTO law and with regards to the definitive rights for Developing Countries. Definitive rights in this context refers to 'precise, effective and operational' rights for Developing Countries in exercise of S&DT, or Developed Countries in granting S&DT, under WTO rules. The outcome that this study seeks to produce, is to establish a codified universal Framework on S&DT that is legally justified under WTO rules and which takes into consideration the needs of Developing Countries.

The Framework is applied to the Economic Partnership Agreement between the Southern African Development Community and the European Union (SADC-EU EPA) as a means of testing the framework. The test is to establish whether the proposed framework redresses challenges under the current dispensation, and provides for effective and operational S&DT for increased trade growth for Developing Countries. The EPA is suitably structured to be used as a test due to the fact that it is a preferential trade agreement, notified under Article XXIV:7 of the GATT 1994, which subscribes to WTO trade rules. It also consists of different classifications of Members who are party to the EPA, namely Developed, Developing and Least-Developed Countries (LDC), the latter countries seeking to derive S&DT to increase their share in global trade.

ACRONYMS

AB	-	Appellate Body
ACP	-	African, Caribbean and Pacific
ADA	-	Anti Dumping Agreement
AEC	-	African Economic Community
AfCFTA	-	African Continental Free Trade Agreement
AGOA	-	Africa Growth and Opportunity Act
AoA	-	Agreement on Agriculture
AU	-	African Union
BNLS	-	Botswana, Lesotho, Namibia, and Swaziland
BELN	-	Botswana, Eswatini, Lesotho, Namibia
BRICS	-	Brazil, Russia, India, China and South Africa
CBDR	-	Common But Differentiated Responsibilities
COMESA	-	Common Market for Eastern and Southern Africa
CPA	-	Cotonou Partnership Agreement
CTD	-	Committee on Trade and Development
DFQF	-	Duty-Free-Quota-Free
DSU	-	Dispute Settlement Understanding
DSB	-	Dispute Settlement Body
EBA	-	Everything But Arms

EEC	-	European Economic Community
EDF	-	European Development Fund
EFTA	-	European Free Trade Agreement
EU	-	European Union
EPA	-	Economic Partnership Agreement
EU-ACP	-	European Union, African Caribbean and Pacific
FAO	-	Food and Agriculture Organization
FTA	-	Free Trade Agreement
GATS	-	General Agreement on Trade in Services
GATT	-	General Agreement on Tariffs and Trade
GDP	-	Gross Domestic Product
GSP	-	Generalized System of Preferences
ICESR	-	International Covenant on Economic Social and Cultural Rights
IEPAs	-	Interim EPAs
IP	-	Intellectual Property
IPR	-	Intellectual Property Rights
ITO	-	International Trade Organization
LDC	-	Least Developed Country
MFN	-	Most Favoured Nation
MTS	-	Multilateral Trading System
NTB	-	Non Tariff Barriers

OECD	-	Organisation for Economic Co-operation and Development
PTA	-	Preferential Trade Arrangement
REC	-	Regional Economic Community
RoO	-	Rules of Origin
RTA	-	Regional Trade Agreement
S&DT	-	Special and Differential Treatment
SACU	-	Southern African Customs Union
SADC	-	Southern African Development Community
SADC-EU EPA	-	Southern African Development Community European Union Economic Partnership Agreement
SCM	-	Agreement on Subsidies and Countervailing Measures
SSM	-	Special Safeguard Mechanism
SPS	-	Sanitary and Phytosanitary Measures
SVE	-	Small, Vulnerable Economies
TBT	-	Technical Barriers to Trade
TBTA	-	Technical Barriers to Trade Agreement
TFA	-	World Trade Organization Trade Facilitation Agreement
TRF	-	Trade Related Facility
TRIMs	-	Trade Related Investment Measures
TRIPS	-	Agreement on Trade Related Aspects of Intellectual Property Rights
UN	-	United Nation

UNCTAD	-	United Nations Conference on Trade and Development
UNFCCC	-	United Nations Framework Convention on Climate Change
UNECA	-	United Nations Economic Commission for Africa
US	-	United States of America
WTO	-	World Trade Organization

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CHAPTER 1: INTRODUCTION TO THE THESIS

1.1 Research Statement

S&DT is an exception to the WTO rule regarding non-discrimination, that provides Developing Countries with preferential treatment over Developed Countries. The provisions are incorporated into WTO Agreements, Decisions and texts. S&DT has been pivotal in aiding a majority of Least Developed Countries and Developing Countries in adapting to World Trade Organization Rules. The provisions have been of paramount importance in increasing Developing Countries' share of global trade. S&DT provisions have evolved throughout the existence of the Multilateral Trade Systems. This has resulted in the increased recognition, concretisation and multiplication of S&DT provisions in WTO and Regional Trade Agreements alike.

There is currently no codified legal Framework for S&DT for Developing Countries under the WTO rules. Further, there is no established universal or dedicated Agreement or binding set of rules that establish the scope, extent of rules, application and modalities. The failure to clarify S&DT rules under the WTO, and lack of an established Framework of S&DT has resulted in clouded interpretations of the extent and exact nature of S&DT under the MTS. The thesis will argue that this is prejudicial against Developing Countries which are heavily reliant on S&DT to increase trade. The need for "precise, effective and operational" S&DT has been stated in Paragraph 44 of the Doha Declaration.[1] This is an acknowledgement of the shortcomings of S&DT under WTO law as affirmed by both Developed and Developing WTO Members. These sentiments have been strongly argued by WTO Developing Countries in WTO negotiations, particularly in the Doha Development Agenda, and echoed by legal and economic scholars. This shortcoming serves as the premise and justification for this study.

[1] World Trade Organization *Ministerial Declaration of 14 November 2001* WT/MIN(01)/DEC/1 (*Doha Declaration*).

There is a need for scholarly research in establishing an S&DT legal framework. Such a framework should be able to establish existing S&DT under WTO law and attempt to create legally binding precise, effective and operational S&DT. The outcomes that this study seeks to produce, is to establish a codified universal Framework on S&DT that is legally justified under WTO rules and which takes into consideration the needs of Developing Countries. This paper shall draw on WTO Agreements, WTO Ministerial Decisions and Declarations, international treaties, and WTO case law (specifically in the area of trade in goods) as sources. It will also analyse reports and documents from International Organisations (in addition to WTO Reports) such as the World Bank and IMF journals, books and legal writings.

WTO rules (particularly S&DT) do not apply evenly to all WTO Members, as Countries are treated in accordance with their respective self-designated categories, specifically as; LDCs, Developing Countries and Developed Countries, as will be expounded under Chapter 2. S&DT under WTO Rules also do not apply equally to all Developing Countries, as will further be examined under Chapter 4. This poses challenges to developing a Universal Framework for S&DT under WTO rules, due to the fact that differing levels of preferential treatment under WTO rules have created a complex web of diverging S&DT for WTO Members.

1.2 Research Objectives

The objective of establishing/developing a legal S&DT Framework is twofold, as follows:

1) to identify the current S&DT principles, and examine their deficiencies and effective provisions under the MTS; and
2) to develop a legal Framework that is legally consistent with the requirements of the MTS and the that can be operationalized in RTAs at international law level.

In developing the legal Framework, emphasis shall be placed on ensuring S&DT is precise, effective and operational and is aligned with the needs and developmental objectives of Developing Countries, in line with the Doha mandate. The overriding objective of establishing a framework on S&DT is to establish a broad system of rules that govern and regulate S&DT. The rules should address pivotal issues such as how S&DT should/can be applied, which states can apply it, and rights and obligations of WTO Members who seek to enforce it. Further rules should establish which parties are expected to make concessions as well as the establishment of a dispute settlement mechanism linked to the existing one regarding violations of possible S&DT.

The Framework would have to be legally compatible at the level of international law with other Treaties, and RTAs which relate to trade in goods. The Framework would have to be able to be applied at RTA and bilateral levels between WTO Members. Bilateral Agreements and RTAs are the most prevalent trade agreements that Developing Countries utilise and gain preferential treatment from. They have also been the most effective Trade Agreements utilised to carry-out Developmental objectives of Developing Countries, despite the requirement that they have to be WTO compliant. It is, therefore, necessary and prudent that an RTA be utilised as the test against which the Legal Framework (the hypothesis) be applied so as to determine whether it succeeds in delivering the anticipated objective/outcomes.

1.3 Limitations of Study

The first limitation involves the lack of information on SADC Members' trade policies and the unwillingness to disclose issues particularly pertaining to domestic trade policy. A considerably low number of SADC Members has codified or up-to-date trade policies (examined under section 6.2.1 of the thesis). This was particularly apparent in the case of LDC Members, particularly Lesotho and Mozambique. This is also the case, with Eswatini. The Author attempted to source such trade policy online, and directly through requesting for documentation from counterparts from various SADC Members. In some instances,

trade policy was not developed, and in others there was an unwillingness and discomfort in the disclosing of or providing information relating to this from three SADC Members. The Author was only able to source two trade policy documents, specifically from Botswana and South Africa, cited in chapter 6 of this thesis.

The limitation, therefore, relates to the fact that it is a core component of this study to establish SADC Members' trade needs in order to determine whether the S&DT Framework would adequately address such needs (and Developing Countries in general). The most fundamental method of determining trade needs and objectives at a national level is through a Country's trade policy. This limitation often required the author to study academic work pertaining to the economy of the Members, World Bank data and studies to establish trade Objectives. This sufficiently added context to Members' trade requirements (chapter 5 and 6 of this thesis) to establish the trade needs and objectives of SADC Members.

The second limitation emerges from the wide scope of S&DT across international law and the need to narrow the scope in order to undertake a comprehensive study. The limitation of the study is the inability to examine S&DT in its entirety in other disciplines (save for a contextual study done in chapter 2 of S&DT under various international law disciplines). S&DT cuts across various legal and economic international disciplines and does not only exist under international trade and economic law, as will be examined under the next chapter. S&DT under equity and human-rights has gained traction through the argument for preferential treatment for disadvantaged groups, advocated by legal scholars from a restorative and moral perspective.[2] Under politics, S&DT presents an opportunity to involve Developing Countries in the participation, administration and involvement of international law and the WTO.

[2] P Cullet 'Differential Treatment in International Law: Towards a new Paradigm of Inter-State Relations' (1999) 10(3) *European Journal of International Law* 573. In an examination of equity, morality and the concept of S&DT, Cullet noted that "[…] differential treatment also refers to various situations where equity, justice or moral considerations lead to the adoption of solutions which constitute a departure from normal legal arrangements".

The scope of S&DT in this research is limited to trade in goods under the WTO and excludes S&DT under Trade in Services and the DSB as established under the WTO Dispute Settlement Understanding Agreement.[3] This is primarily due to the fact that the scope of S&DT relating to trade in goods is already wide, containing multiple detailed Agreements under the WTO relating to goods and S&DT and a plethora of case law related to the Agreements, therefore, also exists. This approach [focusing on trade in goods] enables undertaking comprehensive legal analysis of key texts relating to S&DT and maintaining relevant context. The exclusion of examining S&DT under the DSU means considerations regarding enforcement of rights relating to trade in goods will not be considered in depth. Trade in Services would require a separate study in order to adequately examine the background and development relating to the WTO agenda on trade in services since its incorporation into the WTO law in 1995. Although its rules are considerably similar to trade in goods, the contextual applications are considerably different.[4] The DSB on the other hand, which this study partially examines, contains detailed rules under the DSU,[5] a plethora of WTO case law, and much legal scholarly writing that analyse controversies in recent years.[6] However, explaining the topic would require a considerable review of the DSU mechanism as well as current issues surrounding it and further establishing legal framework rules regarding dispute settlement and S&DT would constitute a study or thesis on its own. The DSB, therefore, will not be examined in detail.

[3] World Trade Organization *Understanding on Rules and Procedures Governing the Settlement of Disputes* Annex 2 of the WTO Agreement 1995 (DSU Agreement).

[4] World Trade Organization *General Agreement on Trade in Services* 1995 (GATS Agreement). While the GATS shares similar objectives with the GATT and trade in goods, such as creating a credible and reliable system of international trade rules, ensuring fair and equitable treatment of all participants (principle of non-discrimination), stimulating economic activity through guaranteed policy bindings, and promoting trade and development through progressive liberalisation, there are considerable divergences in nature. GATS contains concepts on modes of supply, cross-border trade, consumption abroad, commercial presence, and presence of natural persons. It also contains unique schedules and exemption lists unique to services (contained in protocols) and it focuses on areas unique to services such as Financial Services, telecommunications and Airt Transport services through its annexes.

[5] *DSU Agreement* (n 3 above).

[6] Criticism emanates primarily from the US, which pre-dates Donald Trump's administration, regarding procedural as well as substantive aspects of the work and decisions of the DSU. Its main concern is about the alleged "overreach" of WTO panels and the AB. It cites Article 3.2 of the DSU and claims that WTO adjudicating bodies must interpret WTO law and refrain from law-making. https://www.tralac.org/blog/article/13530-the-crisis-in-wto-dispute-settlement.html (accessed 21 March 2020). Also see https://www.washingtonpost.com/politics/2019/12/11/world-trade-organization-may-no-longer-hear-trade-appeals-thats-problem/ (accessed 21 March 2020).

The shortcomings that emerge from narrowing the scope of study is that other approaches to S&DT under international law and provisions under Trade in Services and the DSB will not be used in the conceptualisation of a new improved Framework. The excluded provisions and approaches would be envisaged to contain unique elements or pertinent modalities, which may add to the body of the Framework. The primary justification to limitation is that of ensuring that the scope of the study is sufficiently narrow enough to comprehensively undertake, as the concept of S&DT in trade in goods is considerably wide and detailed in itself, spanning across multiple WTO Agreements and rounds of negotiations.

Despite limiting the scope of the study to trade in goods, S&DT as a concept will be examined in chapter 2 in various contexts (such as intellectual property and environmental law) in order to contextualise the principle and its application. This is to mitigate the limitation and consider various approaches without extending beyond the core scope of the study.

1.4 Significance of the Study

The development of a Framework of S&DT under the WTO rules will contribute to the effort of Developing Countries and SADC EPA States to increase their share of global trade by creating a legally justifiable tool for the application of S&DT, which can be concretised. Further, it will add to trade law scholarship in the understanding of how a Framework on S&DT can assist in guiding both Developed and Developing Countries in complying with WTO rules within RTAs.

The novelty of this study can be found within the Framework itself, and in its unique approach in attempting to resolve the unclear application of S&DT. The unique nature of the framework itself is that it is focused on synthesising a legally binding theoretical outline of WTO case-law on S&DT and WTO Trade Agreements from older non-progressive S&DT texts under the previous MTS with the most current agreement, specifically the TFA. Further, the writer's Southern-perspective shapes the interpretation of S&DT under the above-

mentioned WTO law and cases in order to attain progressive, pro-south development objectives.

A Legal Framework on S&DT which is "precise, effective and operational" is needed to establish concretised preferential rights for Developing Countries, SADC included. The hope is that this thesis will contribute towards the landscape of trade by securing the rights of Developing Countries under WTO law. This, in turn, shall effect the development of Developing Countries, including SADC Members, and it therefore supports the need for research in this area.

1.5 Starting Points / Assumptions

a) S&DT provisions afford Developing Countries the right to favourable/preferential treatment over other WTO Members, and the Developed Countries the ability to treat Developed Countries more favourably.[7]

b) S&DT is an essential component of the WTO objective of integrating LDCs and Developing Countries in the global economy.[8]

c) There is no universal binding legal Framework or Agreement on S&DT under WTO rules.[9]

d) There is a lack of established, clear and precise S&DT terms and conditions under WTO rules.[10]

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[7] S&DT provisions grant trade preferences to Developing Countries and LDCs respectively, with the latter securing more rights. Preferential provisions break away from MFN rule which is predicated on equality of Members. The Enabling Clause, which forms the basis of most, also concretises exemption from MFN treatment for GSPs and preferential Trade Agreements between Developing Countries. This will be further examined in section 1.7 below.
WTO website https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (accessed 19 November 2020).

[8] A Behar 'The impact of North-South and South-South Trade Agreements on bilateral trade' (2010) F.R.E.I.T Working paper 4. Behar states that "Trade Agreements over the last two decades have been the most common and influential method used to integrate developed countries into the global market, and to liberalise trade".

[9] Doha Declaration (n 1 above) para 44. Members agreed to look into the feasibility of concluding a S&DT Framework Agreement in cognisance of the absence of one.

[10] Doha Declaration (n 1 above) para 44. Members at the Doha Declaration recognised the ineffectiveness of the Doha Declaration at Paragraph 44 by stating that "[…] We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries". Under the current MTS, S&DT has developed without a deliberate structure, resulting in provisions that lack enforceability due to vague, complex requirements or lack of binding drafting. Chapter 3 will show how this is prejudicial to Developing Countries which are heavily reliant on them to increase trade. Members are unable to utilise provisions meant to integrate Developing Countries in the MTS and increase trade.

e) North-South RTAs are an important method of integrating LDCs and Developing Countries in the global economy, particularly with respect to market access for South States goods.[11]

f) RTAs between WTO Members should be compliant with WTO rules, particularly on S&DT.[12]

g) A framework on S&DT would secure and solidify preferential conditions for Developing Countries which can be utilised in RTAs.[13]

1.6 Research Questions

The research questions which this study aims to address are the following;

Question 1

Is there a need for a WTO legal Framework on S&DT for Members, particularly Developing Countries?

Question 2

To what extent is S&DT under WTO Agreements, Ministerial Decisions and Declarations enforceable, operational and clear (unambiguous)?

Question 3

[11] R Acharya *Regional Trade Agreement and the Multilateral Trading System* (2016) 99 and 166 noted that North-South RTA's feature more prominently then they did a decade ago, with South members seeking market-access. Further, it was stated that the relevance of the RTA was identified as to whether the products of greatest export interest are covered by the RTA, and highlighted gains made by Developing Countries.

[12] World Trade Organization *General Agreement on Tariffs and Trade* (1994) (GATT 1994): RTA's under the WTO are to be complaint with Paragraphs 4 to 10 of Article XXIV of GATT 1994 (as clarified in the Understanding on the Interpretation of Article XXIV of the GATT 1994) that provide for the formation and operation of customs unions and free-trade areas covering trade in goods and interim agreements leading to one or the other; AND
Paragraph 2(c) of the Enabling Clause (i.e. the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries) that refers to preferential trade arrangements in trade in goods amongst developing country Members.

[13] World Trade Organization *Proposal for a Framework Agreement on Special and Differential Treatment* (19 September 2001) Communication Preparations for the Fourth Session of the Ministerial Conference, WT/GC/W/442 para 12 (WTO Proposal for a Framework Agreement on Special and Differential Treatment). One of the primary objectives in developing the framework is to ensure that "[…] The implementation should go beyond technicalities and include operationalisation of provisions that presently lack operational modalities". Implementation of S&DT would ensure LDC's and Developing Countries can apply the preferential treatment which can be utilised and applied to RTA's.

Can a proposed Framework on S&DT aid in concretising and clarifying S&DT under the WTO rules?

Question 4

To what extent will a legal Framework on S&DT benefit Developing Countries which are party to RTAs?

Question 5

Can a Framework on S&DT assist SADC EPA States in attaining specific developmental goals?

1.7 Background and Motivation

1.7.1 Summarised Background and Development of S&DT

In order to develop a legal S&DT framework pertaining to trade in goods, it is necessary to establish the birth, development and evolution of S&DT under the various MTSs. This is important for purposes of identifying the objectives, strategies and context that S&DT emerged under and which shaped its current construction under WTO rules today. This contextual understanding of the objective and construct of S&DT under WTO rules will influence arguments made in this study regarding establishing a legally enforceable Framework under WTO law. Below is a summary of the development of S&DT, which will be examined in more detail in chapter 2 of this thesis.

S&DT emerged as a concept under international law and exists under numerous disciplines. Under the WTO, regarding trade in goods, it gained prominence particularly due to growing voices by South-States who lamented inequality imposed by the previous and current MTS. Under Intellectual Property Law, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) enshrined preferential treatment for LDCs with particular reference to transition time periods, and adjustment to new rules by Developing Countries.[14] S&DT

[14] World Trade Organization *Agreement on Trade Related Aspects of Intellectual Property* (1995) as amended in 2005 (TRIPS). The notable S&DT provisions regarding transition periods can be found through transitional arrangement rules at Article 65 (for Developing Countries) and Article 66.1 (LDCs) delaying application of the Agreement. This aspect will be further examined in Chapter 2 of the Thesis.

provisions have also emerged in International Environment Law in Multilateral Environmental Agreements (MEA) and in Trade in Services.

The provisions have been utilised since the first MTS in advancing and ensuring growth in trade in Developing Countries. The WTO's predecessor, the General Agreement on Tariffs and Trade (GATT)[15] system responded to the inequality among WTO member countries by creating a set of rules, namely S&DT provisions, which "permit specially favourable trading treatment to support the participation of Developing Countries, even though equality of treatment is a central principle and objective of WTO law".[16] The practice of according special treatment to Developing Countries goes back to at least 1955.[17] However, the term "special and more favourable" treatment first appeared in the 1979 Tokyo Round Decision.[18]

S&DT provisions go against the WTO's most fundamental principle, namely the Most-Favoured-Nation clause, which is a "cornerstone of the GATT and one of the pillars of the WTO trading system".[19] S&DT provisions are exceptions that allow for preferential treatment of Developing Countries. In establishing a Framework for S&DT under WTO rules, it is imperative to note that S&DT provisions can generally be classified into six main groups namely:

i) provisions aimed at increasing trade opportunities through market access;[20]
ii) provisions requiring WTO Members to safeguard the interest of Developing Countries;[21]

[15] *General Agreement on Tariffs and Trade*, 1947 (GATT 1947).
[16] G Moon 'Trade and inequality: A relationship to discover' (2009) Oxford University Press 1.
[17] U Ewelukwa 'Special and Differential treatment in international Law: A concept in Search of Content' (2003) 79 *North Dakota Law Review* 833.
[18] World Trade Organization *Decision of November 18, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, BISD, 26th Supp. 203 (1979) (*the Enabling Clause*).
[19] *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* adopted 7 April 2004 Appellate Body Report WT/DS246/AB/R (EC - Tariff Preferences) para 101. The MFN principle is found in Article I:1 of the GATT. The Most Favoured Nation guarantees equal trading opportunities to that accorded to the most-favoured nation. It is essentially a method of establishing equality of trading opportunity among WTO Members.
[20] *The Enabling Clause* (n 18 above). The Enabling Clause provides for preferential market access for Developing Countries on a non-reciprocal and non-discriminatory basis. Most Developing Countries also enjoy access to developed country markets under non-binding, non-reciprocal preferential schemes. Better market access for products from Developing Countries to increase economic development through exports.

iii) provisions allowing flexibility to Developing Countries in rules and disciplines governing trade measures;[22]

iv) provisions allowing longer transitional periods to Developing Countries;[23]

v) provisions for technical and financial assistance;[24]

vi) provisions related to Least Developed Country Members

Some categories cut into others, such as S&DT relating to preferential provisions on tariffs,[25] which can be either market access related or flexibilities. It is important to note that S&DT evolved from serving as a development tool under the previous MTS[26] into an adjustment tool to better integrate Developing Countries into the WTO legal Framework.[27] Under the

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[21] World Trade Organization *The Agreement on Safeguards* 1994 (*Agreement on Safeguards*). The AS is the primary WTO text that accords S&DT to Developing Countries, as will be examined under Chapter 3. The Agreement on Safeguards builds on Article XIX of the GATT 1994 (often referred to as an escape clause) which provides for emergency action on imports of increased quantities that cause or threaten serious injury to domestic producers.

[22] Flexibility in this context refers to S&DT provisions that accord rights to Developing Countries to derogate from the general application of certain WTO rules. There are multiple flexibility provisions spread across numerous WTO Agreements which will be examined, particularly under Chapter 3.

[23] The WTO Agreement with regards to the Application of Sanitary and Phytosanitary Measures and Article 12.8 of the WTO Technical Barriers to Trade Agreement (TBT Agreement) authorise the respective committees to grant Developing Countries exceptions for a specific period of time from obligations, in whole or in part, under the agreements. The WTO Agreement on Subsidies and Countervailing Measures (SCM) have extended the time periods during which Developing Countries, meeting certain criteria, relating to their level of GNP and export competitiveness have been allowed to use export subsidies. Further LDC's has transition times extended twice in order to comply with the TRIPS Agreement (n 14 above) and that period has been extended twice (TRIPS Council on 11 June 2013), the transition period has now been extended until 1 July 2021.

[24] World Trade Organization *Agreement on Trade Facilitation* 2017 (*TFA*). Section II embodies a new approach to the provision of technical assistance by establishing a link between the obligations of Developing Countries on the one hand, and their implementation capacity on the other hand. Further, the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU (n 3 above)) provides provisions that take special consideration of developing country or LDC concerns, or allow for flexibility in dispute settlement procedures to take account of resource constraints in these countries. There are also the WTO's technical assistance programmes that aim to address many of the capacity challenges facing Developing Countries in the WTO.

[25] World Trade Organization *Agreement on Agriculture*, 1994 (*AoA*). This is one such agreement which provides for preferential treatment for Developing Countries. Under the AoA, Developed Countries were to reduce import tariffs by 36% (across the board) over a six year period with a minimum 15% tariff reduction for any one product. Whereas Developing Countries are to reduce import tariffs by 24% (across the board) over a ten year period with a minimum 10% tariff reduction for any one product. Further, GATT's Article XXVIII takes into consideration the needs of less-developed countries on a product by product basis for a more flexible use of tariff protection to assist their economic development.

[26] M Tortora 'Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet' (2003) *UNCTAD* WEB/CPD/BKGP/16 5. It was argued that S&DT was used as a development tool by allowing flexibility in the use of tariffs and quotas in case of balance of payments crises affecting the local industries (article XVIII of the GATT 1947, article XXVIII), and by helping Developing Countries' exports to compensate their difficulties in acceding to international markets (non-reciprocity in the tariff reductions and generalised systems of preferences as provided by the GATT Part IV of 1964 and the Enabling Clause of 1979).

[27] The Uruguay Round's application of S&DT provisions applied to the "within-the-borders" trade agenda as an adjustment tool to the Developing Countries in order to modify their laws and economic policies to comply with the new trade rules – taking for granted that these rules will automatically be beneficial for their development. This position was posed by Tortora M (n 26 above), who argues that instead of aiming at developing a local productive capacity, the existing WTO S&D measures aim at developing legal and institutional Frameworks that suit the agreed trade obligations.

previous MTS (GATT 1947), S&DT was used as a "development tool" through the process of allowing flexibility in the use of tariffs and quotas in case of balance of payments crises affecting the local industries (Article XVIII and Article XXVIII of the GATT 1947). It further helped the exports of Developing Countries in compensating for their difficulties in acceding to international markets (non-reciprocity in the tariff reductions and generalised systems of preferences as provided by the GATT Part IV of 1964 and the Enabling Clause of 1979). The Enabling Clause provides for preferential market access for Developing Countries on a non-reciprocal and non-discriminatory basis, Paragraph 2(a) provides that the preferences must be "non-discriminatory" and '"non-reciprocal".[28] The transition of S&DT's use as an "adjustment tool" in this context, is with regards to aiding Developing Countries in adjusting to the WTO core mandate of trade liberalisation. This is through enhancing their capacity to not only attain WTO goals but to also take advantage of new markets opened through preferential agreements. S&DT, therefore, have become measures to ensure structural adjustment of Developing Countries in the current MTS and is used as a development strategy by WTO Members.

Developing Countries were dissatisfied with the Uruguay Round Agreements, particularly with regards to "Implementation Issues"[29] as the round failed to "provide equitable access for the products of developing countries in developed country markets, created greater burdens upon Developing Countries and eroded their policy space".[30] S&DT has now been touted as "part of the WTO's legal 'acquis'"[31] and has been described as "the most basic principle of the international law of development" in WTO case law.[32] Despite the increased recognition of S&DT at the level of international law and under the current MTS, its construct and legal enforceability remain unclear.

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[28] The Enabling Clause (n 18 above)Paragraph 2(a).

[29] World Trade Organization Website http://www.WTO.org/english/theWTO_e/minist_e/min05_e/brief_e/brief18_e.htm (accessed 5 July 2018). The implementation issues before ran across the spectrum of the WTO Agreements, covering 23 specific issues such as market access, balance of payments, trade-related investment measures, trade-related intellectual property, customs valuation, safeguards, agriculture and services. Developing Countries have raised implementation issues as a means of addressing perceived inadequacies and inequities in the WTO Agreements, including the timeframes in which Developing Countries were to have implemented the accords into national laws, regulations and practices.

[30] F Ismail 'Mainstreaming Development in the WTO, Developing Countries in the DOHA Round' (2007) *CUTS International* 1.

[31] D Bethlehem, D McRae, R Neufeld & I Van Damme *The Oxford Handbook of International Trade Law* (2009) 484.

[32] *EC - Tariff Preferences* (n 19 above) at para 14.

S&DT differentiation operates according to classification of Members. Differentiation of Members is a key concept in the principle of S&DT. The WTO recognises three classifications of Members based on their respective levels of development, namely Developed Countries, Developing Countries and Least Developed Countries. There is no WTO Agreement or legal text provision that defines these groupings or establishes a criterion for these particular groupings to subscribe to, save for LDCs. Members instead declare or announce themselves as falling within one of the three categories, which has been in practice since the inception of the WTO.[33] LDCs are classified and recognised by the WTO as such based on a list of countries set out by the United Nations. The list is compiled according to a low income criterion, a human resource weakness criterion, and an economic vulnerability criterion.[34] The continued use of this system has recently raised controversies, particularly regarding the issue of graduation regarding emerging economies like China and Brazil and whether the Members should continue to enjoy special treatment under the WTO system. This argument will be examined further in chapters 4 and 6.

Developing Countries and LDCs are eligible to receive S&DT under the WTO from Developed Countries. LDCs are also eligible to receive preferential treatment from Developing Countries. LDCs under the WTO dispensations receive substantially more S&DT on a wide range of Agreements and areas such as market-access, transitional periods and assistance, as will be shown in chapter 3, particularly in the examination of provisions. For the purposes of making the reading of the study easier and for clarity, when referring to both Developing Countries and LDCs, the phrase 'Developing Countries' will be used. However, where a distinction is made between Developing Countries and LDCs, the abbreviation 'LDC' will be specifically referenced.

1.7.2 The need for a Framework for S&DT; Motivation

[33] A Mitchell & T Voon 'Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over?' (2015) 15 *Global Governance* 352.
[34] United Nations *Committee for Development Policy Report on the Sixth Session* (29 March–2 April 2004) 15.

After the lack of success in meeting the S&DT agenda as well as the general dissatisfaction with the Uruguay Round Agreements (as stated above with regards to 'Implementation Issues'), Developing Countries emphasised the need to reach an Agreement on a large number of S&DT proposals that they put on the negotiating agenda at the Doha Ministerial Conference in the first few years of the Doha Round. These were proposals which called for existing S&DT provisions to be made more precise, mandatory and operational.[35]

Calls for a Framework on S&DT to concretise and make S&DT legally enforceable under the WTO system have been repeatedly made by Developing Countries and LDCs. In September 2001, during the preparations for the Fourth Session of the Ministerial Conference (the Doha Round), a communication from a number of Developing Countries[36] called upon the WTO and its members to "elaborate a framework/umbrella agreement on S&D treatment which should include provisions reflecting the objectives and principles of S&D treatment for Developing Countries".[37] The Framework Agreement on S&DT proposed by Developing Countries in the Doha Development Agenda[38] suggested that areas of focus should be *inter alia*;

- mandatory and binding S&DT through the WTO dispute settlement system;
- a reconciliation of the S&DT regime with development targets, for instance, those identified by the United Nations General Assembly Millennium Declaration;
- transition periods linked to objective economic and social criteria.

Southern Members have ventilated their concerns that "Agreements reached on market access and rules must address the interests and concerns of Developing Countries".[39] By examining the current WTO set-up on S&DT, this study will attempt, in chapter 4, to identify

[35] At the Doha Ministerial Conference of 2001, Developing Countries tabled 88 S&DT proposals for review, which members eventually narrowed to five main proposals which relate to S&DT for LDC's. The proposals included, but were not limited to, DFQF market access for LDC's and Aid-for-trade in respect of financial and technical assistance.
[36] Specifically, Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe.
[37] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above).
[38] Doha Declaration (n 1 above). Countries which tabled the proposal were Cuba, the Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe.
[39] Doha Declaration (n 1 above).

the legal force of S&DT provisions that Developing Countries and LDCs (SADC in particular) can utilise to address developmental needs and the shortcomings thereof.

A cursory examination of WTO rules reveals a wide net of S&DT provisions that cuts across numerous WTO Agreements as well as other International Agreements. As stated earlier, in this chapter, the scope of the discussion will be limited to S&DT to trade in goods in order to establish a narrow and specific focus in order to develop a substantively sound framework within the discipline. Whilst a general framework on the interpretation of S&DT would partially aid in outlining rights for Developing Countries, this would fully meet the objectives set out under Paragraph 44 of the Declaration of the 4th Session of the Ministerial Conference to create "precise, effective and operational" S&DT. By focusing on the specific area of trade in goods, Developing Countries will be able to affirm specific rights relating to their needs regarding trade in goods. S&DT in other areas such as intellectual property and environmental law will be examined in the introductory segment to the extent that it contextualises S&DT as a concept and tool.

There are S&DT provisions in WTO Agreements, particularly in the GATT, that are drafted in peremptory language and which lacks specificity. This prevents Developing Countries from making use of these sweeping general provisions. Part IV of the GATT contains numerous such provisions. The sub-chapter on Trade and Development makes reference to "positive efforts" to ensure LDCs secure a share in International trade.[40] It does not state the parameters or specific "efforts" which Developing Countries can take to bolster trade in their countries. Many S&DT provisions across numerous WTO Agreements take similar form and will be examined in detail in chapter 3. This formulation developed without a deliberate structure for S&DT results in S&DT lacking enforceability due to vague and complex requirements or lack of binding drafting. This is prejudicial against Developing Countries which are heavily reliant on them to increase trade. In order to redress the current challenge, existing S&DT provisions and future provisions will require a deliberate change in form and substance. A framework Agreement setting out specific minimum requirements,

[40] GATT 1994 (n 12 above) Article XXXVI:3.

modalities and structured S&DT provisions may potentially be the solution to address the current challenges in the provisions under the present MTS.

1.7.3 Developing a Framework for S&DT

In developing a legal S&DT framework, the study shall firstly identify and examine S&DT provisions under the WTO law, which includes WTO Agreements, WTO Ministerial Decisions and Declarations. Ministerial Declarations, which are not binding sources under the MTS, will also be utilised to interpret S&DT commitments under WTO and will be used as guiding authority to adopt interpretations of the above Multilateral Agreement.[41] This is in accordance with Article IX:2 of the WTO Agreement.[42] These Declarations shall be utilised as soft law,[43] which has persuasive legal effect to WTO members if adopted by three-fourths of Members.[44] This is the position elucidated in the WTO Appellate Body report *US–Clove Cigarettes* case.[45] Interpretation of the S&DT provisions through decisions by the DSB shall also be utilised as they establish the legal implications/effect on WTO Members. This is important for examining the landscape of binding S&DT provisions existing under Trade in goods. This shall be discussed in chapter 3.

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[41] *United States – Measures Affecting the Production and Sale of Clove Cigarettes* adopted 24 April 2012 (Appellate Body) DS409 (*US – Clove Cigarettes*). The case explicitly declares that Ministerial Decisions as referred in Article IX:1 of the WTO Agreement cannot be used as a binding interpretation as provided for in Article IX:2 of the WTO Agreement, unless explicitly referred or procedure envisaged therein is followed. Ministerial decisions and declarations within the meaning of Article XVI:1 of the WTO Agreement could provide "guidance" to the WTO. The Marrakesh Agreement establishing the World Trade Organization under Article II:2 states that "The WTO shall provide the forum for negotiations among its Members […] and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference". Article VI: 1 states that "[….] The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement".

[42] World Trade Organization *Agreement Establishing the World Trade Organization* (1994) (*The WTO Agreement*). Article IX:2 provides that The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.

[43] These are Quasi-legal instruments which do not have any legally binding force. According to Article IX:2 The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.

[44] *US-Clove Cigarettes* (n 41 above) para 251. The Appellate Body distinguished between authoritative interpretations and Ministerial decisions or declarations. The Court (Appellate Body) pointed out that Article IX:2 of the WTO Agreement sets out two specific requirements for the adoption of authoritative interpretations:

(i) A decision by the Ministerial Conference or the General Council to adopt such interpretations shall be taken by a three-fourths majority of Members; and

(ii) such interpretation shall be take on the basis of a recent recommendation by the Council overseeing the functioning of the relevant Agreement.

[45] *US-Clove Cigarettes* (as above) para 251.

The study shall also identify effective S&DT provisions, as well as examine deficiencies, limitations and/or challenges in the provisions throughout the MTS. This is undertaken by grouping S&DT provisions in the MTS and categorising them based on common attributes that the provisions share due to the way the provisions are drafted, under the following categories;

- Clear and enforceable S&DT provisions;
- Vague or unclear S&DT Provisions;
- S&DT provisions that lack specificity or detail, rendering them un-implementable and un-enforceable at [WTO] law; and
- Non-peremptory S&DT provisions drafted in non-obligatory language;
- Complex S&DT provisions which are difficult for Developing Countries to implement.

This is undertaken in chapter 3 of this thesis, and the challenges above will assist in developing and strengthening the framework.

The substantive and structural strengths and weaknesses in S&DT examined under Chapter 3, and applicable WTO law examined under S&DT cases shall be used in the construction of a conceptual Framework. The primary objective in developing this framework, undertaken in chapter 4, is to ensure that the S&DT framework subscribes to WTO developmental (and other fundamental trade) objectives and trade rules, and addresses challenges and shortcomings of S&DT (as identified in chapter 3 of this thesis). The hypothesis of this thesis, therefore, is the rationalisation that a legal Framework is required, and the contents of the Framework are the result of the hypothesis. Approaches and considerations on the structure and substance of S&DT are considered in developing a S&DT Framework. The Framework on S&DT should address Developmental needs of SADC Developing states by establishing “precise, effective and operational” S&DT provisions that enables them to attain trade objectives regarding trade in goods.

The working hypothesis shall then later be tested on the SADC-EU EPA to determine whether the Framework successfully secures trade SADC trade goals and offers clarity with

regards to S&DT therein, and attains the objectives identified. It is necessary to establish the "test" that the Framework will be applied to and justify its selection. Regional Trade Agreements (RTAs) have emerged as vehicles that Developing Countries have successfully utilised to advance trade and development agendas, liberalise trade[46] and attain preferential treatment from North Countries.[47] The SADC-EU EPA is no exception to this trend, with SADC EPA States enjoying preferential treatment to better integrate themselves in the global economy.[48] Justification of the EPA as the test is established in chapter 5. The testing of the Framework is undertaken in chapter 6 of the thesis.

The thesis shall conclude by providing a summary of the findings from the preceding chapters, particularly whether and to what extent the S&DT Framework addresses SADC, as well as the developmental issues and opportunities and shortcomings and challenges the Framework presents. Conclusions will also be made about the effectiveness of the structure and substance of the Framework. The Concluding chapter shall also endeavour to answer questions raised at the beginning of this research, specifically whether the proposed Framework on S&DT aid in concretising and clarifying S&DT under the WTO rules and whether the Framework on S&DT is able to assist SADC EPA States in attaining specific developmental goals.

1.8 Literature Review

The literature review is predominantly constructed from journal articles and books on international law and International Trade Law. Literature is predominantly from legal sources, however, some economic journals and sources from leading International Trade

[46] Doha Declaration (n 1 above) para 4. The WTO Members recognised that "regional trade agreements can play an important role in promoting the liberalisation and expansion of trade and in fostering development." Also see Behar A (n 8 above) stating that "Trade Agreements over the last two decades have been the most common and influential method used to integrate developed countries into the global market, and to liberalise trade".

[47] World Bank *Global Economic Prospectus – Trade, Regionalism, and Development* (2005) World Bank. North South RTA's have given rise to programs such as the US African Growth and Opportunity Act (AGOA) and the EU's Everything But Arms (EBA) in order to liberalise trade preferentially (i.e. different trade partners receive different treatment). This preferential treatment is usually extended unilaterally (rather than reciprocally).

[48] SADC EPA States which are signatory to the EPA enjoy asymmetric trade liberalisation with Botswana, Lesotho, Namibia, Mozambique and Swaziland enjoying 100% duty free quote free market access, and South Africa enjoying 98.7%. This is not reciprocal products from SACU Members that reduce 86% of duties, and 74% for Mozambique.

scholars are consulted, particularly as it pertains to the historical background of Developing Countries in the previous Multilateral Trade Systems. WTO, World Bank and SADC Reports particularly regarding trade-data, are also consulted.

1.8.1 History of Developing Countries in the MTS and S&DT

Hoekman notes that Developing Countries have historically played only a minor role in the multilateral trading system.[49] The Oxford handbook of International Trade Law provides a contextual background of how at the inception of the GATT in 1947 there was no S&DT accorded to Developing Countries.[50] Ismail also illustrates this in his discussion on the first MTS in which he states that "the newly formed GATT did not recognise the special situation of Developing Countries".[51]

Moon explains how the WTO's predecessor, the GATT system, responded to the inequality among WTO member countries by creating a set of rules, namely S&DT provisions, which "permit specially favourable trading treatment to support the participation of Developing Countries, even though equality of treatment is a central principle and objective of WTO law".[52] Sibanda argues that S&DT conceptually "is premised on the understanding that LDCs are at a competitive disadvantage in their participation in international trade relations".[53] He further states, in the same section, that "the preamble of the WTO Agreement and of several of GATT/WTO associated agreements, makes reference to the need to consider special circumstances of LDCs".

Background of S&DT in the GATT MTS was expounded by Ewelukwa[54] as well as Gupta.[55] Ewelukwa and Gupta explain that exceptions in the GATT were addressed, such as Article

[49] B Hoekman 'Developing Countries and the WTO Doha Round: Market Access, Rules and Differential Treatment' (2004) 19 *Journal of Economic Integration* 206.
[50] D Bethlehem *et al*. (n 31 above) 485.
[51] F Ismail 'Rediscovering the Role of Developing Countries in GATT before the Doha Round' (2008) 1(1) in De Gruyter *The Law and Development Review* 51-73.
[52] G Moon (n 16 above).
[53] S Sibanda Snr 'Towards a Revised GATT/WTO Special and Differential Treatment Regime for Least Developing Countries' (2015) 50(1) *Foreign Trade Review* 32.
[54] U Ewelukwa (n 17 above).

XVIII, which allowed developing economies to void or renegotiate their commitments and also offered limited infant industry protection. Ismail addresses how the Uruguay Round Agreements failed to provide equitable access for the products of Developing Countries in Developed Country markets.[56]

Developing Countries have developed coalitions to pursue policies on special and differential treatment. Rolland notes that "like-Minded Groups was formed in 1996 in opposition to the expansion of the trade agenda to domains such as investment, competition, trade facilitation, and government procurement (the so-called Singapore issues)." Further that "[t]he Small and Vulnerable Economies Coalition, also created in preparation for the Singapore Ministerial Meeting, advocated particular preferential treatment, technical assistance, and flexibility of commitments for its members".[57]

He notes that the concept of S&DT was further elaborated with a view to increase the involvement in and contribution of Developing Countries.[58] Tortora also elaborates on how the integrated S&DT evolved from serving as a development tool into an adjustment tool to better integrate Developing Countries into the WTO legal Framework.[59] Such discourse paves the way for the addition of S&DT in the TFA and the SADC-EU EPA to better integrate SADC EPA States into the global economy.

Historical development of S&DT under international aw utilising Southern TWAIL perspectives should also be mentioned. Anghie argues that decolonialism is heralded as one of the most pivotal events which altered the development of international law in the sense that newly formed Sovereign States of Africa and Asia could participate as "equals" at international law level (including the WTO).[60] Further, Cullet notes that during this period of time, notwithstanding the acceptance that a true "community of states" had finally come

[55] KR Gupta 'Objectives of GATT and Developing Countries' (2007) 35(2) *South African Journal of Economics* 126.
[56] F Ismail (n 51 above).
[57] S Rolland 'Developing Country Coalitions at the WTO: In Search of Legal Support' (2007) 48 *Harvard International Law Journal* 493.
[58] H Juan *The WTO and Infant Industry Promotion in Developing Countries: Perspectives on the Chinese Large Civil Aircraft Industry* (2015) 37.
[59] M Tortora (n 26 above).
[60] A Anghie Imperialism, Sovereignty And The Making Of International Law (2004) 196-97.

into being, equality in international law was hardly reflected in economic, political or social equality.[61] It will be shown in chapter 2 of this thesis how S&DT emerged from trade needs of Developing Countries at the end of colonialism. The development of S&DT in the context of decolonialism has hardly been explored in legal jurisprudence, yet it plays a significant role in establishing the development of S&DT as a principle and in its efficient application under the current dispensation.

Southern perspectives regarding S&DT in the Cotonou Agreement (which can be said to be the EPA's Parent Agreement) are discussed by Onguglo and Ito in their statement that "[t]he CPA clearly stipulates that SDT is a key principle in ACP-EU trade relations and in the international trading system generally".[62] Further contribution on the topic can be found by Hailu in 'Effects of Bilateral Trade Agreements on the Multilateral Trading Arena: special consideration of EPA between EU and ACP countries.'[63]

It has been noted that "the traditional approach of SDT in the GATT/WTO has not been a success in promoting development".[64] The rationale of this study is predicated on this position. This buttresses the need to seek a legally enforceable S&DT framework, which concretises preferential treatment for Developing Countries in order to promote development. Notwithstanding the ineffectiveness of S&DT, this thesis (in chapter 2) also rationalises the positive effect that S&DT as a principle as well as specific provisions have had in attaining growth in the trade of Developing Countries.

The importance of the Enabling Clause for Developing Countries has been examined by multiple authors. Ukpe describes it as "a veritable instrument for promoting the economic

[61] P Cullet (n 2 above) 565.
[62] B Onguglo & T Ito 'In defence of the ACP submission on special and differential treatment in GATT Article XXIV' (2005), Discussion Paper No. 67 - *European Centre for Development Policy Management* 4.
[63] M B Hailu 'Effects of Bilateral Trade Agreements on the Multilateral Trading Arena: special consideration of EPA between EU and ACP countries' (2006) Paper Presented at the Ninth Annual Conference on Global Economic Analysis Organized by Centre For Global Trade Analysis at the United Nations Conference Centre (UNCC) Addis Ababa-Ethiopia, 15.
[64] B Hoekman, C Michalopoulos & AL Winters 'More Favorable and Differential Treatment of Developing Countries: Towards a New Approach in the WTO' (2003) *World Bank Policy Research Working Paper 3107* .

development of Developing Countries".[65] And Gadbaw and Medwig has described it as "a viable means of advancing social justice objectives through a WTO mechanism".[66]

1.8.2 S&DT under the Current WTO Dispensation

This thesis examines WTO provisions across various areas relating to trade in goods, WTO Declaration and Decisions. WTO case law is also examined to establish the application and effect of S&DT in the WTO. Over and above the wide plethora of WTO law, scholars who have examined S&DT under the current WTO dispensation include Gunawardne, who reflected on the complexity of applying Article XVIII of the GATT and how rarely the provision was used.[67]

Bhala provides perspective on the Trade and Development chapter of the GATT, specifically that Article XXXVI:8 offers the most significant substantive provision of Part IV due to its hard-law commitment vis-à-vis LDCs.[68] Hudec, however, argues differently, stating that Part IV has not significantly improved the situation of Developing Countries under the GATT.[69]

Ornelas has criticised the enabling clause and notes the wide discrimination across recipients (Developing Countries), which contrasts with the original goals of UNCTAD.[70] An important practical case analysis is provided by Withenawasam who describes a challenge with regards to the GSP+ and Sri-Lanka, which lost GSP+ concessions granted by the European Union.[71]

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[65] A Ukpe 'Defining the Character of the Enabling Clause: Towards a More Beneficial GSP Scheme' (2008) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265733 (accessed 19 December 2018).
[66] RM Gadbaw & M Medwig 'Multinational Enterprises and International Labor Standards: Which Way for Development and Jobs?' in LA Compa & SF Diamond (eds) *Human rights, Labor Rights, and International Trade* (1996) 141, 148.
[67] MD Gunawardne 'GATT and the Developing World: Is a New Principle of Trade Liberalization Needed?' (1991) 15 *Maryland Journal on International Law & Trade* 45- 46.
[68] R Bhala *Modern GATT Law: A Treatise on the General Agreement on Trade and Tariffs* (2005) 1080.
[69] R Hudec *Developing Countries in the GATT Legal System* (1987) 227.
[70] E Ornelas 'Special and Differential Treatment for Developing Countries' (2016) *LSE Centre for Economic Performance*, 9.
[71] M Withenawasam 'The Impact of GSP+ Withdrawal on Sri-Lankan Economy' See https://www.academia.edu/19570256/THE_IMPACT_OF_GSP_WITHDRAWAL_ON_SRI_LANKAN_ECONOMY (accessed 13 May 2019).

In the area of subsidies, Hoekman and Messerlin describes the challenges of world subsidies by stating that they affect world prices through artificially increased global supply, which results in the depression of international prices.[72]

On SPS, Prévost argues that critical S&DT in the SPS Agreements is couched in "hortatory language and the question arises whether any binding obligations can be derived from its terms".[73] Delich and Lengyel describes how SPS measures have been used for protectionist purposes.[74]

Naumann establishes core principles as well as an explanation of what RoO are.[75] Herz and Wagner also provides insight on RoO for Developing Countries through trade data.[76]

On S&DT and protective measures, Sykes provides context on how the vague Article XIX of the GATT was addressed during the Tokyo round.[77] And Olivares argues that the non-mandatory nature of most S&D provisions are a "birth defect", which is the case in respect of the non-binding nature of Article 15 of the ADA.

1.8.3 SADC and RTAs in the MTS, and SADC Objectives

Tortora explains that Trade Agreements over the last two decades have been the most common and influential method used to integrate Developing Countries into the global market, and to liberalise trade.[78] The surge of RTAs and the use of RTAs to advance better trade conditions is also well documented by Sala.[79] Sala identified that the unsatisfactory progress of MTS negotiations and the efficiency of RTAs in attaining free trade, has led to

[72] B Hoekman & P Messerlin 'Agricultural Trade Reform and the Doha Development Agenda' (2006) *World Bank* 195.
[73] D Prévost 'Operationalising special and differential treatment of Developing Countries under the SPS Agreement' (2005) 30 *SAYIL* 23.
[74] V Delich & M Lengyel 'Can Developing Countries use SPS Standards to gain access to markets? Case of Mercosur' (2014) *WTO Publications* 87.
[75] E Naumann 'Rules of Origin and EPAs: What has been agreed? What does it mean? What next?' (2008) 2 *TRALAC 2008.*
[76] B Herz & M Wagner 'The Dark Side of the Generalised System of Preferences' (2011) 19(4) *Review of International Economics* 763-775.
[77] A Sykes 'Protectionism as a "Safeguard" A Positive Analysis of the GATT "Escape Clause" with Normative Speculations' (1991) 58 *U. CHmc. L. Rev* 255 .
[78] M Tortora (n 26 above).
[79] D Sala 'RTAs formation and trade policy' (2005) *European University Institute*, 1.

the increase in use of the latter. Another critical examination of RTAs in global trade can be seen on the WTO website on Regional Trade Agreements,[80] which provides almost real-time information and statistics on Trade Agreements,[81] WTO rules on RTAs (which is vital to address in this thesis) and access to RTAs through the RTA database.

RTA under the current MTS are required to be in line with WTO laws. This has posed challenges for Developing Countries which have sought preferential treatment through such RTAs. Liard notes that "the process of examination of RTAs has been streamlined since the creation of the WTO" and that "the examination process is effectively bogged down over certain systemic issues, namely, the meaning of key terms in the WTO provisions, such as the requirement that RTAs cover 'substantially all the trade' (goods) or 'substantial sectoral coverage' (services)".[82]

A unique and novel feature to the legal discussion on S&DT that this thesis examines, is the analysis of a proposed legal framework and its application in the context of SADC Members and an SADC legal trade framework. One of the goals of the thesis is to establish whether the legal framework aids SADC Members which are party to the SADC-EU EPA in attaining developmental goals (in line with their respective regional objectives). It is anticipated that the examination of S&DT under WTO law and its effect in the context of Southern Africa would contribute to the jurisprudence of development law within the WTO, and that meaningful outcomes will emerge from a change in structure and substance of S&DT.

Establishing the SADC objectives and attempts at attaining same is essential to this study. The Technical Report: 2011 Audit of the Implementation of the SADC Protocol on Trade establishes a candid review of the SADC Protocol and its success and failures.[83] This is important for purposes of assessing progression of SADC's goals. The report states that

[80] World Trade Organization website http://www.WTO.org/english/tratop_e/region_e/region_e.htm (accessed 22 July 2016).
[81] As of 1 July 2016, some 635 notifications of RTAs (counting goods, services and accessions separately) had been received by the GATT/WTO.
[82] S Liard 'The WTO Agenda and Developing Countries' (2000) *Centre for Research in Economic Development and International Trade No. 00/5*9.
[83] US AID *Technical Report: 2011 Audit of the Implementation of the SADC Protocol on Trade* (2011) USAID Southern Africa Trade Hub Submitted by AECOM International Development to SADC Secretariat.

there has been substantial progress on the development and implementation of the monitoring mechanism for NTBs as well as on the enhancement of trade facilitation initiatives within SADC.[84] The report further provides an encouraging report regarding trade facilitation in the region. It also addresses individual Members' effort to address customs issues, for instance, it expounds how Botswana addresses NTBs in the context of its inter-ministerial market access committee. Additionally, a national trade facilitation working group, which includes both public and private sector representatives, was established in 2010.[85]

Literature on the SADC's Tripartite-Free-Trade Area and attempts at consolidating trade facilitation attempts is addressed by Erasmus and Hartzenberg.[86] The Authors provide much needed insight on the effectiveness of the SADC FTA, and on progress regarding Members implementation of tariff reduction commitments.

It is of course also necessary to interrogate the SADC Treaty, the SADC Protocol on Trade, the Regional Indicative Strategic Development Plan, and other key policy and implementation documents such as the SADC Draft Guideline on the Draft Guideline on the Coordinated Border Management which addresses trade facilitation. This legal analysis is essential as these frameworks intertwine in objectives, implementation and policy space of the SADC-EU EPA.

1.8.4 Approaches to a S&DT Legal Framework under the WTO

The need for this study is premised on establishing a legal framework of S&DT, which is in line with Paragraph 44 of the Declaration of the 4th Session of the Ministerial Conference. This paragraph mandates that the WTO Committee on Trade and Development (CTD) is to review S&DT provisions with the aim of "strengthening them and making them more

[84] US Aid Technical Report (as above).
[85] US Aid Technical Report (as above) 23.
[86] G Erasmus & T Hartzenberg 'The tripartite Free-Trade-Area – Towards a New African Integration Paradigm?' (2012) *TRALAC*.

precise, effective and operational". There is limited literature on the need for a framework, and a more precise legal instrument to understand and apply S&DT is therefore necessary.

1.8.4.1 The Development Test

There are numerous conceptual approaches which scholars have proposed to address challenges regarding S&DT under the current dispensation. Hoekman, a prominent international economist, acknowledges that the predominant view among analysts and practitioners is that "many if not most SDT provisions are either exhortatory or unlikely to be beneficial".[87] Exhortatory provisions, in this context, specifically relate to best effort or endeavour provisions incorporated in S&DT language throughout the WTO texts. These S&DT provisions will be reviewed in chapter 3, specifically provisions such as those that require Developed Countries to pay "special regard" to "special situations" of Developing Countries[88] and aspirational provisions which speak of attainment of "positive efforts".[89] S&DT Provisions which are unlikely to be beneficial are provisions which fail to ascribe mandatory S&DT due to non-obligatory language.[90] Chapter 3 will examine how a considerable number of S&DT provisions are "best endeavour" clauses and lack precision,

[87] B Hoekman 'Operationalising the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' (2004) *European University Institute*. Hoekman cited J. Whalley who echoed the same sentiments by stating that "[i]n the Uruguay Round […] best endeavours for now seem not to translate into that much".
See J Whalley 'Special and Differential Treatment in the Millennium Round' (1999) 22(8) *The World Economy* 1065-1093.
Also see D Prévost (n 73 above) 23; Prévost stated that "hortatory language and the question arises whether any binding obligations can be derived from its terms".

[88] World Trade Organization *Anti-Dumping Agreement* 1994 (*ADA*) Article 15; The Article provides that:

> "It is recognised that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of antidumping measures under this Agreement."

The provision places no obligation on Developing Countries to take a particular action after considering the special circumstances, and no enforcement measures for Developing Countries on this clause.

[89] GATT 1994 (n 12 above) Part IV. The Provisions are vague and unenforceable due to best-endeavor provisions. Article XXXVI:1 makes repeated mention of recognition and recollection of LDC's needs to attain development objectives and the standard of living between developed and Developing Countries. Article XXXVI:2 and XXXVI:3 are also unenforceable, they speak to need for a rapid and sustained expansion of the export earnings of the LDC's and the need for positive efforts. Article XXXVI:4 - 7 speak on collaboration between contracting parties and the need for market access by LDC's.

[90] World Trade Organization *Agreement on the Application of Sanitary and Phytosanitary Measures* 1994 (*SPS Agreement*). Article 10. The provision provides that "[i]n the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members". The provision has little effect, as it does not prescribe any obligation of Members to act on the special needs.

effectiveness, operationality and enforceability.[91] Hoekman proposes two diverging approaches.

The first approach includes "to focus on the enforcement side of the picture, and make recourse to the DSU conditional on a 'development test' for some issues".[92] The development test proposed would involve an "economic assessment of challenged measures", which would be undertaken by an envisaged independent body, which would be a pre-requisite before a matter proceeds to the DSU.[93] The test would involve an analysis of the likely net benefits from implementation or non-implementation from a development perspective and the extent or magnitude of negative spill-overs associated with the use of the relevant measure that potentially is not in compliance with WTO rules.[94] This option may be beneficial as it adds a peremptory development layer prior to disputes, which may clarify S&DT issues. The negative impact of the approach is that the utilisation of an interpretative body still leaves S&DT rules vague, unenforceable and unspecified up until dispute issues are taken to the said body and dispute mechanism. The approach leaves many issues on S&DT rules unresolved. If the measures are not brought to the envisaged independent body to undertake the development test, by either Developed or Developing Countries, challenges regarding S&DT legal provisions will remain unresolved. Further, the development test would place an additional burden and a potentially difficult standard to meet in proving the net benefits from implementation or non-implementation *vis-à-vis* a development perspective and the extent or magnitude of negative spill-overs. This would also place a burden on Developing Countries which seek to utilise the DSU, that would not apply to Developed Countries, despite the financial and technical constraints Developing Countries already have. This is not an efficient approach, considering the numerous non-binding provisions which span across the WTO Agreements. Further, reliance on a development test to resolve challenges of vague non-specific provisions which are part of legal acquis will not increase use of the provisions by Developing Countries without

[91] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above).
[92] B Hoekman (n 87 above). An option and example of this test is to create a "formal "circuit breaker" mechanism that would make recourse to panels under the DSU conditional on a prior process of consultation mediated by an independent body that focuses not solely on legal issues but on the likely net benefits of (non-)implementation and the magnitude of any negative spillovers associated with the use of policies that are subject to WTO disciplines.
[93] SW Chang (n 79 above) 129.
[94] B Hoekman (n 87 above).

amendment of existing rules or introducing more clear and precise rules. This approach, therefore, cannot be employed in isolation to resolve S&DT issues.

1.8.4.2 Plurilateral Approach

The second approach is to "renegotiate the rules".[95] There are two options under rule negotiation. The first is to use plurilateral Agreements as a possible alternative (which exist under the WTO structure).[96] Article II:3 of the WTO Agreement specifies that the agreements and associated legal instruments included in Annex 4 are part of the WTO Agreement "for those Members that have accepted them, and are binding on those Members". This, therefore, legitimises plurilateral Agreements.

The rationale Hoekman employs is one where parties are free to opt in and out of specific Agreements.[97] Hoekman explains that Developing Countries could avoid implementation of rules which digress from developmental objectives and national policies. This approach is similar to a previously proposed approach of opting for a simple rule-of-thumb approach that would allow opt-outs [by Developing Countries] for resource-intensive agreements for all countries satisfying broad threshold criteria such as minimum level of per capita income, institutional capacity, or economic scale.[98]

Singh makes a strong case for the Plurilateral approach, specifically for Developing Countries to opt out of Agreements, stating that "[t]here are parts of WTO Agreements which do not advance the cause of development and, arguably, restrict it".[99] Reference here is to "TRIMs, TRIPs, Subsidies and Countervailing Duties, Anti-dumping and other similar measures".[100] The developmental context of S&DT will be examined in chapter 2 as it has been argued that not all WTO Agreements advance the interest of Developing Countries, particularly TRIPS.[101]

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[95] Hoekman (n 87 above).
[96] World Trade Organization *The Agreement on Government Procurement and the Agreement on Civil Aircraft* 1 January 1980.
[97] Hoekman (n 87 above).
[98] B Hoekman, C Michalopoulos & LA Winters 'Special and Differential Treatment in the WTO After Cancún' (2003) 27(4) *The World Economy* 481-506.
[99] A Singh 'Special and Differential Treatment, The Multilateral Trading System and Economic Development in the 21st Century' (2005) *Putting Development First* 240-241.
[100] Singh (as above) 27.
[101] TRIPS (n 14 above). The provision examined the Agreement and found that there are no "general exceptions" for critical areas such as public health, which diminishes Developing Countries' Policy Space. Compulsory licensing under the TRIPS

Singh concludes by suggesting that these Agreements need to be re-negotiated and, if they cannot be satisfactorily amended, similar to Hoekman, Singh suggests that Developing Countries should have the right to opt out of them.[102]

The Plurilateral approach doesn't address challenges of remedying existing vague, non-specific and unenforceable S&DT provisions which Developing Countries would seek to implement. But rather, to Hoekman's own admission, would "move the WTO towards a two-track regime" from a consensus-based approach that has historically been the norm. This would also mean that Developing Countries would lose trade preferences on agreements they opt out of. Further, selective Agreements also mean a loss of Developed Parties that they may gain trade preferences from, which would go against the objective of S&DT for Developing Countries.

Hoekman concludes by stating that a "recast" [multilateral] framework that aims to take development concerns seriously would go further than a Plurilateral approach.[103] He concludes that elements to the new approach could include, firstly, acceptance of core rules by all WTO members, i.e. MFN, national treatment, the ban on quotas. Secondly, implementation of an explicit cost-benefit analysis to determine implementation benefits and negative spill-overs by development-motivated policies on other countries. Thirdly, adopting mechanisms that strengthen the consultative and "pre-panel" dimensions of WTO dispute settlement in assisting governments to attain their objectives in an efficient way. This is by mandating a focus not only on legal interpretation, but to examine the rationale and impact of policies [by Developing Countries] that may be inconsistent with WTO law, with the aim of assisting governments to attain their objectives in an efficient way.[104] This pre-supposes that the aim is to attain development goals which are legally compliant through a fact-finding process of Developing Countries' objectives and policies. Lastly, to

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Agreement is set-out under Article 31, however, this is not a provision for preferential treatment which considers Developing Countries' Public Health needs. TRIPS doesn't specifically list the reasons that might be used to justify compulsory licensing, however, the Doha Declaration on TRIPS and Public Health confirms that Countries are free to determine the grounds for granting compulsory licences and to determine what constitutes a national emergency at paragraph 5(c). This is indicative of how Developed Countries' IP policy emerged dominant in property protection and enforcement within TRIPS,

[102] Singh (n 99 above).

[103] Hoekman (n 87 above).

[104] Hoekman (as above) 20.

commit to establishing a global funding mechanism to provide the resources to address adjustment costs (which include erosion of trade preferences, and enhancing supply capacity). The objective, as stated by Hoekman, is "in recognition of the need to transfer some of the gains from trade from winners to losers".[105] This appears to counterbalance the rules based approach that does not address policy-related concerns, particularly those of Developing Countries, to assist with compliance of WTO rules and off-setting negative effects from application of WTO law. These approaches would be best placed in a framework geared at a 'long term' solution to S&DT, which also operates as an interpretative tool.

Application of Hoekman's Plurilateral approach can be found in the context of Malawi, an LDC which has not entered into any of the four WTO Plurilateral Agreements. The first stage would be acceptance of core WTO rules, which Malawi has done as a signatory of the WTO which acceded to the MTS in May 1995[106] with duly submitted tariff schedules.[107] Then the approach would require implementation of an explicit cost-benefit analysis to determine implementation benefits and negative spill-overs. In the context of the Information Technology Agreement II, the benefits would be that the Agreement would have the potential to boost Malawi's development and competitiveness by encouraging the importation of goods and services that could drive the industrialisation process and grow exports.[108] It was further identified that this in turn could put the Country on an improved path towards the realisation of its MGDS II, which would assist in promoting the transfer of key technologies to enhance value addition.[109] The negative consequences are that the country's productive base is too underdeveloped and under-resourced to produce products that could take advantage of the market access opportunities in the various Plurilateral

[105] Hoekman (as above).
[106] World Trade Organization Member Information on WTO Webpage https://www.WTO.org/english/theWTO_e/countries_e/malawi_e.htm (accessed 6 November 2019).
[107] World Trade Organization Website, Current Situation of Schedules, https://www.WTO.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm#mwi (accessed 6 November 2019).
[108] South Africa Institute of International Affairs (SAIIA) *Plurilateral Trade Agreements and the Impact on LDC's – To Participate or not to Participate?* South African Institute of International Affairs & Trade Matters and the Trade Research Entity of the North-West University, February 2018. See https://saiia.org.za/wp-content/uploads/2018/03/saia_spr_plurilaterals_Malawi-Case-Study_20180306.pdf , at page 8.
[109] SAIIA (as above).

agreements. And that growth in some industries, particularly the nascent information and communications technology sector, could be negatively impacted.[110]

The penultimate element to this approach would be of adopting mechanisms that strengthens the consultative and "pre-panel" dimensions of WTO dispute settlement to assisting governments to attain their objectives in an efficient way. This involves a fact-finding process of Developing Countries' objectives and policies through an established mechanism, for instance through modalities established under a WTO Agreement. In this context, it is suggested that Malawi needs to first implement its many policies and strategies, which have been developed to enhance the productivity and competitiveness of the economy, to take better advantage of existing market access opportunities and the unilateral preferences it enjoys under current bilateral and regional agreements, before adding to its trade agenda. This fact-finding process should be able to allow Developing Countries to examine such objectives.

Lastly, a global funding mechanism to provide the resources to address adjustment costs. This should be able to cushion the negative effects of Malawi entering into the Plurilateral IT Agreement by, for instance, financing under-resourced sectors to produce products that could take advantage of the market access, or capacitating Malawi's nascent information and communications technology sector.

1.8.4.3 Other Approaches; Framework for S&DT, Policy Space and Principal Supplier

Kleen and Page provides comprehensive overview of the S&DT issues, challenges, and contentions between Developing and Developed Countries as well as insights on propositions regarding S&DT at the height of the Doha Development Round.[111] The authors critically set out seven principles for S&DT which they propose to be enshrined into a S&DT Framework. The principles are:

[110] SAIIA (as above) 9.
[111] P Kleen & S Page *Special and Differential Treatment of Developing Countries in the World Trade Organization* 2005 Global Development Studies Number 2.

- S&DT should increase the benefits to Developing Countries from trade and the weight given to their interests;
- It should not be used to solve all development needs;
- An inclusive organisation must build in flexibility;
- It must be consistent with a Country's interests (or what a Country views as their interest);
- SD&T should promote integration of countries into the world trading system and support the basic aims of the WTO;
- It must avoid excessive costs to other countries and to the international system; and
- SD&T should be binding (must have legal force).

The authors established that a [new] framework for S&DT might encourage a more consistent approach to S&DT.[112] However, the purpose and general scope of S&DT has proven contentious between Developing and Developed Countries, creating a deadlock in negotiations, particularly during the Doha round. The paper, therefore, focuses on approaches which do not require developing a new framework.

Two primary proposals were advanced for S&DT under the Article. The first is a "middle way" approach to break the deadlock between contention during the Doha round on S&DT related issues through revising the Enabling Clause. The authors propose revising the clause by building on the already existing provisions in the Agreement by adapting it "to the problems of today, taking into account the developments that have taken place over the last 25 years".[113] The authors are unclear on specifically which S&DT provisions would be incorporated. However, an explanation is provided, namely that the revised Enabling Clause "could be characterised as a set of general principles and a legal cover for various types of preferential treatment, as well as some very general formulations on the concessions and contributions that could be expected from Developing Countries in trade negotiations". The authors are therefore proposing for an amended Enabling clause with updated (relevant and binding) preferential treatment provisions and concessions, which will expand the scope of

[112] Kleen & Page (as above) xii.
[113] Kleen & Page (as above) 98.

coverage and substance of S&DT. This would, therefore, limit reliance on general provisions regarding S&DT and also propose updating the language of S&DT in the revised Enabling Clause to facilitate legal certainty. This would be a similar approach as adopted in the TRIPS Agreement through the protocol which entered into effect on 23 January 2019. The authors submit that it "does not represent a full-fledged framework agreement".[114]

The second proposed approach is for Developing Countries to develop WTO policy frameworks in their respective countries. The authors indicate that "a framework is necessary to ensure coherence across a broad range of policies".[115] This approach could guide policy makers in Developing Countries which are yet to develop country based WTO policies to define how to apply their objectives to the issues raised in WTO negotiations. This approach is focused on negotiations and improving predictability and transparency relating to S&DT issues. It is an approach Which is not necessarily predicated on S&DT rules in the WTO but it is, however, useful to the extent that it positions Developing Countries to establish a position on critical WTO related issues which it can carry forward in negotiations, such as balances between their own policy and WTO rules and between long term interests and short term pressures.[116] This allows Developing Countries to maximise on S&DT provisions under existing national structures during WTO negotiations, without the need for a new framework which has been an issue of contention between WTO Members. An example of application of this approach is with regards to the challenges Developing Countries face regarding SPS and TBT, such as Botswana in the context of a beef exports, and re-focusing national policies to address the challenge. Lack of preferential treatment or ineffective provisions would mean that Botswana would have to focus on strengthening technical capacity and implementation regarding meeting the standards of importing Developing Countries. This means increased focus on negotiations and improving predictability and transparency. Botswana, as a priority, has pushed for increased compliance with regional conditions (SADC SPS Annex, at SADC and SACU level) and has actively negotiated for provisions on technical and financial assistance in the SADC-EU EPA.

[114] Kleen & Page (as above).
[115] Kleen & Page (as above) 99.
[116] Kleen & Page (as above).

This maximises on S&DT provisions using its own structures and through Regional and International FTA's to ensure trade gains, without extending the substance and scope of S&DT through an additional Agreement.

In examining this approach, two positive benefits emerge. Firstly, the application of the principle allows flexibility for a Developing Country to implement S&DT rules based on its 'policy space' as long as this does not impose significant negative (pecuniary) spill-overs.[117] From the above-mentioned example regarding Botswana's SPS & TBT export challenge, this would mean that Botswana has the right to seek solutions through preferential treatment under WTO rules. This could be through the use of provisions such as Article 10(2) of the SPS Agreement which provides for longer time-frames for compliance for products of interest to Developing Countries (in this context beef). This would mean that Botswana could pursue this flexibility. However, the Developing Country would have to be cautious to align national policy so as to not place reliance on extension of time to comply as opposed to building necessary infrastructure and capacity to comply.

This allows a country to implement a specific set of S&DT rules, which may not have been previously applied for trade gains. The basis of this approach is that rules on implementation of Policy space of a Developing Country may be created so long as this does not impose significant derogation of WTO rules. This also forms the second advantage, that this approach does not require a change to S&DT rules but is rather focused on implementing existing ones. This approach, therefore, aims to work around existing rules without introducing new WTO rules or effecting any change to existing rules.

The approach, however, doesn't address the critical issue of re-negotiating or amending ineffectual trade rules which do not adequately attain their objectives under the MTS. It is geared at short term solution, which is acknowledged by the authors and is intended on breaking the deadlock on the controversial S&DT issues. This approach, therefore, does not holistically address S&DT under the WTO law, as is the focus of this research.

[117] Hoekman (n 87 above).

Another approach involving development of policy and of national development strategies by Developing Countries is proposed by Prowse.[118] Prowse argues that the effective delivery of trade-related capacity building (S&DT) relates specifically to two areas: Firstly, *in-country* in order to help formulate appropriate trade positions as well as to place trade reform in the context of the country's overall development strategy that will promote a supply response and facilitate pro-poor growth. And, secondly, *within the global rule making process* to ensure that implementation of WTO rules and efforts to negotiate and implement future disciplines makes sense from a development perspective. This is an "inwards-out" approach to S&DT where technical or financial assistance (in Agreements or under WTO rules) is to be related to national policies.

Prowse's country-specific approach shares similarities with the country-specific approach employed in the Trade Facilitation Agreement (which will be examined in chapter 3) to the extent that S&DT is tied to a country's particular economic dispensation and the TFA links aid to the capacity or ability to implement a particular obligation as opposed to its policy. Prowse's approach has the benefits of involving Developed Countries in adapting trade policies in line with WTO rules and being able to benefit from S&DT which may be adapted to strategies. The only downturn might be in the complexity of ensuring that multilateral monitoring and surveillance would have to implemented with input from international development agencies as it would need to be established to ensure that decisions are subject to scrutiny and debate.[119] The above notwithstanding, the approach is a relevant and viable one as Members deriving S&DT preferences or exemptions from such strategies would be deriving specific and relevant S&DT in line with paragraph 44 of the Doha Declaration, which calls for making S&DT more "precise" whilst adapting Developing Countries to WTO rules through development of national development strategies.

[118] S Prowse 'The Role of International and National Agencies in Trade-Related Capacity Building' (2002) 25(9) *World Economy* 1235-1261.
[119] Prowse (as above).

A more specific 'policy space' approach is suggested by Stevens who explores an analytical framework for developing S&DT.[120] The study was not focused on proposing or conceptualising new S&DT but rather on aligning Developing Countries' approach to S&DT to the new trade agenda (e.g. on TRIPS and TRIMs) with existing rules.[121]

In his analysis, Stevens makes three arguments with regards to S&DT. Firstly, he asserts that the interest of each member "must not be so different that they require unique treatment". Achieving differentiation through national schedules presents an impractical and infeasible large negotiating burden as pointed out by Stevens. WTO members cannot reach agreements with other Members on precise provisions of its national schedules as this cannot be accomplished within the normal time of WTO negotiations.[122] Stevens does however recognise that "[…] every country is different and each one makes its own, independent commitments during WTO Rounds".[123] This supports the premise, as he states, that the default assumption at a multilateral level is that one-size *does not* fit all.[124] However, the impracticability of differentiation based on tariff lines would be unfeasible in the current dispensation as above-stated.

Secondly, Stevens state that "there must be some way to identify broad groups of countries that share sufficiently similar characteristics to warrant the uniformity of treatment among themselves but differential treatment compared with others".[125] Stevens acknowledges that every country is different and each one makes its own independent commitments during WTO Rounds in line with their national trade-related policies. He makes the argument that the groupings are to be precisely defined to ensure S&DT remains as closely relatable and applicable to the group as possible, for example, market access and domestic subsidies should be applicable to food-insecure and poor States with sickly agricultural sectors under the AoA. Stevens acknowledges that there are shortcomings in this step of identifying

[120] C Stevens 'The Future of Special and Differential Treatment (SDT) for Developing Countries in the WTO' (2002) *Institute of Development Studies* (IDS) Working Paper 163 6. Also see B Hoekman (n 87 above).
[121] Stevens (as above) 1.
[122] Stevens (as above).
[123] Stevens (as above).
[124] Stevens (as above).
[125] Stevens (as above)6.

groups from OECD work, which has shown "off the peg" indices has led to new combinations of criteria.[126]

Lastly, Stevens suggests that the next step is ensuring identified groups with common features is provided with actionable modulations in the rules. He provides that a key requirement is that S&DT should be enforceable within the WTO.[127]

There are various approaches to note and possibly adopt in Stevens' arguments in conceptualising a S&DT framework agreement. In examining Stevens' approach: Firstly, his proposition that S&DT rules should be able to be adapted and applicable to "new agenda" WTO rules is one that is central to the development of S&DT. This sentiment will be echoed in chapter 2 of this study when examining the historical emergence of S&DT and its applicability under the MTS. The old approach to S&DT of trade preferences through GSP limited reciprocity in the context of certain rules and exceptions, which were conditional on levels of development [through undefined, unspecified criteria] particularly under the GATT. This has meant that S&DT provisions have been adaptive to new rules. This, therefore, requires adaptive and relevant S&DT to be embedded in new Agreements (such as the TFA as discussed in chapter 4). Alternatively, this requires an S&DT framework, as envisaged under the proposed Framework, that may be holistically used to address shortcomings or discrepancies (in application of S&DT rules) which remains specific to existing WTO rules.

Secondly, Stevens' approach of identifying broad groups of countries that share sufficiently similar characteristics is a notable and viable approach to adopt as it may also address the issue of eligibility of Developing Countries to use specific S&DT. Stevens proposes that this may be done through relevant indicators to identify groups of Countries.[128] This would operate a dual task of addressing Developed Countries' concerns about abuse of S&DT treatment, particularly the concern that S&DT applies and is used by emerging Countries, which should normally not be eligible to use a particular S&DT provision. Secondly,

[126] OECD *Analytical criteria for calibrating provisions for special and differential treatment across different beneficiaries* (2001) 27, TD/TC.WP Paris: Organisation for Economic Cooperation and Development trade Directorate, Trade Committee.
[127] OECD (as above) 26.
[128] OECD (as above) 13.

establishment of Groups of countries with various needs would facilitate in making S&DT adaptive and specific to Developing Countries' needs.

Finally, former Senior Trade Negotiator of China to the WTO, Xiankun Lu, takes a different approach to Stevens' approach of grouping countries. He states that because of the high political sensitivity, blunt attempts to redefine "Developing Countries" or to regroup Developing Countries are "political dead ends".[129] This is due to the fact that "politically, it is impossible for parliamentarians of developed countries to accept that emerging economies should continue to be sheltered under the same SDT as poorer Developing Countries. However, it is equally difficult to imagine that politicians in emerging economies would agree to forfeit their developing country status and undertake even similar obligations as developed countries". Xiankun employs a pragmatic approach to addressing the issue of S&DT grouping of countries through examining the volatile state of play regarding graduation, and the polarised position between various Developing and Developed Countries regarding the issue. This subject-matter is currently an issue of contention between the US on one-side, which is against self-declaration and for graduation, and Developing Countries on the other-side, with China and India as the emerging economies at the forefront advancing that self-declaration is relevant, and arguing against graduation.

Xiankun proposes that "rather than continuing the doctrinal and conceptual debate on the developmental status of emerging economies, negotiators could look at the specifics of each negotiating subject in a flexible and pragmatic manner to find solutions". He lists the TFA as such an Agreement. Unfortunately, Xiankun fails to expound on the "flexible and pragmatic" manner of finding a solution. However, the approach of negotiating each subject, particularly linking such negotiations to constraints, needs and various indices of a Developing Country, is an approach in line with delivering S&DT that is operational and relevant and in line with Paragraph 44 of the Doha Declaration.

[129] L Xiankun 'How to Get Out of the Box on SDT and Move the SDGs and the WTO Negotiations Ahead?' (2016) *International Centre for Trade and Sustainable Development* http://www.ictsd.org/opinion/how-to-get-out-of-the-box-on-sdt-and-move-the-sdgs-and-the-WTO-negotiations-ahead (accessed 5 October 2019).

Further, Xiankun proposes an alternative novel approach to grouping Developing Countries in respective categories. He suggests the use of the "principal supplier" rule to balance obligations of emerging economies. The rule was used in previous negotiations under the GATT to refer to a Country or Countries that were the most important source of a particular product imported by another country.[130] Xiankun explains that "the logic [is that] a principal supplier country is strong in producing and exporting a particular product, hence [it] may be in a comfortable position to offer better market access and withstand the potential competition from exporters of that product from other countries [and this] could be applied to current WTO negotiations". An example of application of this principle was provided by Bond *et al*[131] who elucidated that the principal supplier principle applies in trade negotiations between members where the principal supplier of a product makes requests of importing countries for tariff concessions. An example of application of this rule is China, a main exporter of knit clothing, making a request to Members of SADC (who might be party to trade negotiations and have an interest in the same market) to accord them tariff concessions. This approach would mean S&DT would be accorded, under the area of market access, without having to make a determination on a Members classification Status.

Lastly, Xiankun further envisages modalities of carrying out an examination to determine which Members are "principal suppliers". He envisages an examination of trade statistics of which WTO Members are already principal suppliers. Such an evaluation could also provide for specific suggestions about how the concept could be applied fairly in WTO negotiations.

The "principal supplier" concept is a pragmatic deviation from the other approaches above, particularly regarding the issue of emerging countries and trade concessions. The approach "could help Members jump out of the box of doctrinal debates on SDT and serve as an interesting starting point to look at where each WTO Member could potentially contribute

[130] World Trade Organization Website, GATT Analytical index, https://www.WTO.org/english/res_e/publications_e/ai17_e/ai17_e.htm (accessed 3 November 2019). Article XXVIII on modification of schedules in early GATT negotiations: "Participating countries [could] request concessions on products of which they individually, or collectively, [were] the principal suppliers to the countries from which the concessions are asked".

[131] EW Bond, S Ching & E Lai 'Accession Rules and Trade Agreements: The Case of the WTO' (2000) see https://pdfs.semanticscholar.org/6c45/c9f89b7de1b927c0cddde7368d4b59f24049.pdf (accessed 3 November 2019).

more in a fair manner".[132] It is could offer a less contentious approach to graduation, which Developed Countries could potentially accept due to concessions on the part of emerging Countries. With the foregoing said, the approach is limited for the purposes of this thesis, as its application only extends to graduation and emerging Countries in the S&DT debate. Lu also does not address the eligibility of Developing Countries to S&DT provisions and whether they may use S&DT when they are a "principal supplier". Further, wider areas of S&DT that cut across multiple Agreements that affect LDCs and other Developing Countries [that are not emerging economies] are not addressed, such as enforceability of S&DT, imprecise vague provisions, and lack of operational provisions. The principle, however, will be considered in adopting an approach regarding S&DT and with regards to the issue of graduation and emerging economies.

1.9 Methodology and Approach

The methodology utilised and adopted in this Doctoral thesis is primarily qualitative literature review. The approach employed is of in-depth critical analysis and review of the key agreements, being the WTO texts (Agreements and Ministerial Declarations and Decisions), cases and the SADC-EU EPA, and other incidental texts, together with perspectives from international trade law jurisprudence and legal opinions regarding pertinent issues relating to the WTO Trade Facilitation Agreement, S&DT, the development cooperation, and the SADC-EU EPA.

In adopting a qualitative approach, the author also conducted two interviews with members of the SADC Secretariat at the SADC headquarters in Gaborone, Botswana. This was primarily to identify and address issues of ascertaining SADC trade objectives and issues surrounding the application of S&DT, particularly in the context of North-South RTAs .

The author also employs a Southern perspective when analysing Agreements and WTO texts and construct a progressive approach, particularly in examining the legal development and justification for S&DT and interpretation of the provisions in the MTS. This includes a

[132] L Xiankun (n 129 above).

collection of academic writers from Developing Countries who have called for a more inclusive Multilateral Trade System that may facilitate for trade gains for marginalised countries in order to tip the scale in their favour.

1.10 Structure / Outline

Chapter 1: Introduction

This chapter outlined the focus of the study and provided the parameters and scope of the research. The chapter further laid out the objectives and the methodology of the research and established the novel elements that the research aims to address and interrogate. The chapter also introduced the WTO and the previous trading system, RTAs and provided a brief background of S&DT and the SADC-EU EPA. It further outlines the structure of the thesis.

Chapter 2: S&DT and its Development under International Law

This chapter will establish S&DT as a legal concept, and provide contextual background on linkages between S&DT and fundamental underlying legal principles of sovereignty, equality of Developing Countries at international law, and non-discrimination. The chapter will also follow the development and application of S&DT under various areas of international law, particularly under Equity, Environmental Law and Intellectual Property Law. This examination is undertaken in order to establish the nature of S&DT under various disciplines and link the developments to S&DT under International Trade Law.

S&DT under Trade will be examined in this chapter to establish objectives in the concept. The chapter also examines determined strengths and weaknesses of the concept in general, and in the trade context. By establishing such justifications for S&DT under WTO rules, and weaknesses and deficiencies in the S&DT concept, the author will be able to identify the problem at the heart of this research and the need for reform under the WTO rules.

Chapter 3: S&DT Provisions under WTO law – Application, Enforceability and Shortcomings

This chapter will identify the current framework of S&DT under WTO law by examining and interpreting WTO legal texts, which primarily comprise of WTO Agreements, Ministerial Decisions and Declarations and through interpretation from DSU decisions. The study shall also identify effective S&DT provisions, as well as examine deficiencies, limitations and/or challenges in the provisions throughout the MTS. This is undertaken by grouping S&DT provisions in the MTS and categorising them based on common attributes that the provisions share due to the way the provisions are drafted, under the following categories;

- Clear and enforceable S&DT provisions;
- Vague or unclear S&DT Provisions;
- S&DT provisions that lack specificity or detail, rendering them un-implementable and un-enforceable at [WTO] law; and
- Non-peremptory S&DT provisions drafted in non-obligatory language;
- Complex S&DT provisions which are difficult for Developing Countries to implement.

WTO decisions on S&DT related issues shall also be used in the examination of the provisions to assist with interpretation on S&DT concepts and law. This study shall form the basis of the framework, in identifying deficient provisions and substantive and structural challenges in the current MTS, which require to be redressed to ensure effective and operational preferential treatment in line with the WTO development objective.

Chapter 4: Establishing a Framework for S&DT under the WTO

This chapter will establish a conceptual framework for S&DT rules under the WTO. The primary objective in developing this framework is to ensure that the S&DT framework subscribes to WTO developmental (and other fundamental trade) objectives and trade rules, and addresses challenges and shortcomings of S&DT (as identified in chapter 3 of this thesis). The envisaged framework and model WTO legislation is to be developed for the operation, use and implementation of S&DT rules.

The chapter will examine structural approaches and considerations regarding developing the framework and models proposed and explored by Developing Countries and scholars, and considerations in developing the framework. The chapter will proceed to adopt approaches based on objectives of S&DT under WTO texts, challenges under the MTS and justify the said approaches. Finally, the chapter will establish the envisaged S&DT Framework.

Chapter 5: The SADC-EU EPA; S&DT, Trade Objectives and Development Needs

This chapter will establish the SADC-EU EPA as the "test" that the Framework will be applied to. The chapter shall provide background regarding the SADC-EU EPA negotiations, justification under WTO law as a preferential Agreement and will identify S&DT provisions that exist therein. The primary objective of this chapter, therefore, is to establish SADC trade objectives and developmental needs and the SADC-EU EPA trade objectives, which relate to SADC trade needs respectively through legal texts, instruments and key policy documents.

The chapter will include a short description of the birth of SADC and its general objectives, and shall specifically focus on trade objectives laid out in its key legal texts, such as the SADC Protocol on Trade, SADC Regional Indicative Strategic Development Plan (RISDP) and the SADC Treaty. The chapter will also establish trade objectives established in the SADC-EU EPA and S&DT in the RTA. The chapter will also identify S&DT provisions under the EPA.

Chapter 6: Applying the SD&T Framework Agreement to the SADC-EU EPA

The S&DT Framework is tested by applying the conceptual S&DT Framework Agreement to the SADC-EU EPA in this chapter. This chapter shall examine the potential effects or outcomes of applying the Framework Agreement to the SADC-EU EPA. Specifically, the potential effect on the rights and obligations of both Developed and Developing Countries regarding S&DT. The Framework Agreement was created to improve or enhance preferential treatment under the WTO structure for Developing Countries' needs. The main question, therefore, will be to determine whether the provisions in the Framework facilitate for more effective and precise S&DT for SADC Members' needs. And to determine whether the framework would result in definitive, enforceable rights.

The primary determination is to establish whether the Framework attains the objective/outcomes of the framework, as established in chapter 4, when applied to the SADC-EU EPA. The objectives of the framework were formulated to redress challenges identified in chapter 3 in the structure and substantive provisions of S&DT under the current dispensation, for example, that S&DT should facilitate for a predictable, enforceable and equitable MTS, and further, that it should secure rights of Developing Countries under WTO law for increased participation and integration in the MTS and to increase their share of global trade.

The chapter will attempt to apply the Framework Agreement specifically to S&DT related provisions in the SADC-EU EPA and to the interests of Developing Countries [identified in the RTA]. The primary question when applying the Framework Agreement, is to determine the outcome, particularly with regards to use, implementation, and enforcement of S&DT and the ability/inability to secure preferential treatment and to bind preference granting members. An evaluation will be conducted to determine the potential benefits or challenges and shortcomings of utilising the Conceptual Framework.

Chapter 7: Conclusion and Recommendations

This chapter summarises the findings and outcomes which emerge from the thesis and makes recommendations based on the aforementioned.

CHAPTER 2: S&DT AND ITS DEVELOPMENT UNDER INTERNATIONAL LAW

This chapter analyses S&DT as a legal concept and examines its historical development. The chapter then attempts to determine the objectives of S&DT, and further establishes the contextual background and linkages between S&DT and fundamental underlying legal principles of sovereignty, equality of Developing Countries at international law, and non-discrimination.

The strengths and weaknesses in the legal concept of S&DT under trade law are critically analysed through arguments for and against S&DT under this Chapter. Legal justifications for the use and application of S&DT WTO rules by Developing Countries are also examined. The purpose is to identify the fundamental elements and purpose behind the concept. This will further assist the research in identifying the problem with the current construct of S&DT under the WTO dispensation and the need for reform under the WTO rules.

The chapter also follows the development and application of S&DT under various areas of international law, particularly Environmental Law and Intellectual Property Law. This examination is undertaken in order to establish the nature of S&DT under various disciplines and to denote successes and failures in application of the principle, which is useful for purposes of hypothesising improvements to S&DT under the MTS.

2.1 The Development Of S&DT Under WTO Law

International institutions, such as the WTO, have played (and continue to play) an important role in global economic development.[133] Countries and political leaders have been confronted with concerns about poverty, socio-economic development issues and have sought solutions from the World Bank, UN, and other intergovernmental agencies.[134] The development of S&DT under international law, particularly trade, emerged as a solution to

[133] B Kingsbury 'Sovereignty and Inequality' (1998) 9(4) *European Journal of International Law* 601.
[134] Kingsbury (as above).

these challenges. The concept of differentiation has been observed as a "novel phenomenon in international law".[135] It is predicated on the basis of partnership and solidarity, breaking away from principles of equality of states as indicated in section 2.1. S&DT provisions have served human rights and social developmental goals under international law, with the preferential provisions operating as a viable means of advancing social justice objectives through the WTO mechanism.[136]

S&DT under trade in goods was only conceived after the establishment of the first Multilateral Trade System (MTS). The GATT 1947 contained no preferential provisions for Developing Countries at the time of negotiation, and its enactment and its objective were not aligned to serve the developmental agenda of Developing Countries.[137] The GATT was notably a separate interim organisation (detached from the International Trade Organization (ITO)) which enabled Members to begin tariff reduction negotiations among themselves in the post-war reconstruction of Europe.[138]

The terminology of S&DT in International instruments gained traction in the 1960's. However, the concept of "treating Developing Countries differently and more favourably" in trade relations was accepted during the first negotiations for an international trading system in the 1940s.[139] This was formed under the international acceptance of differential treatment of the relations between colonies and their governing countries in the complex of trading arrangements of the century before 1940 and respect for national sovereignty, rather than on economic or developmental principles. It manifested as Developing Countries managed to introduce an additional clause, specifically a protection measure during ITO Negotiations between 1947 and 1948.[140] The draft ITO texts and negotiations contained

[135] P Cullet *Differential Treatment in Environmental Law: Addressing Critiques and Conceptualizing the Next Steps* (2016) 4.
[136] RM Gadbaw *et al* (n 66 above) 148; Also see T Collingsworth 'International Worker Rights Enforcement?' in LA Compa & SF Diamond ((eds) (1996) *Human rights, Labor Rights, and International Trade* 227.
[137] GATT 1947 (n 15 above)
[138] UNCTAD 'UNCTAD at 50, A short History' (2014) *UNCTAD* 3.
[139] S Page 'The Evolution of Special and Differential Treatment in the Multilateral Trading System' (2004) *ICTSD Paper* 6.
[140] United Nations Conference on Trade and Employment (1948) *Final Act and Related Documents Interim Commission for the International Trade Organisation*. This clause allowed Developing Countries to apply national protection measures to support "economic development and reconstruction" of industry and agriculture, although such measures were in general prohibited in the Charter. In 1948, this clause was introduced into GATT as Article XVIII via an amendment. Developing Countries have taken part in GATT as equal parties.

pro-developmental provisions[141] but the ITO collapsed and the temporary trade Agreement [GATT] prevailed. S&DT under the WTO is defined as "special provisions which give developing countries special rights and allow other members to treat them more favourably."[142] It has a narrow description under the WTO, applying only to preferential provisions that are accorded and may used by only to two groups of members, specifically Developing Countries and LDCs.

Developing Countries did not consider GATT to be a forum that could adequately take their interests into account. This GATT failed to ensure a suitable institutional framework for addressing the development concerns of a growing number of newly independent countries in the post-colonial period.[143] At the time when the GATT entered into force in 1947, many of the Developing Countries who were signatories to the agreement were under colonial rule and only obtained independence in subsequent years, with 96 new states being formed since 1945 from the process of decolonisation.[144] The emergence of S&DT as we know it under the WTO, which advocates for LDC and Developing Countries' needs, can be traced to the transition of Developing States from colonisation. Decolonialism is heralded as one of the most pivotal events which altered the development of international law and the conceptualisation of the principle of Sovereign equality of States.[145] The end of colonialism supported the theory and claim that international law had finally become truly applicable to all states for the first time as newly formed Sovereign States of Africa and Asia could participate as "equals" at international law level. The participation of Decolonised States in the MTS subsequently led to the newly liberated States advocating for a trading system that considers their trade needs and economic situations. This consequently led to the Enabling Clause and S&DT under the MTS.[146] Despite the acceptance that a true "community of

[141] The draft document was written by the United States of America and had a strong bias towards freer trade. Leading Developing Countries such as Brazil, Chile, China and India argued that in order to promote their own economic development, they might need to adopt measures of trade protection, such as quantitative restrictions on imports, which was far different from GATT negotiations.

[142] WTO website, https://www.wto.org/english/tratop_e/dda_e/status_e/sdt_e.htm (accessed 24 May 2020).

[143] UNCTAD 'Beyond Conventional Wisdom in Development Policy: An Intellectual History of UNCTAD 1964-2004' (2004) *UNCTAD* UNCTAD/EDM/2004/4 4.

[144] A J Christopher 'Decolonisation without Independence' (2002) GeoJournal 56 *Kluwer Academic Publishers* 213.

[145] Anghie (n 60 above).

[146] Page (n 139 above) attributed an important shift in economic policy of Developing Countries in the 1960's to 1973, stating; "Economic understanding of development was influenced by these political events, with control over a country's

states" had finally come into being and the notion of "sovereign equality"[147] bounding all states, equality of international law as (and still has) hardly reflected in economic, political or social equality.[148]

Economic and political inequality created by colonialism continued to operate after independence, despite change of legal regime and new found sovereignty. Developing states, as a consequence, demanded special measures to remedy decades of economic stagnation under colonisation and an international economic system that favoured interests which were formed during colonial rule.[149] The recognition that real independence requires more than political independence, was the birth or foundation of International law of Development, which realises that special measures are to be taken for true equality.[150]

Following decolonialism, Developing Countries subsequently lobbied for a new organisation dedicated exclusively to trade and development issues, namely the United Nations Conference on Trade and Development (UNCTAD), an organ of the UN General Assembly established in 1964.[151] Prior to UNCTAD's establishment, Developing Countries under the GATT were only able to successfully negotiate the first S&DT principle in the GATT review 1954/55, specifically Article XVIII, regarding flexibility of rules in respect of balance of payments and protection of domestic industries of Developing Countries.[152] This was the

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own economy (or own resources: this was a period of nationalisation as well as nationalism) seen as essential to secure economic independence as well as political independence." The continued trend resulted in Developing Countries seeking provisions in the MTS that could satisfy their new economic and political agenda post colonialism in Africa and focus on political development in Latin America.

[147] Charter of the United Nations (1945) (UN Charter) 1 UNTS XVI Art. 2(1) and 1(2). The United Nations Charter's embrace of "the principle of […] sovereign equality" derives directly from the purpose "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

[148] Cullet (n 2 above) 565. Whilst Cullet acknowledges that Developing Countries after independence acknowledged existing international law, they voiced that political independence couldn't be equated with economic independence.

[149] Cullet (n 2 above) 565.

[150] D Morawetz 'Twenty-five Years of Economic Development: 1950 to1975' (1977) *World Bank* Chapter 1. The need for economic growth and social and cultural development to be concurrent and complementary was accorded greater emphasis in subsequent formulations of the objectives of development. Further, perceptions of development problems, needs and priorities began to evolve towards a concept of "development" that was far broader than just economic growth, with factors such as Human Rights being considered.

[151] Morawetz (as above) 3. The independence of the former colonies in Asia and Africa gave momentum to this cause. In this context, UNCTAD was viewed by many as an alternative to the GATT system that was considered by Developing Countries to have been drawn up without their effective participation and thus not reflecting their interests.

[152] GATT 1994 (n 12 above) Article XVIII. The Article states that the contracting parties agree that Developing Countries:
"[…] should enjoy additional facilities to enable them

(a) 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

first explicit development based exception under the GATT.[153] Article XVIII, in practice, was a provision which formulated the basis for the granting of sweeping exemptions from GATT structures for many Developing Countries with a view to import substitution and protection of infant industries.

The recognition of the limitations of political independence led to movements formulated by Developing Countries and recently decolonised countries, such as the Non-Aligned Movement established in 1961, which tabled the New International Economic Order (NIEO).[154] The NIEO Declaration is perceived as an "…evolution and more precise articulation of a Third Worldist program that can be tracked back to the 1955 Asian-African Conference held in Bandung, Indonesia."[155] NIEO tabled proposals through UNCTAD which included *inter-alia* regulation of multinationals in their territories and generalised non-reciprocal and non-discriminatory tariff preferences, transfer of technology, and economic and technical assistance with no strings attached.

Through the UNCTAD 1964 Conference in Geneva, 15 General and 13 Special Principles were adopted and designed to govern international trade relations and trade policies conducive to development.[156] The principles had a substantial impact on the approaches to trade and development issues in subsequent years and included *inter-alia;*

- international trade being conducted to mutual advantage on the basis of the MFN treatment, with the proviso that Developed Countries should grant both tariff and non-tariff preferences in trade to Developing Countries;
- recognition that international trade was one of the most important factors in development;
- the right of Developing Countries to protect their infant industries; and

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(b) to apply quantitative restrictions for balance of payments which take full account of the continued high level of demand for imports likely to be generated by their programmes of economic development."

Further, Sections A,B and C set out the specifics of the "additional facilities'.

[153] M Trebilcock , R Howse & A Eliason *The Regulation of International Trade* (2005).

[154] United Nations *Declaration for the Establishment of a New International Economic Order* (1974) United Nations General Assembly Document A/RES/S-6/3201.

[155] Humanity Journal website, http://humanityjournal.org/issue6-1/bookend-to-bandung-the-new-international-economic-order-and-the-antinomies-of-the-bandung-era/ (accessed 24 May 2020).

[156] These principles were based on the development concepts put forward by Raúl Prebisch, the first Secretary-General of UNCTAD.

- universal commitment to refrain from all forms of dumping.

The above-mentioned principles issues will be examined in detail under Chapter 3.

Shortly after the establishment of UNCTAD, following the increased demands of Developing Countries, Part IV was established, which is the developmental cornerstone of the GATT. Part IV dealing with trade and development and encompassing Articles XXXVI to XXXVIII was introduced into GATT (the substantive provisions will be examined in detail in Chapter 3). The General System of Preferences (GSP) was advocated for under UNCTAD following resolution adopted in UNCTAD II in New Delhi.[157] GSP refers to preferential tariff system extended by Developed Countries to Developing Countries. It allows low or zero tariff imports from Developing Countries. GSP waivers were then shortly introduced on a voluntary basis with waivers being agreed to by GATT contracting parties in 1971, which constituted a particularly new approach to S&DT (as will be explained later in this chapter). GSP will also be examined in detail at chapter 3 of this thesis.

The Enabling Clause was one of the first significant provisions under the various MTS's which accorded Developing Countries formal cementation of S&DT.[158] It operates primarily in the International Trade arena by providing for permanent legal cover for GSP's and preferential treatment under the MTS by legitimizing the granting of "differential and more favourable treatment" to Developing Countries without granting the same to all other Members.

The Uruguay Round marked a historical and economic shift in the emergence of S&DT principles in the MTS. Developing Countries' increased interest and participation in negotiations and deliberate trade policy objectives and increase in global trade resulted in a shift of the application of the principle. [159] The Uruguay Round led to innovations such as

[157] Second Session of the United Nations Conference on Trade and Development (UNCTAD II) 31 January - 29 March 1968; The Conference adopted resolution 21 (II) calling for tariff preferences in favour of Developing Countries in line with the proposal made earlier by Prebisch, although the endorsement by the TDB.

[158] Ukpe (n 65 above) 2. Ukpe succinctly described the Enabling Clause as "the single most important 'other decisions' of the Contracting Parties to the GATT 1947" (n 15 above), which is today "an integral part of the WTO framework" which was "a veritable instrument for promoting the economic development of Developing Countries".

[159] Page (n 139 above) 18. Page states that "[…] they wanted changes in areas of major interest to developed countries, agriculture and textiles and clothing, where asking for special treatment". Further, by the beginning of the Uruguay Round, the position of the Developing Countries was very different from 1973. They were providing an eighth of manufactured exports at the beginning of the Round and more than a fifth by the end.

transition periods and technical assistance, which today formulate an important role for Developing Countries in the WTO. This also culminated in a significant increase of S&DT provisions across the MTS. S&DT currently spans across numerous Agreements on areas which include five broad categories specifically;

- Provisions aimed at increasing trade opportunities through market access;
- Provisions requiring WTO Members to protect the interest of Developing Countries (protective measures);
- Provisions on flexibility of commitments;
- Provisions that allow longer transitional periods to Developing Countries; and
- Provisions on technical and financial assistance.[160]

The recent developments of S&DT and the unsuccessful Doha round have been briefly examined in chapter 1 and the provisions shall further be examined in Chapter 3, specifically the inadequacies of S&DT under the current WTO system. Ministers in Doha, at the 4th WTO Ministerial Conference, mandated the CTD to examine these special and differential treatment provisions. Changes to the substance and structure of S&DT under WTO Agreements have not been implemented, for the most part. The WTO TFA, however, has offered novel approaches. The novel approach adopted by Members involves self-commitment of obligations by Developing Countries regarding various WTO Trade Facilitation related obligations. Further, obligations under TFA are tied to a Developing Country's capacity and technical and financial assistance needs. The above notwithstanding, S&DT provisions under the current trade dispensation have been ineffective, non-binding and unclear, and currently continue to apply and are, therefore, binding on WTO Members.

2.2 Sovereignty, Equality of States and S&DT

[160] WTO Website, Special and Differential Treatment Provisions: https://www.WTO.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, (accessed 3rd November 2020).

The section above briefly addressed how S&DT speaks to the fundamental and underlying issues of sovereignty and the equality of Developing Countries at international law level and in the MTS. It is imperative to expound this issue for the purposes of contextual understanding of the principle of S&DT at international law level. It is essential to examine S&DT's normative construct and, in the context of other international disciplines, to track growth, challenges and opportunities under S&DT in the context of International Trade Law. This will be used to develop the hypothesis and the proposed framework.

The principle of sovereignty[161] and equality of states represents the fundamental doctrine of the law of nations and international law. Brownlie establishes that this doctrine is contextualised by three corollaries:

1. jurisdiction exercised by States over territories and permanent populations;
2. the duty not to intervene in the exclusive jurisdiction of other States; and
3. the obligations which emerge from the sources of international law. [162]

An extensive number of International Instruments are founded upon this principle and have entrenched it into their Instruments,[163] including the WTO.[164]

The concept of 'sovereignty' has extensively been subject to debates regarding its definition, particularly with respect to the elements sovereignty encompasses. Krasner's view on sovereignty, which is from a political-scientific perspective as opposed to a legal standpoint on sovereignty, is a widely adopted approach accepted by academics due to its robustness, providing different and logically independent meanings.[165] Krasner focuses on the rules of sovereignty and how they are continually broken and offers a holistic perspective of the

[161] Sovereignty is simply defined as "the power or authority to rule" in the Cambridge Academic Content Dictionary (2008)
[162] I Brownlie *Principles of International Law* (1998) 45.
[163] UN Charter (n 147 above) Article 2(1). Also see the Statute International Court of Justice (ICJ) and the WTO Agreement.
[164] P Lamy 'The Place of WTO Law and its Law in the International Legal Order' (2007) 17(5) *The European Journal of International Law* 973. The principle of sovereign equality requires formal equality of states of all sizes and power under the WTO institutional rules. While most international economic organisations have a restricted body alongside their plenary body, the WTO is unusual in that the totality of its Members participate, as a matter of law, in all of its bodies – from the Ministerial Conference. Further, all of the decisions are taken according to the principle 'one government/one vote' and by consensus.
[165] S Krasner S*overeignty: Organised Hypocrisy* (1999) 3.

concept through international relations which incorporates legal as well as socio-political elements. He breaks sovereignty into four categories,[166] which include *inter-alia* International Legal Sovereignty, which he describes as states recognising one another as independent territories, or that they have "formal juridical independence".[167] He also lists Westphalian sovereignty as one of the categories, where states have the right to separately determine their own domestic authority. Westphalian principles of sovereignty is rooted in the principle of non-intervention by other states in the internal affairs of members[168]

The principle of S&DT does not detract from international legal sovereignty in relation to the international territorial boundaries of states. Sovereignty at international law level imposes duties and confers rights upon States and Nations. [169] The States, therefore, possess control over their affairs (due to rights they confer and obligations on other Nations) within a territorial or geographical area. S&DT acknowledges the territorial boundaries of States, however, it confers preferential treatment notwithstanding the MFN rule. Members that voluntarily enter into multi-lateral organisations such as the WTO, and accept conditions relating to erosion of rights or preferences exercise sovereignty by adhering to the instruments and terms. It has been argued that the WTO and S&DT diverges drastically from principles of sovereignty due to the Multilateral nature of the WTO, which creates the International Community, and erodes exclusive Sovereignty over trade policy and domestic trade laws. Notwithstanding the fact that State consent to the WTO is the starting point for legitimacy to accept WTO obligations, a further argument has been raised, namely that vague, ambiguous and incomplete text results in decisions (i.e. by the Appellate Body) beyond the consent of Members[170] and thereby infringes on Sovereignty of States. S&DT provisions comprise of a significantly high number of provisions which are vague, ambitious and incomplete.

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[166] Krasner (as above) 3. The four categories are international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty.
[167] Krasner (as above) 4.
[168] Peace of Westphalia (1648). This sovereignty supposedly outlined in the Treaty of Westphalia, was originally defined as the absolute power of the king and later the state to reign over a population.
[169] H Kelson 'The Principles of Sovereign Equality of States as a Basis for International-Organization' (1994) 53(2) *Yale Law Journal* 207.
[170] J Meltzer 'State Sovereignty and the Legitimacy of the WTO' (2005) *University of Pennsylvania Journal of International Law* 695.

S&DT and the WTO itself has consequently eroded state sovereignty due to obligations which affect trade policy and domestic trade laws, particularly Westphalian principles of sovereignty by providing for legally enforceable rights which a WTO Member has to accord with and which amounts to intervention by a Supranational body. Globalisation and the Interdependence of States and their problems strengthen the need of new effective tools to address evolving structures of international law. Collective-state cooperation is required in almost every area of governance in the twenty-first century among states, from health and drug controls, arm trafficking, terrorism, financial regulations to human-rights. This has resulted in International governing institutions regulating interactions and establishing instruments which also contain provisions on differential treatment and special treatment, which inherently erodes sovereignty of signatory states. Over and above globalisation, the inter-dependence of States economically, historically and socially and geographically (where landlocked countries require each other for trade purposes) indicates a stark difference between legal sovereignty and the reality of the sovereignty of States on the ground. Further, diverging economic differences, dependence of Members regarding aid (particularly in North-South relationships), and political interference in various Countries' decisions highlight that legal sovereignty may be eroded in reality.

The principle of equality in sovereign equality is, as stated by Pruess, based upon "[…] a plurality of entities that refer to each other, recognise their independent existence, accept their mutual comparability, and hence acknowledge their status of equality".[171] The equality of states in the concept of sovereign equality only goes as far as the extent that all states "satisfy the same conditions according to which they qualify as States" and become equals in terms of their legal status.[172] The paradoxical phrase of "Sovereign Equality" in modern international law lies in the political, socio-economic, infrastructural and military inequality of LDCs and Developed states that co-exist in international forums, which are party to International Instruments. Further, the erosion of Sovereignty by all Members who are party

[171] UK Preuss 'Equality of States – Its Meaning in a Constitutionalised Global Order' (2008) 9 *Chicago Journal of International Law* 20.
[172] B Gilson 'The Conceptual System of Sovereign Equality' (1984) *Peeters* 59.

to International instruments by virtue of obligations imposed by the said instruments. Meltzer succinctly elucidates that whilst membership in an international organisation is an expression of states' legal sovereignty, membership may nevertheless undermine states' Westphalian Sovereignty.[173] He further went on to establish how relations and globalisation of world systems, in particular the WTO system, affects relations and interdependence.

The concept of sovereign equality is important in establishing a society of States with equal legal capacities. This justifies its inclusion in the WTO Instruments. This is the principle that no state is superior to any other state and all states are equals with respect to their status in the plurality of states.[174] Sovereign equality, however, hardly has any relevance with the concept of equality. Preuss fittingly explains that "[t]here is a clear distinction between the equality of the law and equality before the law".[175] The WTO system holds Members equal before the law. The WTO through its rules on S&DT do not provide for equality of rights and duties, as it confers uneven advantages in favour of Developing Countries. While sovereign equality doesn't guarantee distributive equality or international distributive justice, it safeguards Developing Countries' independence and equality under the WTO Law and from other WTO Members whilst they are accorded preferential treatment. Equality, or specifically legal equality, does not mean equality of rights and duties irrespective of the several states' size, power, and international responsibilities.

Inequality of rights and obligations under the WTO is highlighted by the Enabling Clause, which provides at Paragraph 5 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". This provision has been used to justify asymmetric S&DT-based agreements, with minimal to no reciprocation on similar issues,

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[173] Meltzer (n 170 above) 695. Meltzer opined that:
"The implications of membership in the WTO for state sovereignty have a vertical and a horizontal dimension. The vertical dimension is the effect on state sovereignty as a result of the relationship established between the WTO and each member state. The horizontal dimension focuses on how WTO membership effects interstate relations. The horizontal and vertical implications for state sovereignty of membership in the WTO needs to be assessed in light of both the increasing interdependence and globalization of the international system and the power asymmetries that exist between states."

[174] Preuss (n 171 above) 26.

[175] Preuss (as above) 24.

particularly tariff concessions. The application of the issue of reciprocity under the Enabling clause and its extent has been a point of contention for developing and Developed Countries, particularly in the EU-ACP EPA negotiations, with divided interpretations on the WTO provision.[176] The EPAs are structured to be WTO compliant as will be elucidated in chapter 5. At face value, this is partly a divergence with the Difference Principle under equity, which sees reciprocity as essential for operation of a contract.[177] The motivation is that reciprocation is imperative for mutual benefit of a contract.

The Enabling clause, however, is qualified by stating that such reciprocity is not necessarily prohibited. It states that such reciprocity is not to be to the extent that it is "inconsistent with their individual development, financial, and trade needs." This, therefore, indicates that reciprocity is to be present in preferential agreements, to the extent that it doesn't negatively affect subjective needs of Developing Countries. This position therefore means that S&DT under WTO law is not entirely at odds with the principle of equity on the need for reciprocity in agreements. It has also been established that preferential treatment under the WTO takes into account needs of individual contracting parties and LDCs in particular as set-out under Article XXVIII bis (3) (a) and (b) of the GATT. Paragraph 44 of the Doha Declaration acknowledges the need to address specific needs of LDCs and Developing Countries.

It is evident from the above comparison that the construct of S&DT has key components of equity in its construct. These principles aid in providing context of the key objectives or features of what S&DT is to attain, particularly in redressing inequalities and ensuring that the measure provide genuine equality of opportunity to WTO Members.

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[176] One of the key objectives of the EPA's was the replacement of unilateral preferences under Lome and Cotonou Agreements with reciprocal free trade arrangements in order to make the EPAs "WTO-compatible". EPA's operate under Article XXIV of the GATT which the EU has argued requires that the countries entering into a reciprocal free trade agreement liberalise "substantially all trade" within a "reasonable length of time" without distinguishing between developed and Developing Countries. ACP countries supported by NGOs disagree and argue that ACP countries should continue to enjoy non-reciprocal market access to the EU or at least be required to liberalise their trade regime over a long transitional time. Also see J Whalley 'Special and Differential Treatment in the Millennium Round' (1999) *CSGR Working paper No. 30/99*. Whalley makes a useful distinction between S&DT provisions adopted before the Uruguay Round and those adopted subsequently. The former were crafted to provide market access for Developing Countries in advanced countries' markets on a preferential and non-reciprocal basis.

[177] Whalley (n 87above).

2.3 Equality, Non-Discrimination & S&DT

The principles of equality and non-discrimination are fundamental to the rule of law[178] and, as stated above, to most international instruments. At an individual level, human equality and rights are linked to international trade law, as "[t]rade creates or expands some activities and destroys or diminishes others."[179] Non-discrimination is inherent to the principle of equality and other guarantees of human rights, which also includes economic liberties.[180] These liberties have transcended international instruments and are incorporated into the established objectives of the UN and UN Charter.[181] This includes the achievement of "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[182] The principle of non-discrimination is also central to the Multilateral Trading System.[183]

The WTO system is predicated on the non-discrimination principle, which was developed under the GATT.[184] It is recognised in the Preamble of the WTO Agreement as a key instrument in attaining the objective of the WTO.[185] The MFN treatment[186] obligations, held

[178] United Nations *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (2012). Paragraph 2 provides that "all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law."

[179] World Bank Website, https://documents.worldbank.org/en/publication/documents-reports/documentdetail/183791468162289893/the-impact-of-international-trade-on-gender-equality (accessed on 3rd November 2020).

[180] T Cottier & M Oesch 'Direct and Indirect Discrimination in WTO Law and EU Law' (2011) NCCR Trade Regulation*, Swiss National Centre of Competence in Research Working Paper No.2011/16* 4.

[181] The primary objectives of the UN under the Charter are found under the preamble and Article 1 (1), in maintaining international peace and security, advocating for equal rights (Article 1(2)), and the preamble in reaffirming "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

[182] UN Charter (n 147 above) Article 1(3).

[183] GATT 1994 (n 12 above) Article I:1 - Non-discrimination is primarily contained under the Most Favoured Nation principle under Article I:1 and National treatment principle under Article III of the GATT.

[184] GATT 1994 (as above) Article I:1 and Article III of the GATT.

[185] *The WTO Agreement* (n 42 above). The WTO Agreement specifically provide for the "[…] elimination of discriminatory treatment in international trade relations".

[186] GATT (n 12 above) Article I:1.

as the cornerstone of the GATT and one of the pillars of the WTO trading system,[187] and the national treatment obligation,[188] are the main principles of non-discrimination under WTO Law. The MFN principle guarantees equal trading opportunities to all WTO Members; it is essentially a method of establishing equality of trading opportunity among WTO Members.

Non-discrimination under the WTO occurs where Members undertake to contractually to meet the obligations of equal treatment on the basis of reciprocal advantages. This is to give way to substantive equality. The principle is *jus cogens*, in that it is a compelling and fundamental principle of international law and WTO law, alongside other similar principles such as the principle of equality before the law and equal protection before the law.[189] The above notwithstanding, it has been established that rules such as Article XX of the GATT and S&DT are exceptions to the fundamental principle (of non-discrimination). Members therefore have the right to discriminate to the extent of the application to the relevant WTO rules. Non-discrimination under WTO law is to curb protectionism and to ensure equal treatment of foreign and domestic products, and ensure that treatment and conditions more favourable than those granted to any third party would be equally extended to any other party to the agreement. This, therefore, means that non-discrimination is a powerful tool for trade liberalisation as is obligates States to "surmount their innate distrust of each other and to engage in mutually beneficial and generalised reductions in tariff barriers".[190] Non-discrimination, however, does not guarantee free trade, as tariffs are key in protecting domestic industries and providing income to states. Non-discrimination also continues to exist through TBTs and SPS, particularly in food standards, and subsidies. Despite commitments made to non-discrimination, there are a number of exceptions to this principle under WTO law. The exceptions exist in the same Agreement that provides for non-discrimination (the GATT 1994); such exceptions also include S&DT provisions.

Legal exceptions to the non-discrimination principle are scattered over the GATT 1994. Article XX of GATT 1994 diverges from non-discrimination on the basis of public goods of

[187] *EC - Tariff Preferences* (n 19 above) para 101.
[188] GATT 1994 (n 12 above) Article III.
[189] United Nations *Universal Declaration of Human Rights*, 1948, Article 7. The Article states "All are equal before the law and are entitled without any discrimination to equal protection of the law."
[190] A Lukauskas, R Stern & G Zanini *Handbook of Trade Policy for Development* (2013) 3.

public morals, human, animal and plant health and life, natural resources and compliance with domestic law not inconsistent with GATT rules. Further, Article XXIV of GATT 1994 offers exemptions to MFN treatment of like products (for instance, free trade areas and customs unions).[191] The test employed to determine legality of an action by a State that violates principles of non-discrimination is whether the measure is suitable and feasible and whether less intrusive alternatives are not reasonably available. This test has widely been adopted by the Appellate Body and Panels. In *US –Gambling,*[192] the Appellate Body adopted the *Korea – Various Measures on Beef*[193] interpretation relating to whether a measure is "necessary"; it should be determined through "a process of weighing and balancing a series of factors"[194] and that the process is one that

> "[...] comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO inconsistent measure is 'reasonably available'". [195]

Exceptions to non-discrimination are also found in S&DT provisions, which go against the WTO's most fundamental Most-Favoured-Nation principle which is a "cornerstone of the GATT and one of the pillars of the WTO trading system".[196] The Enabling Clause, which forms the basis of most S&DT provisions, also concretises exemption from MFN treatment for GSPs[197] and preferential Trade Agreements between Developing Countries.[198] Paragraph

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[191] *Turkey – Restrictions on Imports of Textile and Clothing Products* Appellate Body Report adopted on 19 November 1999 Appellate Body Report WT/DS34/R (Turkey – Textiles) para. 58. The Panel at paragraph 58 that;
"Article XXIV may justify a measure which is inconsistent with certain other GATT provisions… First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of subparagraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue."

[192] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* adopted 20 April 2005 (Appellate Body Report) (WT/DS285/AB/R) 102.

[193] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, adopted 10 January 2001 (Appellate Body Report) (Korea – Beef) (WT/DS161/AB/R).

[194] *Korea – Beef* (as above) para 164. The series of factors includes "[…] the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports".

[195] *Korea – Beef* (as above) para 166.

[196] *EC - Tariff Preferences* (n 19 above) para 101. The MFN principle is found in Article I:1 of the GATT. The Most Favoured Nation guarantees equal trading opportunities to that accorded to the most-favoured nation; it is essentially a method of establishing equality of trading opportunity among WTO Members.

[197] The *Enabling Clause* (n 18 above) Article 2 (a). The Provision creates a permanent waiver to the MFN clause to allow preference-giving countries to grant preferential tariff treatment under their respective GSP schemes, from which Developing Countries benefit. Under the prescribed GSP schemes of preference-giving counties, selected products

2(c) underlines the basis for derogating against non-discrimination in favour of Developing Countries by providing that:

> "Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES".

Numerous S&DT provisions under various WTO law, which derogate against the core principle of international law of non-discrimination, shall be identified, particularly in chapter 3 of this thesis, and will be discussed in detail.

2.4 S&DT Under WTO; Justifications For, and Against S&DT and Shortcomings

Chapter 1 of this study established how S&DT developed under the previous MTS's and its current application and dispensation under WTO law. It further established key provisions scattered under various WTO law, particularly Agreements, Ministerial Decisions and Declarations as well cases where the DSU has made determinations on various aspects regarding the said principle. The principle or right has come to the forefront in international trade. This section highlights justifications for S&DT as well criticisms in the context of economic, political and legal arguments.

2.4.1 Arguments For S&DT

Section 2.1 examined the historical development of S&DT under the various MTSs. It established how S&DT was developed as a solution to the existing economic inequity of Members in order to facilitate the increase in trade in goods of Developing Members. It was further established above that S&DT under the WTO is fundamental to bridging the inequality of Members through trade.

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originating in Developing Countries are granted reduced or zero tariff rates over the MFN rates. In addition to this, LDCs receive special and preferential treatment for more extensive coverage of products and deeper tariff cuts.

[198] T Fritz 'Special and Differential Treatment for Developing Countries' (2005) *Global Issue Papers No. 18* 32.

The first and primary argument for S&DT which has commonly been made and accepted by international jurists and economists, is that Developing Countries and LDCs cannot be treated the same as Developed Countries under all WTO rules.[199] Developing Countries, if inequality and incapacity remains unaddressed, are constrained in attaining the grand-objectives of liberalisation and "raising standards of living" through trade as established in the Agreement Establishing the WTO.[200] The main ideas underlying this position were elaborated by Prebisch and Singer in the 1950s and 1960s. Prebisch argued that treating the unequal equally simply exacerbates inequality.[201] The conceptual premises underlying S&DT is that Developing Countries are intrinsically disadvantaged in participating in international trade and that the WTO or multilateral system must take this into account when determining rights and obligations which apply to them.

It will be established later in this chapter, when examining S&DT and equity, that one of the cornerstones of equity is that two persons of unequal rank cannot be treated alike. Differentiation of WTO Members, therefore, is essential to the MTS's mandate of establishing trade rules and frameworks that are fair and equitable. S&DT, therefore, justifies or validates the WTO system by establishing equitable provisions that address inequality and differentiate between states.

The second justification for S&DT is that preferential treatment through affirmative action or exceptions are pivotal in integrating Developing Countries into the International Trade System in order to attain the ultimate aim of global trade liberalisation as established in the preamble of the GATT 1994.[202] Structural imbalances between developing and Developed Countries in terms of their shares of world trade, access to financing and technology, institutional capacity, and human resources have to be acknowledged and addressed for Developing Countries to develop capacity. The Uruguay Round's application of S&DT

[199] UNCTAD (n 147 above) xi.
[200] The WTO Agreement (n 42 above). The Preamble of the Agreement Establishing the WTO establishes general Developmental and liberalization objectives. The preamble also prescribes for substantial reduction of tariffs
[201] UNCTAD (n 147 above) xi.
[202] GATT 1994 (n 12 above). the Preamble provides for the substantial reduction of tariffs and other trade barriers and the elimination of preferences on a reciprocal and mutually advantageous basis.

provisions applied to the "within-the-borders" trade agenda as an adjustment tool to Developing Countries so as to modify their laws and economic policies to comply with the new trade rules. S&DT in the form of flexibilities under such agreements, financial and technical assistance provisions, and transitional clauses have aided Developing Countries in compliance with WTO obligations.

Thirdly, S&DT is also justified in providing Development for Developing Countries, which is in line with the developmental objectives established in the Agreement Establishing the WTO.[203] A reasonably high and predictable degree of S&DT can assist economic development.[204] This argument is fleshed out by Page, who advocates that designing S&DT to target some of the possible elements of "development" such as promoting industrialisation, innovation or good policy, or improved access to Developed Country markets, which in turn would foster economic growth.[205] Development from S&DT can be attained on two fronts, firstly, S&DT can result in development through trade measures designed to increase any advantages which trade may offer for development or to reduce any disadvantages.[206] Secondly, S&DT can be structured with helping Developing Countries as political entities through increasing their power and influence within the international system. A corresponding argument to this is that in developing provisions aimed at increasing power and influence, Developing Countries share of world trade is so low that their policies and S&DT and would have no significant impacts on Developed Countries. This argument was made in the 1970's,[207] prior to the emergence of emerging economies such as China, in securing a noteworthy share of global trade.[208]

[203] Notwithstanding the primary objective of trade liberalisation, *the WTO Agreement* (n 42 above) contains developmental objectives. The preamble affirms that "[…] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand". The application of the WTO without S&DT would have adverse results on Developing Countries and LDC's, which is opposed to the developmental objectives in the Agreement.
[204] Singh (n 99 above).
[205] Page (n 139 above) 5.
[206] Page (as above) 5.
[207] Page (as above) 16. Page opined that "Developing countries were still seen as infant exporters and so weak that even with special treatment they were not (normally) competitors for developed countries."
[208] WTO *World Trade Statistics Review* (2019) 8. In 2018, China was the World's leading merchandise trader.

Preferential provisions and non-reciprocal S&DT permit Developing Countries to pursue their economic development under protection whilst enjoying all the privileges and advantages of the multilateral trading system. The infant industry argument was made by Messerlin, specifically, that Developing Countries might not have a comparative advantage in a particular industry at present, however, they might do so in the future if they are given the opportunity to develop in the right environment.[209] S&DT accords such opportunities for development, particularly when it is operational and specific to Developing Countries' needs. A Developed South also has benefits for Developed Countries as a prosperous developing world provides a greater market for advanced country goods which in turn leads to higher incomes and production in the said Developed Countries. Development through S&DT results in International trade being more efficient for the benefit of all countries.[210]

S&DT can be argued to fall within the scope of development under the international law and international human rights law scope. This is an argument for S&DT, specifically that S&DT is aligned with the objectives of international law and human rights principles. It was expounded in the sub-chapter above on the historical development of S&DT that the development dimension expanded with the advent of decolonialism and participation of Developing Countries in the international law arena, which included the GATT MTS. Against this background, the UN General Assembly adopted the *Declaration on the Right to Development* which defined development in an expansive sense in its preamble, stating;

> "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."

[209] PA Messerlin 'Enlarging the Vision for Trade Policy Space: Special and Differentiated Treatment and Infant Industry Issues' (2006) 29(1) *The World Economy* 1397.

[210] T Murray 'Trade Preferences for Developing Countries' (1977) *Palgrave* 14. Murray found that Developing Countries have "high production costs […] less frequent transportation services […] and less effective marketing and distribution channels". Report by the Secretary-General of the OECD - "The Generalised System of Preferences: Review of the First Decade" (1995) Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Economic Relations Thomson/West 1126-1127 states that "[…] preferential tariff rates in the markets of developed countries could provide impetus for the industrial development of the Third World" allowing them to "overcome difficulties […] arising from high initial costs".

Development under International Human Rights law and under the WTO scope have overlapping features. This Chapter has examined the scope of development under WTO law to extend to economic, trade and financial needs. Development under international law includes changes in society, culture and the political realm, within the human rights ambit. The International Covenant on Economic, Social and Cultural Rights (ICESR) incorporate States' obligations to respecting, promoting and fulfilling economic, social and cultural rights and include (amongst others) the rights to work, an adequate standard of living, health, education, social security, housing and participation in cultural life.[211]

In examining S&DT under the WTO and under the international human rights law context, the primary linkage to the two disciplines is States' commitments and obligations to development. States must cooperate transnationally so as not to impede on other States' ability to fulfil their human rights obligations.[212] To this extent, there is a right to development under the ICESCR and the Development Declaration as examined above, that stretches to cover economic, financial and trade needs. The right exists at a multilateral level, as the civil and political rights do not come under the scope of the WTO in its system of agreements. ICESCR can be seen as dealing with economic and social rights through the special treatment accorded to Developing Countries. Needs of Developing Countries and LDCs under WTO law, and International Human Rights Law, particularly regarding trade needs, are to be safeguarded and promoted under the respective multilateral bodies, which is the underlying basis for S&DT. S&DT therefore can be argued to fall within the scope of development under the international law and International human rights law scope. The provisions are necessary for the Membership to actualise Developing Countries' ICESCR economic and financial trade needs and commitments, through preferential asymmetric treatment by Developed Countries. This therefore justifies the need for the provisions. It also follows that international instruments have consistently made provision for differentiation between Members, acknowledging differences in capacity to undertake

[211] United Nations General Assembly, The International Covenant on Economic, Social and Cultural Rights, 1966.
[212] United Nations Document, General Comment 3: The nature of States parties' obligations, UN CESCR, 5th Sess., para. 2, UN Doc. HRI\GEN\1\Rev.1 (1990)

commitments, and economic and trade inequalities between States, as will also be examined under this Chapter.

2.4.2 Arguments Against S&DT

The first very apparent and important argument against S&DT is a rudimentary one entrenched in WTO text, namely that S&DT is inherently contrary to the fundamental principles of non-discrimination and reciprocity on which the GATT 1994 system was based. The MFN principle is the bedrock of the MTS.[213] S&DT derogates from this provision through the Enabling Clause, allowing Developed Countries granting of preferences without violating the MFN rule and without the need for a waiver.[214] The central principle of the MFN treatment is itself most fundamentally aimed at advancing mutual market access.[215] Liberalisation is based on the sufficiently accepted premise (which is qualified) that trade liberalisation leads to economic growth.[216] By derogating from the primary objective under GATT 1994, S&DT provisions undermine the very essence of the MTS, attaining global reduction of tariff prices. Further, the "Development Objective" in the GATT 1994 which S&DT is premised under is secondary, and secondary to the tariff reduction mandate. Birdsall and Lawrence argues that "[a]greements that embody adherence to common rules by their nature imply reciprocal obligations"[217] as opposed to non-reciprocal preferential rules. The derogation from S&DT from MFN undermines it as a principle of Public international law, as it established the sovereign equality of states with respect to trading policy.

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[213] GATT 1994 (n 12 above). Article I:1 establishes that "any advantage, favour, privilege 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 the territories of all other contracting parties".

[214] *The Enabling Clause* (n 18 above). The Enabling Clause, as a voluntary regime, has subsequently been construed as providing for generalised, nonreciprocal, and non-discriminatory preferences. The GSP scheme is "an autonomous regime granted on a non-reciprocal, generalised and non-discriminatory basis". Also see L Bartels 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 21(3) *Journal of International Economic Law* 509.

[215] *EC - Tariff Preferences* (n 19 above). Also see S Laird 'Multilateral Approaches to Market Access Negotiations' in MM Rodriguez, P Low & B Kotschwar (eds) *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (1999) 205.

[216] E Kessie 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements' (2007) *WTO Law and Developing Countries* 15.

[217] N Birdsall & RZ Robert 'Deep Integration and Trade Agreements: Good for Developing Countries' in I Kaul (ed) *Global Public Goods. International Cooperation in the 21st Century* (1999) 133.

The second argument against S&DT is linked to the first, namely that preferential treatment (which is usually short-term) prevents or hinders long-term gains for Developing Countries. Wand and Winters argue that going against the MFN principle and liberalisation sacrifice long-term gains for short term advantages under preferential treatment. They "teach developing country negotiators to focus on short-term quasi-rents [...] rather than to focus on the long-term needs of assured access for commercially viable products".[218] This was in reference to unilateral preferences from Developed Countries, where Developing Countries often seek preferences where they may have little comparative advantage, and may gain very little from the arrangements due to quantitative constraints (such as in GSP) or by rules of origin. An example for example, the United States' general system of preferences (GSP) and SADC Members, which will be examined in detail under chapter 6. This was further re-iterated by Fritz who addressed ''free-riding" preferences, stating that they promote short-term "rent-seeking" and national economies hurt themselves with externally oriented protection, because it prevents specialisation on competitive products and innovation import.[219] Fritz argues that this is a common pattern, which occurs in the World Bank, the WTO and other institutions.

Hoekman further states that the "overuse of the 'non-reciprocity' clause has, in the past, excluded Developing Countries from the major source of gains from trade liberalisation - namely the reform of their own policies".[220] The context in which Hoekman examined non-reciprocity was that by not engaging in reciprocity, they lose a mechanism that can be used to support pursuit of beneficial trade policy reforms and in turn generate better access to export markets.[221] S&DT makes Developing Countries complacent and prevents them from making the difficult choices which would guarantee long term, sustainable growth, which is counter-development.

[218] ZK Wang & AL Winters 'Putting ,Humpty' Together Again: Including Developing Countries in a Consensus for the WTO' (2000) Centre for Economic Policy Research, *CEPR Policy Paper No. 4*.
[219] Fritz (n 198 above) 32.
[220] Hoekman *et.al* (n 64 above) 15.
[221] Hoekman *et.al* (as above) 15.

A third pragmatic argument advanced is that there is no economic evidence in relation to various S&DT areas or provisions, that demonstrates that S&DT will lead to development in Developing Countries.[222] This point is further examined in chapter 3, which examines existing S&DT and its use or effectiveness. WTO's categorisation of S&DT measures has an extremely important omission. There are no S&DT provisions here that would enable Developing Countries to overcome the anti-developmental impact of several parts of the WTO Agreements themselves. In will be examined at section 2.6 of this thesis that intellectual property (IP) Agreements are primarily geared at IPR enforcement and protectionism, an agenda birthed from Developed Countries' Policy, which is onerous on Developing Countries. There is very little evidence of advantages of technology transfer and development ensuing from LDC and Developing Countries, which have little capacity to take advantage of agreements. It will be difficult to maintain that the TRIPS, the TRIMs as well as several other elements of the Agreements normally have a positive impact on economic development.[223] This, therefore, means that despite the existence of S&DT in WTO acquis, its effectiveness is limited, or inconsequential under certain dispensations. General S&DT as a consequence grants ineffective non-specific, non-binding commitments, which do not serve the purpose they are meant to attain and should therefore be excluded from WTO Agreements.

An argument that has come to light in recent years, is that S&DT strains trade relations, which may result in a weakened MTS, or even the demise of the WTO system. The strain is exacerbated by the dependence of the provisions, particularly by LDCs. Dependence on the

[222] P Kleen & S Page (n 111 above) 23. The authors state that "[…] some countries with preferences have not used them or used them, but did not benefit, some because they were not in the right commodities (they faced protection for agriculture and clothing) or at the wrong time (countries with severe structural problems and supply constraints cannot use additional access); others suffered because the preferences encouraged distorted production (bananas). They have sometimes helped, but they do not solve all development problems".
Also see the paper by C Michalopoulos at the Food and Agriculture Organisation Round Table on Special and Differential Treatment in the Context of the WTO Negotiations on Agriculture, Geneva, 1 February 2002 http://www.fao.org/3/Y3733E/y3733e0c.htm (accessed 30 March 2019). He makes the point that there is little evidence that "general exhortatory language regarding liberalizing products of particular interest to Developing Countries has resulted in greater cuts in protection on such products in developed country markets".
[223] Singh (n 99 above) 240-241.

provisions is acknowledged under Article XXXVI (4) of the GATT 1994 under the Trade and Development chapter.[224]

S&DT issues has been one of the contentious issues particularly on issues such as agriculture and cotton during the Doha round, with Members struggling to even agree on a mutually acceptable pre-Nairobi draft declaration preliminary discussions on relevant subject-matters.[225] The recent strained trade relations between the US and China, which will be examined in detail at Chapter 4, has primarily emerged with S&DT as one of the contentious issues, particularly China's continued status as a Developing Country and its access to preferential treatment. Trade relations have reached the point of significant deterioration, with US President Donald Trump directing the United States Trade Representative (USTR) in a memorandum to stop treating such countries as developing countries for the purpose of WTO membership if "substantial progress" toward reform had not been made within 90 days.[226] A much publicised "trade war," between the two giant WTO Members has ensued since the US imposed tariffs on China in July 2018.[227]

The argument therefore against S&DT is that the continued dependence on S&DT by Developing Countries will continue to aggravate increasingly polarised groups, which will increase strain on the MTS. This reality is that the WTO legal provisions are currently not equipped with robust rules to address the development and preferential treatment scope, as will be established under Chapter 3. This will inevitably affect trade relations moving forward, with a polarised WTO Membership with diverging interests. Members may not be willing to increase preferences, or abandon Developing Country Status and lose preferences.

Another argument against S&DT is with regards to the high costs of S&DT borne by Developed Countries, as a result of preferential treatment and adjustment costs Developing

[224] GATT 1994 (n 12 above) Article XXXVI (4) provides that "Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products,* there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products."
[225] World Trade Organization, Documents of the Nairobi Ministerial Conference, Submissions from members - Joint Communication from 29 countries WT/MIN(15)/10, 7 December 2015.
[226] Reuters website, https://www.reuters.com/article/us-usa-trade-wto/trump-targets-china-in-call-for-wto-to-reform-developing-country-status-idUSKCN1UL2G6, (accessed 24 May 2020).
[227] BBC website, https://www.bbc.com/news/business-45899310 (accessed 24 May 2020).

Countries face in complying to multilateral commitments. S&DT addresses multiple challenges Developing Countries face, such as provisions on market access and export-related costs which can be resolved through financial or technical assistance. LDCs are particularly volatile, Soobramanien and Gosset opined that 'When compared with developing countries in general, small states have been found to face higher export-related costs owing to their geographic remoteness (many are islands or landlocked countries) and other factors that can undermine their economic competitiveness.'[228]

The primary challenge is that operationalising S&DT requires a number of factors, which will be identified throughout this paper, particularly under Chapter 4. It was stated that S&DT falls into five particular categories, namely market-access, safeguard measures, transitional periods, flexibilities, technical and financial assistance. The most apparent challenge when considering costs is financial costs associated with financial and technical assistance, regarding LDCs which have institutional, human-resource and infrastructural trade related needs. Financial assistance in a MTS which contains more Developing Countries than it does Developed will always pose a concern, coupled with equitable modalities to cater for diverging groups of Members. It will be at Chapter 4 how the MTS currently doesn't prescribe rules that address this challenge.

S&DT operational challenges extends to fundamental structural questions regarding the MTS itself, and central principles, such as non-discrimination. Questions which remain unanswered under WTO law, or partially un-resolved include; To what extent should a member-state be accorded preferential treatment? What criteria should be set for Member-States to receive preferential treatment? When are Members ineligible (or graduate) from being classified as a Developing Country? Which Member-States should accord preferential treatment, and the extent to which they should extend the treatment. The questions pose significant challenges, particularly regarding establishing modalities, and rules on costs in a system which attempts to guarantee sovereign equality, whilst maintaining core rules such as non-discrimination.

[228] T Y Soobramanien and L Worrall *Emerging Trade Issues for Small Developing Countries: Scrutinising the Horizon* 2017 Commonwealth Secretariat 6.

Lastly, it has been argued that S&DT treatment for Developing Countries cannot be operationalised in the sense of being made a formal and an enforceable part of the WTO rules.[229] Finger defends Hudec's position with regards to the above and expresses that the '"'welfare obligation' of developed countries to assist in the development of Developing Countries cannot be given legal force".[230] Hudec further qualifies this and states that the welfare concept itself is incapable of being defined with the kind of specificity needed to establish a meaningful obligation of customary international law applicable to the governments of all Developed Countries.[231] This argument has also been advanced by Mitchell.[232] Despite this position, S&DT has become workable and effective in key areas of WTO rules negotiated among WTO Members.[233] An example of this can been seen under the use of S&DT under the Enabling Clause and Article XXIV by Developing Countries in RTA, which allows them to enter into preferential arrangements, gaining key market-access (this aspects will be further examined in chapter 3 of the study). Further, Hudec also expresses that Developing Countries may secure legal S&DT non-reciprocated rights in the form of contractual rights arising from negotiated liberalisation, which are still binding in public international law and enforceable within the WTO dispute settlement system.[234]

2.4.3 Challenges and Shortcomings of S&DT Under WTO Law

The general consensus among scholars is that S&DT has not been effective and statistics also indicate this. Despite a growth of S&DT provisions from the commencement of the Enabling clause, the share of Developing Countries' trade in world trade has only slightly increased between 1980 and 1999.[235] With the exception of emerging developing countries, i.e. as China and India, most Developing Countries have not experienced a significant

[229] JM Finger 'Developing Countries in the WTO System' (2008) *World Economy* 887.
[230] Hudec (n 69 above) 187.
[231] Hudec (as above) 187.
[232] A Mitchell 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) *World Trade Review* 469.
[233] E Kessie (n 216 above) 15. S&DT provisions relating to transitional periods or flexibilities are generally enforceable and can be relied on by Developing Countries to defend themselves when breached.
[234] Hudec (n 69 above) 187 - 188.
[235] CA Goerl 'Special and differential treatment of Developing Countries in the World Trade Organization' (2009) *Economie Internationale*.

increased share in trade notwithstanding the introduction of numerous S&DT provisions following the Uruguay Agreements, as will be examined under Chapter 4. A majority of Developing Countries, especially LDCs, have seen their share in world trade stagnate or even decline, as reported in 2007.[236] The 2019 World Trade Statistical Review further indicates that LDCs' share of global trade has not grown significantly in recent years.[237] LDCs' share of global exports has decreased from 1.06% in 2011 to 1.02% in 2018.[238]

Chart 5.16
Merchandise trade of LDCs, 2008-2018
(Percentage share)

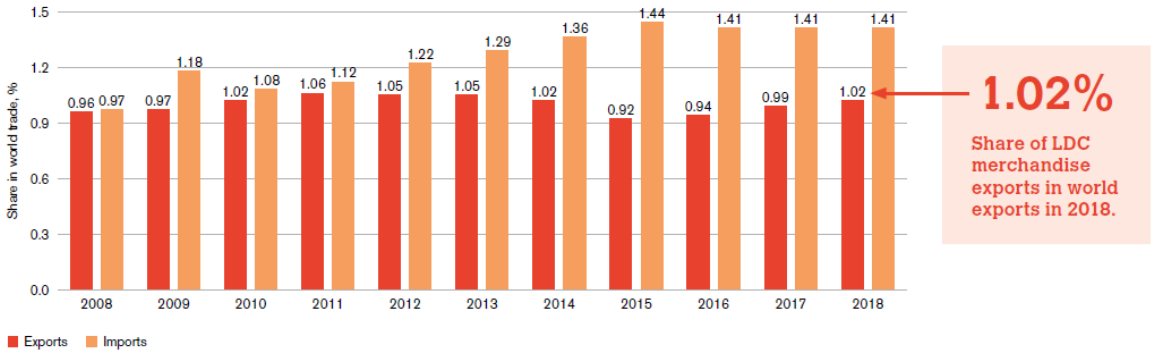


Chart from World Trade Organization World Trade Statistical Review (2019) page 62.

The 2019 World Trade Statistical Review further shows global exports from LDCs have not grown significantly in recent years.[239] The steady rise has been caused by oil exports and global increase in energy prices, despite numerous WTO S&DT to promote diversification of exports.[240]

[236] G A Bermann & P C Mavroidis *WTO Law and Developing Countries* (2007) New York: Cambridge University Press 1.
[237] World Trade Organization *World Trade Statistical Review* (2019) 62.
[238] WTO *World Trade Statistical Review* (as above).
[239] WTO *World Trade Statistical Review* (as above).
[240] WTO *World Trade Statistical Review* (as above).

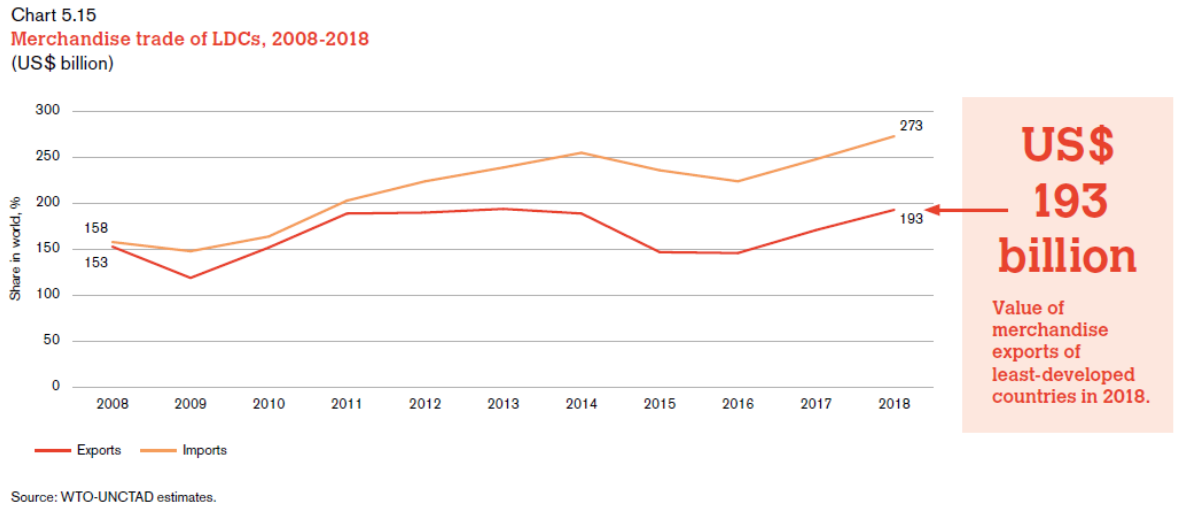


Chart from World Trade Organization World Trade Statistical Review (2019) page 62.

The data above is indicative of the fact that the introduction of S&DT under the previous and current MTS has not significantly increased Developing Countries and LDCs increasing their share of trade. Numerous challenges and shortcomings hinder the effectiveness of S&DT. S&DT has also been argued to have not performed well due to lack of strategy, evidence and economic and welfare justification.[241]

As established in this study and as will be further elaborated on in chapter 3, Developing Countries have not been successful in implementing and capitalising on existing S&DT. This is due to a number of issues which are not only S&DT related, and challenges and shortcomings in S&DT provisions themselves, the way they have been constructed as well as their objectives, as will be expounded under Chapter 3. Developing Countries have mooted that S&DT must be provided on a non-discriminatory basis,[242] with sufficient flexibility in the rules to be maintained in order to allow exceptions for developmental purposes. Further, they must address trade-related development concerns, which include supply-side constraints, capacity and infrastructure. It will be shown in chapter 3 that the primary shortcomings which affect the operation of S&DT are those relating to enforceability,

[241] Kuhlmann K & Agutu A L 'The African Continental Free Trade Area: Toward A New Legal Model For Trade and Development' (2020) 51. Geo.J.Int'l L.4 18.

[242] This particularly meant that S&DT should, at the most, provide for one type of discrimination specified, i.e. between Least Developed and other Developing Countries and no other forms of discrimination, such as in *EC – Tariff Preferences* (n 19 above) where India disputed the EC accords tariff preferences to Developing Countries under its current scheme of generalised tariff preferences despite its status as a Developing Country.

unspecified procedures in establishing needs of Developing Countries, and lack of effective implementation and monitoring mechanisms. It is imperative that shortcomings be taken into account in order to address deficiencies and issues which are to be attended to in the Framework.

2.4.3.1 Enforceability - Lack of Binding Provisions

The S&DT matrix in the WTO Agreements lacks enforceability, predominantly due to its general, non-specific, and non-binding provisions. It has been described as soft-law, comprising of non-binding provisions couched in "best efforts" type language.[243] Common language in WTO Texts, including the GATT 1994 and the Agreement establishing the WTO, contain broad general objectives and developmental clauses as well as "positive efforts" to ensure Developing Countries and LDCs secure a share in International trade.[244] Hudec theorises that the non-mandatory nature of S&DT is the main reason why preferences rarely result in the expected benefits for Developing Countries.[245] This position is also echoed by Hoekman and Caglar.[246]

A majority of S&DT clauses are not couched in the obligatory language necessary to bind parties. Instead, they are abstract and use aspirational language, despite being taken up in a treaty provision. The provisions are further softened by the use of the word "should" instead of "shall", helping to detract from their seemingly mandatory character.[247] Multiple vague and general provisions exist, such as GATT 1994 Article XXXVII:1 which provides for the "fullest extent possible", GATT 1994 Article XXXVII:3 which refers to "special regards", and the AoA (Article 16.2) which provides for "monitoring, as appropriate". This wording has resulted in adjudicators shying away from rigorous or strict treaty interpretation exercises

[243] M Footer 'The (Re)turn to 'Soft Law' in Reconciling the Antinomies in WTO Law' (2010) 11 *Melbourne Journal of International Law* 9.
[244] GATT 1994 (n 12 above) Article XXXVI:3.
[245] Hudec (n 69 above).
[246] B Hoekman & O Caglar 'Trade Preferences and Differential Treatment of Developing Countries: A Selective Survey' (2005) *World Bank Policy Research Paper 3566* 6.
[247] S Paliwal 'Strengthening the Link in Linkage: Defining "Development Needs" in WTO Law' (2012) 27(1) *American University International Law Review* 64.

when dealing with S&DT clauses and have not attempted to develop tests, standards or methodologies that would be useful for future cases.[248]

Even the Enabling Clause, which is a central preferential provision to Developing Countries, accords preferences which are not mandatory.[249] This, therefore, means that a decision to accord preference is entirely discretionary or at the will of Developed Countries. There are enforceable S&DT provisions present in areas of WTO rules, particularly with regards to transitional periods or flexibilities. These rules are part of the rules negotiated among WTO Members.[250] The DSU has also provided positive interpretation on a number of provisions in Agreements.[251] Notwithstanding the above, it will further be argued in this chapter that such S&DT is not in key areas central to Developing Countries' primary needs, and is merely an adjustment and integration tool. [252]

Unenforceability of S&DT flows from the unbinding nature of S&DT. Provisions are not fully operational and cannot be implemented due to lack of specificity and further lack of direct relevance to the needs of Developing Countries. In the preparations for the Doha Round, Developing Countries established a proposal for a framework of S&DT and noted that "all the existing S&D provisions in various WTO agreements should be fully operationalised/implemented. The implementation should go beyond technicalities and include operationalisation of provisions that presently lack operational modalities".[253] The Developing Countries, in order to overcome this challenge, proceeded to suggest that this can be rectified by making S&DT mandatory and legally binding through the dispute

Rolland (n 57 above) 127.

[249] *The Enabling Clause* (n 18 above). Paragraph 1 of the Enabling Clause states that: "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to Developing Countries".

[250] Kessie (n 216 above) 15. S&DT provisions relating to transitional periods or flexibilities are generally enforceable and can be relied on by Developing Countries to defend themselves when breached.

[251] *Brazil – Export Financing Programme for Aircraft*, adopted 20 August 1999 Panel Report WT/DS46/R (*Brazil Aircraft*). At Paragraph 7.26 the Panel held that under Articles 27 and 29 of the *SCM Agreement* certain Members are entitled to special and differential treatment and are not subject to the prohibition on export subsidies - Paragraph 7.26 - the Panel further stated that Brazil is a developing country Member within the meaning of the *SCM Agreement*. As such, Brazil is entitled to the extensive special and differential treatment accorded to such Members by Article 27 of the *SCM Agreement*.

[252] Wang & Winters (n 218 above). S&DT is limited in Agreements which may not necessarily benefit Developing Countries in the first place.

[253] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above) para 12.

settlement system of the WTO, including notification requirements and inclusion of these commitments in country schedules.[254]

The challenge or shortcoming of "positive effort" provisions is lack of enforceability and this has been echoed in the "incomplete contract" debate. The WTO endogenously adopted this contract form, which cuts across core agreements such as the GATT 1994 and the DSU. This has spilt over into S&DT provisions across Agreements, which has resulted in general or 'incomplete' S&DT.

2.4.3.2 The incomplete Contract Debate

An economics theory known as the "Incomplete Contract" theory[255] has been successfully advanced in the context of the WTO, specifically that the WTO compact is an incomplete Agreement.[256] Further, the form (WTO being an incomplete Agreement) was deliberately adopted.[257] The 2009 WTO Report acknowledges that Trade Agreements are incomplete by nature and flexibilities offer an avenue for dealing with difficulties arising from contractual incompleteness in an agreement.[258] Further, the "incomplete contract" approach stresses the fact that a trade agreement is a contract that does not specify rights and duties of and for all parties in all possible future states of the world, which is common in long term contracts.[259] It has been observed that contracts are mostly incomplete; what varies from one relationship to another is the degree of incompleteness.[260]

The incomplete structure presents advantages of flexibility of Members exercising discretion regarding trade negotiation and measures, within the rules. However, challenges of lack of enforcement due to scattered, unclear and concrete provisions remain. Incompleteness

[254] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above) para 15.
[255] M A Rossi 'Incomplete Contracts' in Backhaus J. (eds) Encyclopaedia of Law and Economics (2014) Springer, New York. The incomplete contract theory refers to circumstance that some aspect of contractual parties' payoff-relevant future behaviour or some relevant payoff in future contingencies is unspecified in the contract and/or unverifiable by third parties.
[256] H Horn, G Maggi & R Staiger 'Trade Agreements as Endogenously Incomplete Contracts' (2007) 100(1) *American Economic Review* 394-419; K Bagwell & RW Staiger *The Economics of the World Trading System* (2000).
[257] World Trade Organization *World Trade Report 2009* (2009) WTO 28 (*World Trade Report 2009)*.
[258] *World Trade Report 2009* (as above).
[259] *World Trade Report 2009* (as above).
[260] M Bac 'Opportunism and Dynamics of Incomplete Contracts' (1993) International Economic Review Vol. 34, No. 3 pp. 663.

leaves ample room for ambiguity, controversial interpretations, misunderstandings, and opportunism in WTO rules.[261] These challenges, however, are not restricted to incompleteness of WTO text, but can also be attributed to other factors, such as non-binding language, or imprecise language used in WTO legal text. This is of particular significance in the context of S&DT, as preferential provisions in-turn are also characteristic of such ambiguity, misunderstanding and diverging interpretation. An example of the incomplete contract is with regards to general WTO provisions, is firstly found in the GATT 1994. Bindings only stipulate upper bounds on the tariffs that can be applied, thus leaving governments with discretion to go below the bounds. Another example is with regards to binding provisions, which frequently have escape clauses that allow countries to unilaterally impose temporary protection, such as Article XIX of the GATT 1994 which addresses emergency action on imports of particular products or to renegotiate bindings, or Article XXVIII of the GATT 1994 which allow Members to re-negotiate bindings. The WTO to a large extent maintains a combination of rigidity, in the sense that contractual obligations are largely insensitive to changes in economic (and political) conditions, and discretion, in the sense that governments have substantial leeway in the setting of many policies.[262]

Such incompleteness in certain instances prevents the WTO Agreements from being self-enforcing[263] as provisions across numerous WTO texts lack specific terms, enforcement measures and penalties, which places heavy reliance on the adjudicating DSU for enforcement. The concerns regarding such incompleteness, for example under the DSU, is that Members subject themselves to a process where they may be subject to penalties that they deem inappropriate given the absence of *ex ante* specificity on the rules that will apply.[264] This results in weak enforcement methods. The WTO's established trade frameworks and rules leave gaping openings in interpretation due to lack of specificity. Even the WTO's core agreement, the GATT 1994's central provisions, are formulated in such a

[261] World Trade Organization *World Trade Report 2007* (2007) WTO 98.
[262] H Horn et al (n 256 above) 1.
[263] B Hoekman 'Proposals for WTO Reform, A Synthesis and Assessment, Policy Research Working Paper' (2011) *Policy Research Working Paper World Bank*.
[264] Hoekman (n 87 above) 8.

way that the actual ambit of the agreement is predominantly left to be determined by adjudicating bodies.[265]

In the 2007 WTO report, it was advanced that an initial trade agreement must be seen as a necessarily incomplete contract. This is due to the inherent complexity of such an agreement, with political, legal and economic effects on both domestic and international scales. It was further advanced that incompleteness accommodates advanced unforeseen environmental changes, dynamism, future shocks, and all other factors having an impact on the original contractual balance.[266] The WTO's inherent incomplete contract construct, despite having its advantages as mentioned above, has resulting consequence on S&DT.

Switzer applies Economic Contract theory to various S&DT provisions to examine S&DT and its operationalisation within the WTO. [267] In her examination, she notes that Economic Contract theory holds that moral hazards may arise from the use of flexible standards which permit subsequent *ex post* readjustments to take account of new situations.[268] A moral hazard in this context is a situation in which one party to an agreement engages in risky behaviour or fails to act in good faith because it knows the other party bears the consequences of that behaviour. Further, moral hazards arise where contracting parties are given too much discretion or manoeuvring space, which allows for opportunistic abuse. Her findings are that S&DT provisions, like many provisions under WTO agreements, are contractually incomplete. This has created tension between commitment through more enforceable provisions and retaining flexibilities.

In a World Bank study on the S&DT controversy, it is argued that defining the criteria to determine eligibility for S&DT lies at the heart of the S&DT debate. The extent or depth of the differential treatment granted will be inversely related to the number of eligible countries. Authors have advocated that eligibility for S&DT should be restricted to fewer

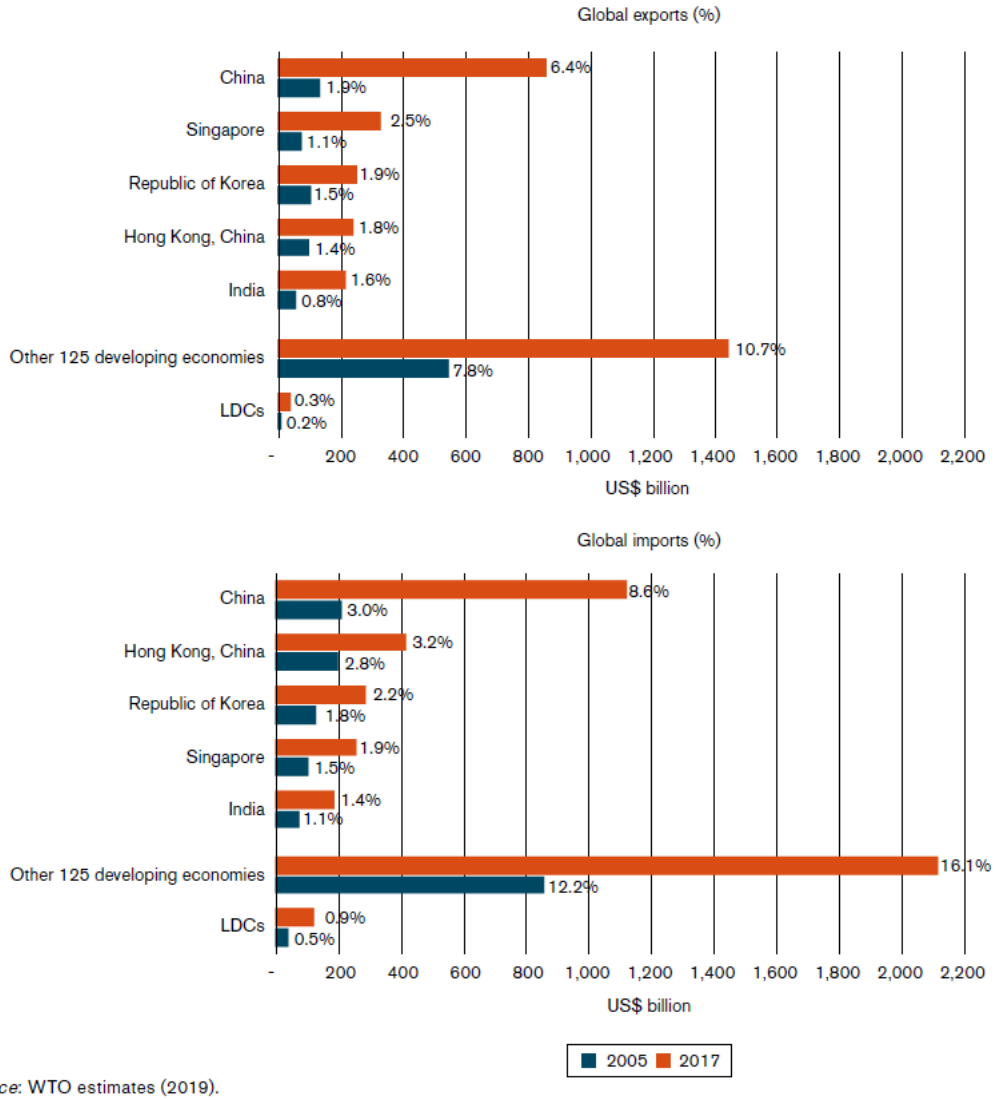
[265] Horn *et al* (n 256 above) 1.
[266] Horn *et al* (as above).
[267] S Switzer 'A Contract theory approach to Special and Differential Treatment and the WTO' (2017) 16(3) *Journal of International Trade Law and Policy* 126-140.
[268] Switzer (as above) 135.

WTO member countries than is currently the case under the self-declaration approach that is used to identify Developing Countries. The authors, however, do not provide any economic justification for their advocacy of selection other than universality in the granting of S&DT treatments to DCs. This argument is further discussed in chapter 3 of this thesis, where it is argued that the countries that should be eligible to receive S&DT should be Developing Countries and LDCs, which demonstrate particular developmental and trade needs in line with Paragraph 1 of the Decision on Measures in Favour of Least-Developed Countries. The WTO, however, follows a self-designation system, where member-states announce for themselves whether they are 'Developed' or 'Developing' Members and recognises LDCs as those countries which have been designated as such by the United Nations. In this regard, it has been rightly stated that "[…] overall, no consistent treatment of the developing country category emerged from the decades of GATT practice".[269] The diverging sizes of developing economies and disparities in share of global export and imports is evident from the figure below in the 2019 WTO Trade Report.[270]

[269] Rolland (n 57 above).
[270] World Trade Organization *World Trade Report 2019,* The Future of Services Trade 33.

Figure B.10: Five Asian economies account for more than half of developing economies' exports and imports

Leading developing services exporters and importers, 2005 and 2017



Source: WTO estimates (2019).

Note: Values differ from reported statistics by the above economies as they include an estimate of services exported or imported through foreign-controlled affiliates.

The need to make provisions "operational" and enforceable is central to addressing and remedying lingering issues of immediate concern to Developing Countries and LDCs, particularly such as transitional measures, infant industry protection, safeguard measures (particularly in agriculture), and much needed markets access. A framework on S&DT is a vital tool to providing much needed guidelines with regards to implementation of S&DT interpretation by Members in a Multilateral system which has vague, non-specific, un-enforceable provisions.

2.4.3.3 Unspecified Procedure in Establishing "Needs" of Developing Countries

Developing Countries have advocated vehemently for S&DT in line with the developmental needs of Developing Countries. This argument is consistent with one of the core objectives of the MTS.[271] It also consistent with the wording in Article XXXVI:3 of the GATT 1994 [272] and the preamble of the instrument that established the WTO.[273] This developmental argument (for S&DT to be structured to Developing Countries' needs) has been interpreted positively by the DSU in a number of matters, which include The Panel on *India — Quantitative Restrictions*[274] and *EEC - Restrictions on Imports of Dessert Apples* - Complaint by Chile.[275] The above notwithstanding, S&DT has failed to be cascaded in specific clauses in WTO Agreements, and has failed to establish procedures which establish the specific needs of Developing Countries.

Developing Countries' needs are subjective to the respective WTO Member in question. GATT 1994 or WTO legal texts do not define 'Developing Countries' Needs', save for restricting such needs to those regarding their 'economic development', under Article XXXVI:3 of the GATT 1994.[276] The scope regarding needs of Developing Countries is widened

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[271] *The WTO Agreement* (n 42 above). The WTO's principal objective regarding Developing Countries is set out in the preamble of the Marrakesh Agreement. Also see GATT 1994 (n 12 above) Part IV. It follows that WTO states recognise the need "for positive efforts designed to ensure that Developing Countries […] secure a share in the growth in international trade commensurate with the needs of their economic development".

[272] GATT 1994 (n 12 above) Article XXXVI:3 of the GATT. The Article provides that there is need for positive efforts designed to ensure that LDC's secure a share in the growth in international trade commensurate with the needs of their economic development (emphasis mine).

[273] *The WTO Agreement* (n 42 above) Preamble. The preamble provides that the WTO is to ensure that LDC's secure a share in the growth of international trade that is commensurate with their economic development needs.

[274] *India – Quantitative Restrictions on Imports of Agricultural textile and Industrial products*, adopted 22 September 1999 (Panel Report) WT/DS90/R (*India - Quantitative Restriction*). Para 7.27.2 clearly sets the need to promote trade liberalisation while considering Developing Countries' needs.

[275] *European Economic Community - Restrictions on Imports of Dessert Apples - Complaint by Chile* adopted 22 June 1989 (Panel Report) L/6491 – 36S/92 (*ECC – Desert Apples*). This case sheds light on the position regarding the rule in the Marrakech Agreement, in the instance of North-South trade relations between Chile and the ECC. The Panel examined a claim by Chile "that in restricting imports of apples from Chile the Community had paid no regard to the special needs of Chile as a developing country as it was obliged to do under Part IV of the GATT. The Court noted that the EEC had held consultations with affected suppliers and had amended its regulations, but these consultations and amendments had been general in scope and had not related specifically to the interests of less-developed contracting parties in terms of Part IV". After delicately and carefully examining this issue, "the Panel could not find that the EEC had made appropriate efforts to avoid taking protective measures on apples originating in Chile" (paragraph 8.4).

[276] GATT 1994 (n 12 above); Article XXXVI:3 states that "There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development."

under Article XXXVII:4, which provides for "individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests…". Development needs have been defined as something needed to attain economic development; an undertaking, process, input, objective, or policy required to achieve one or several goals of economic development.[277] This concept is expounded in further detail under chapter 3, and is central to structuring S&DT in the Framework under Chapter 4.

The effectiveness or ineffectiveness of past and present S&DT provisions cannot just be assumed but must be assessed in specific cases and in relation to specific countries and regions.[278] Specific cases are to be linked to developmental needs of the said Developing Country. Not all developmental needs are congruence with WTO rules and objectives and are legally valid. There are a number of non-trade needs, which do not fall into the ambit of the WTO. This then begs the question which developmental goals are permitted under WTO law.

Paliwal establishes that developmental needs are to be in line with the WTO Framework.[279] He proceeds to limit developmental needs recognised under WTO objectives in the WTO legal framework under four broad categories, namely; macroeconomic growth, poverty reduction, sustainability, and education. The four categories which are used to identify developmental needs are not conclusive, rather, there are numerous other developmental needs which are subjective to Members, such as diversification of economies or industrialisation. The Development criterion identified by Paliwal, and other criterion shall be examined and fleshed out below, and aligned with WTO texts in order to determine the extent to which development needs apply under WTO law.

Firstly, the inclusion of "poverty eradication" is premised on the objective in the GATT 1994 of "raising standards of living". This is consistent with the WTO law, particularly that "the

[277] GM Meier & JE Rauch *Leading Issues In Economic Development* (1984) 5-6. This is not an exhaustive list.
[278] Ewelukwa (n 17 above) 833.
[279] Paliwal (n 247 above) 73.

goal of raising living standards, with poverty reduction part and parcel, emerges as a goal that is consistent with WTO law".[280] Whilst this study does not dispute this argument that poverty eradication is a result or part and parcel of raising standards of living, the study restricts the WTO recognised category to the goal of raising living standards as is consistent with explicit objectives established in WTO text. The study excludes Agreements that exceed the WTO's ambit.[281]

The argument for the inclusion of "education" as a category of development needs recognised by the WTO is premised on the role education plays in economic development and as a means of achieving macroeconomic growth in the GATT 1994.[282] This argument holds education as a WTO objective through the interpretation of Article 13 of the ICESCR, which affirms the right of everyone to education, and Article 55 of the UN Charter which specifically calls for 'educational cooperation'.[283] Individual needs of a country for economic growth may therefore be tied to education as a means of development, which when read with GATT 1994 Article XXXVIII:4 which recognises individual development needs. This argument has not been substantiated adequately to operate as a stand-alone WTO objective. The GATT 1994, through its preamble and text, provides for objectives through explicit mention of the provisions and supporting passages in subsequent Agreements. Education, when paired with International Agreements to interpret WTO rules, can be seen to be a sub-goal within broader objectives at best.

Economic needs, and specifically the need for macroeconomic growth, is in line with the WTO rules and has been a founding principle and recognised goal of the international trading system.[284] The Enabling Clause promotes trade and export earnings of Developing

[280] Paliwal (as above) 85.
[281] Paliwal (as above) 85. The author argues that the United Nations Charter, in Article 55, sets forth this goal of raising living standards as a founding principle of the post-war international legal order. He further argues that Article 11(2) of the International Covenant on Economic, Social and Cultural Rights reaffirms this goal, and recognises the fundamental right of everyone to be free from hunger.
[282] Paliwal (as above) 87. Paliwail argues that Education leads to specialisation of an economy, and thus enhanced wage-earning potential for individuals and economic growth. Greater specialisation and diversification of the economy is addressed as a means to achieving.
[283] UN Charter (n 147 above). The Charter provides for solutions of international economic, social, health, and related problems; and international cultural and educational cooperation.
[284] GATT 1994 (n 12 above) Part IV.

Countries in order to attain economic development through increased market access. The pivotal MFN treatment clause is itself most fundamentally aimed at advancing mutual market access, which is a development need consistent with WTO law. The Appellate Body also recognised that macroeconomic growth is consistent with WTO rules by stating that it recognises "the vital role played by the Enabling Clause in the WTO system as means of stimulating economic growth and development".[285] Therefore, S&DT provisions that speak to macroeconomic growth of a Developing Country are consistent with WTO rules.

Raising standards of living is a key WTO objective and consistent with WTO rules. This objective is carried under Articles XXXVI:1(*a*) and (d) and speaks of "raising of standards of living", which is provided as "particularly urgent" in the said text. Paragraph 7 of the Appellate Body Report, *EC –Tariff Preferences*, validates S&DT by providing that:

> "[C]oncessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the [GATT] should promote the basic objectives of the [GATT], including those embodied in the Preamble and in Article XXXVI".

It is imperative to note that "trade and economic endeavours" are to be conducted to attain the raising of standards of living in this regard.[286] It is, therefore, argued that trade/economic endeavours, efforts or actions in Developing Countries are legally validated, subject to such action being an effort to raise standards of living [in line with the WTO Objective].

Sustainable development is also an objective under WTO rules. This refers to meeting present needs without compromising the ability of future generations to meet their needs.[287] The GATT 1994 provides for sustainable development through the preamble and under Article XX (despite it not using the nomenclature of sustainable use). The GATT 1994

[285] *EC - Tariff Preferences* (n 19 above) para 106.
[286] GATT 1994 (n 12 above) Preamble.
[287] *World Commission on Environmental and Development* (1987) 'Development and International Economic Co-operation: Environment' Note of the Secretary-General (Brundtland Report).

provides that trade and economic endeavour should be conducted under Article XX (b) and (g) which extends environmental protection to be introduced into the WTO's institutional framework through exceptions. Sustainable measures have to be in line with Article XX which is not to be applied in a manner that accords arbitrary or unjustifiable discrimination, as provided by the DSU.[288]

2.4.3.4 No Effective implementation and Monitoring Mechanism

S&DT operated for a long time without a monitoring mechanism or implementation mechanism on the general soft-rules which are S&DT and that Developing Countries had advocated for. A Decision was taken at the Bali Ministerial Conference in December 2013 to establish a Monitoring Mechanism on S&DT to analyse and review the implementation of S&DT provisions.[289] The monitoring of S&DT which would assist in understanding implementation challenges and deficiencies was also implemented. The Mechanism is to be undertaken on the basis of written inputs or submissions made by Members. As of 22 September 2016, no written submissions from Members had been made.[290] This, therefore, means that the lack of success of the monitoring mechanism in discharging its mandate can be partially attributed to the Developing Countries, as the CTD would not be able to identify challenges due to lack of data and information specifically on use of S&DT. This challenge is fully developed in chapter 3 of this study which identifies shortcomings of S&DT.

The objective of the Mechanism was to monitor the implementation of S&DT provisions that were identified to be strengthened in the context of the negotiations under paragraph 44 of the Doha Declaration.[291] The Mechanism does not have legal authority to alter

[288] *United States – Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996 (Appellate Body Report) WT/DS2/AB/R (*US – Gasoline*).
[289] World Trade Organization *Monitoring Mechanism on Special and Differential Treatment* 11 December 2013 WT/MIN(13)/45 – WT/L/920. According to the Decision the Monitoring Mechanism which operates in Dedicated Sessions of the CTD is to act as a focal point within the WTO. The Mechanism was to take place in Dedicated Sessions of the Committee on Trade and Development and provide members with an opportunity to analyse and review all aspects of the implementation of S&D provisions contained in multilateral WTO agreements (WTO *Monitoring Mechanism on Special and Differential Treatment)*.
[290] World Trade Organization *Special and Differential Treatment Provisions in WTO Agreements and Decisions* 22 September 2016 WT/COMTD/W/219; Paragraph 1.6.
[291] WTO *Monitoring Mechanism on Special and Differential Treatment* (n 289 above), paragraph 5.

Members' rights and obligations under WTO Agreement, but rather can only make recommendations. No monitoring system or matrix has been created which has incorporated S&DT from different agreements, guidelines and procedures to observe effectiveness or lack thereof of S&DT. As stated above, limited written submissions have slowed substantive discussion in that framework.[292] Switzer submits that the Mechanism established in 2013 has proven to be "a resolute failure, an empty tool box spurned by the very Members it was designed to assist".[293] LDCs and Developing Countries have not taken advantage of the current mechanism in place.

An effective monitoring mechanism is essential to ensuring S&DT attains its intended purpose of ensuring LDCs and Developing Countries secure a commensurate share of global trade and thereby close the gap on inequality. Members evolve and the S&DT required will not always be on the same level of development. Further, needs are also diverging and change over time. This, therefore, means that S&DT provisions would diminish for certain Members, whereas certain instruments with S&DT may become more relevant. The above is currently not monitored under WTO rules. A monitoring mechanism is also essential to observe not only the development of S&DT but also the efficiency thereof. This is with the view of monitoring whether the provisions deliver the impact and for which they are intended and identifying key areas to be addressed.

A monitoring mechanism is key in aiding countries to progress by benefitting from S&DT provisions that they would be entitled to at various stages of development. Such a mechanism would ensure predictability in establishing criteria for use, considerations and flexibilities for Members with pressing greater needs. A monitoring system would assist in implementation of technical agreements and compliance with WTO obligations with S&DT to stipulate specific means of support, such as technical assistance.

2.5 S&DT Under Environmental Law

[292] ICTSD Website. https://www.ictsd.org/bridges-news/bridges/news/examining-how-to-reinvigorate-talks-on-supporting-developing-countries (accessed 30 November 2017).
[293] Switzer (n 267 above) 140.

S&DT has grown in different disciplines at international law level homogenously, with varying development and application of the principle, and nomenclature or term. The principle formulates an intrinsic part of International Environmental Law (IEL). The provisions are found in some of the most basic IEL instruments, such as the Rio Declaration[294] and the Stockholm Conference.[295] It was advanced by Cullet that S&DT developed rapidly at IEL level due to the need to discover common ground on a number of international environmental issues by North and South Countries.[296] This is due to the fact that there was a need to create equity in IEL legal frameworks (that two persons of unequal rank cannot be treated alike), to ensure countries are able to implement agreements, which also transcended into the creation of S&DT principles and norms being established. The provisions are critical tools in engaging Developing Countries to participate and enter into environmental treaties.

At the heart of IEL lies the concept that States shall have "common but differentiated responsibilities and respective capabilities" which was established in the 1992 Rio Declaration.[297] This principle has been abbreviated and referred to as "CBDR". Its legal character and the structure of the basic principle has evolved since the 1992 Rio Declaration in subsequent IEL Agreements such as the Kyoto Protocol, which will be examined further in this section. The principle acknowledges the different capabilities and differing responsibilities of individual countries in addressing climate change. The principle has been applied in *US – Shrimp (Article 21.5 – Malaysia)* to guide the parties, specifically on the weight of their responsibilities.[298] The Panel further urged the parties to the dispute "…to cooperate fully in order to conclude as soon as possible an agreement which will permit the

[294] United Nations *Rio Declaration on Environment and Development* (1992) United Nations Conference on Environment and Development (Rio Declaration). Rio Principle 6 states that special situation and needs of Developing Countries, "particularly the least developed and those most environmentally vulnerable, shall be given special priority". Further, Rio Principle 7 states that Developing Countries have a responsibility to peruse sustainable development and specifically ties in "technologies and financial resources they command". The Rio Declaration also recognises the necessity to give special priority to LDCs and the most environmentally vulnerable countries.

[295] United Nations *The Declaration of the United Nations Conference on the Human Environment* (1972) (Stockholm Declaration). The Declaration calls for financial and technical aid, and calls on the North to the North to ensure that environmental technologies be made available to Developing Countries.

[296] P Cullet (n 135 above).

[297] Rio Declaration (n 294 above).

[298] *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, adopted 21 November 2001 (Panel Report) (*US - Shrimp*).

protection and conservation of sea turtles…taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment."[299] The CBDR principle can be deduced to have been used as a general over-arching approach to [financial and technical] responsibilities of the respective Developing and Developed Countries, the Panel however did not attribute specific or detailed rights tied to the principle.

Elements of CBDR emerged early in the 1972 Stockholm Declaration,[300] the first IEL instrument which recognised the right to a healthy environment. The agreement highlighted seven environmental problems which require cooperation amongst nations to resolve and twenty-six principles to guide nations through their responsibilities.[301] Principle 10 of the Declaration takes cognisance of Developing Countries' "economic factors as well as ecological processes" in attaining environmental management. The most important CBDR provision in the Declaration, however, can be found in Principle 11, which highlights that environmental policies of all States should enhance and "not adversely affect the present or future development potential of Developing Countries". This is consistent with S&DT provisions under the WTO MTS which require Members to safeguard the interest of Developing Countries, which contain parallels with Article XXXVI:1(a) of the GATT 1994 in prioritising the raising of standards of living and the progressive development for LDCs as priority under the Agreement. Principle 11 of the Stockholm Declaration forms the bedrock of CBDR in differentiating between developing and Developing Countries and taking special consideration of Developing Countries. Despite the fact that the nomenclature of CBDR had not been coined, these early principles of recognising the importance of Developing Countries' needs and circumstances, in order to create an inclusive and implementable agreement, were established.

The CBDR concept is further linked to the principle of sustainable development within the climate change regime. The 1987 World Commission on Environment and Development (the

[299] *US - Shrimp* (as above) paragraph 7.2.
[300] Stockholm Declaration (n 295 above).
[301] Stockholm Declaration (as above). The seven environmental problems were in the form of proclamations by States, and 26 principles were also established.

Brundtland Commission) founded or brought the principle of sustainable development to the forefront.[302] The Commission highlighted that economic growth needs to be confined within the limits of environmental resources, whilst reducing global poverty.[303] This provision later evolved under CBDR to tie implementation of agreements with resources.

The Brundtland Commission goes on to further assert that wealthier countries are more equipped to deal with the effects of climate change.[304] This differentiation and acknowledgement of different economic positioning, technical knowledge and structures of North and South Countries formulates the basis of CBDR. The Commission further asserts that the "inability to promote the common interest in sustainable development is often a product of the relative neglect of economic and social justice within and amongst nations".[305] This is an acknowledgement that differentiation of states must be addressed for the inclusion of all states for future environmental goals.

Despite this declaration of differentiating responsibilities between North and South States, there are no further binding commitments/obligations owed by North States in the same agreement. The position on the lack of binding force of the above concept was encapsulated in a report by the US to the UN.[306] The US accepted that the above principle required a special leadership role of Developed Countries. It however reported that it fails to accept any interpretation of principle 7 that "would imply a recognition or acceptance by the United States of *any international obligations or liabilities*" (emphasis mine).[307] This is a considerably diverging approach to S&DT that is employed under the WTO. Under the WTO dispensation S&DT establishes binding obligations on Developed countries, and is entrenched into the legal text. There are provisions couched in "best endeavour" non-obligatory language, however peremptory provisions also exist such as the Enabling Clause which prevents a WTO Member from receiving or expecting reciprocity from Developing

[302] Brundtland Report (n 287 above).
[303] Brundtland Report (as above) Preamble, Paragraph 3. Sustainable development is defined as "development which meets the needs of current generations without compromising the ability of future generations to meet their own needs".
[304] Brundtland Report (n 274 above) Chapter 2, paragraph 25. The Report states that "Globally, wealthier nations are better placed financially and technologically to cope with the effects of possible climatic change."
[305] Brundtland Report (as above) Chapter 2, Part 2, Paragraph 26.
[306] Rio Declaration (n 294 above).
[307] Rio Declaration (as above) paragraph 16.

Countries with regards to GSP under Article 5. S&DT to this extent, creates binding duties and obligations under the WTO, which CBDR notably under IEL fails to do.

The CBDR concept was replicated in other agreements and evolved, particularly in the 1992 United Nations Framework Convention on Climate Change (UNFCCC) under Article 3(1).[308] The provision again buttressed the underlying principle of "common but differentiated responsibilities", particularly in Developing Countries taking the lead in combating climate change. The concept was further expounded in the agreement under Article 3(2) by expressing that in implementing the convention, full consideration is to be given to the "specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change". The Convention marked the evolution of the CBDR concept by expounding the application of S&DT from merely recognising diverging differences of North and South countries. The Convention sets out special consideration of Developing Countries States from the start. The preamble recognises that standards applied by some countries may be inappropriate and of unwarranted cost to Developing Countries. The Preamble also takes cognisance of the fact that Developing states have priority needs, such as poverty eradication and further recognises that resources are required to attain sustainable development towards UNFCCC goals.

The UNFCCC was one of the first environmental Agreements to integrate concretised CBDR provisions into the agreement and was the first Instrument to use the term.[309] The Convention established different central obligations between North and South States under Article 4, which distinguishes between commitments applying to all parties and commitments applying only to "developed country Parties and other Parties included in Annex 1". Obligations are based on classification of stated Annex 1 parties that have the obligation to adopt policies and corresponding measures to mitigate climate change by limiting GHG emissions. This progression in approach in the UNFCCC builds on the CBDR

[308] United Nations *United Nations Framework Convention on Climate Change* (1992) (*UNFCCC*).
[309] R Khare 'The Principle of 'Common but Differentiated Responsibilities and the Challenges Posed by it in the Context of International Climate Governance' (2015) 3(2) *International Journal of Law and Legal Jurisprudence Studies* 99.

principle established under sustainable-development and linking parties' capacity with implementation.

The UNFCCC further marked a significant improvement in taking cognisance of the needs of Developing Countries and integrating them in the Framework. Article 4 explicitly sets out that Developing Countries *shall* provide "new and additional financial resources" including the transfer of technology. The provision further ties implementation of commitments of Developing Countries with financial resources and technology needed. The peremptory wording and language used to affirm Developing Countries' assistance, and flexibility in implementation represents significantly improved S&DT. Further provisions, such as Article 9(2)(d), promulgate for capacity building in scientific research under the Agreement.

Numerous IEL scholars have forwarded various categories of the S&DT under the above-stated "CBDR".[310] There are three broad categories of CBDR[311] namely:

a) Rules which differentiate with regards to central obligations of a treaty, e.g. different emission targets by differing countries;
b) Rules which facilitate implementation of a treaty (rules on flexibility), which Honkonen refers to as "contextual differentiation";[312]
c) Rules on assistance. Three particular areas were identified; financial assistance, transfer of technology, and capacity building (particularly in the area of sustainable development).

The Kyoto Protocol, which is built on the UNFCCC, had the purpose of strengthening commitments made, while factoring in issues of equity.[313] It contains provisions on all three categories of S&DT. From the onset, Article 3 of the UNFCCC was incorporated in the

[310] T Honkonen 'The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects' (2009) *Kluwer Law International.* Also see Cullet (n 137 above).
[311] L Rajamani *Differential Treatment in International Environmental Law* (2006) 93-94. The approach taken by Lavanya Rajamani offers an explanation as to the types of CBDR and contextualises its significance, which makes it suitable for this purpose.
Honkonen (as above).
[313] United Nations *Kyoto Protocol to the United Nations Framework Convention on Climate* (1997) (Kyoto Protocol).

Preamble of the Kyoto Protocol, setting the tone for the rest of the agreement. The parties to the Protocol are "guided by Article 3" of UNFCC, which is the heart of CBDR.

The instrument expands concrete CBDR provisions found in the UNFCCC. The Protocol inserts concrete CBDR provisions by capping emissions in Annex-I Countries. However, it allows Developing Countries to avoid emission targets. Article 10 further excludes new commitments for Developing Countries despite the fact that Annex-I countries do not enjoy the same exclusion from obligations.

Preferential terms which extend time-frames with regards to implementation can also be found in the said Protocol at Article 3(5) which provides for delayed compliance schedules for Developing Countries. Countries developing into market economics, referred to as a Country with Economy in Transition (CEITs) under this provision, were granted flexibility in allowing them to have optional base years for reduction charges, which allowed them to choose higher emissions than the standard base year (1990). This amounted to an implementation flexibility.

The Kyoto Protocol also provide ample provisions on financial and technical assistance. Article 10(c) of the Kyoto Protocol states that all parties shall "take all practicable steps" to promote, facilitate and finance "environmentally sound technologies, know-how, practices and processes pertinent to climate change, in particular to Developing Countries". Article 11(2) (a) and (b) further buttresses the provision of financial resources and technology.[314] Further, assistance is found under Article 12(8), where The Conference of the Parties at the meeting of the Parties commits to sharing proceeds from project activities to *inter alia* assist Developing Countries, which are vulnerable to adverse conditions of climate change and to costs of adaptation. Both articles 10 and 11 use peremptory language, where the Protocol

[314] Kyoto Protocol (as above). The provisions address implementation related issues, particularly in meeting Articles 4 of the Convention. Article 11 (2) (a) provides that with the operation of the financial mechanism, developed countries shall provide "new and additional financial resources to meet the agreed full costs incurred by developing country Parties in advancing the implementation of existing Commitments". Article 11 (2) (b) provides for additional costs in order to meet Article 4 commitments, such as "financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of advancing the implementation of existing commitments under Article 4".

provides that Developing Countries "shall" provide the above-mentioned assistance, with the proviso that such steps be practicable.

A clean development mechanism (CDM) under the Executive Board was established under the Kyoto Protocol, which provides direct technical support and organised various capacity building events at the regional and sub-regional level for Developing Countries.[315] Sub-Saharan countries currently receive assistance through the Nairobi Framework, which specifically targets helping Developing Countries in sub-Sahara Africa in order to improve their level of participation in the clean development mechanism. The above assistance is indicative of how the explicit inclusion of preferential treatment provisions in IEL has resulted in the creation of programmes and frameworks to aid Developing Countries in attaining targets under Agreements.

The recent Paris Climate Agreement incorporates CBDR into its provisions and includes a number of S&DT principles.[316] It encapsulates CBDR in its preamble and in the same breath makes mention of the parallel principle of "equity" which are to guide Parties in attaining objectives of the Convention. Equity, in this context, encompasses other elements of international climate policy, such as vulnerability to climate impacts, finance, and technology transfer,[317] which has similarities to S&DT particularly with regards to technical and financial assistance to meet obligations. The concept of "national circumstances" is a principle which is recognised in the recent Trade Facilitation Agreement (TFA), and fleshed out in great detail, where a Member's obligations are tied to its domestic capabilities in relation to the instrument, as will be detailed under Chapter 3. The Paris Agreement falls short of developing modalities as detailed as those under the TFA. It incorporates generic non-specific language in provisions such as Article 2, where it states that "[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

[315] United Nations Report *Implementation of the framework for capacity-building in Developing Countries* (2018).
[316] United Nations *Paris Agreement* (2016) in *UNFCCC*, COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add, 1 (Paris Agreement).
[317] S Klinsky & H Winkler 'Equity, sustainable development and climate policy' (2013) *Climate Policy* 2. The authors stated that Equity "now includes adaptation and support through finance and technology, which effectively links equity in climate change to developmental justice".

S&DT under the MTS, particularly the TFA, is considerably more developed in this area, as it contains detailed rules tying Developing Countries obligations with their circumstances, and enabling them to self-designate timelines and needs according to their circumstances.

The noticeable change in the Agreement is in its incorporation of "respective capabilities" and "national circumstances" in every mention of CBDR. This inclusion to the principle is a noticeable move with the current international economic dynamics as it means countries which were previously categorised as developing and that are now amongst the most economically strong global players (such as Qatar), may not continue to rely on CBDR provisions under this Agreement.[318] This nomenclature or alteration of the principle was originally introduced through a joint announcement by China and the US, which signalled an alternation of the concept of differentiation on a global level.[319] This is a diverging approach to the Kyoto Protocol.

One of the most drastic points of departure can be found in Article 4(3) of the Paris Agreement, where contributions are required from each Signatory State and are to be "progressive" contributions, which are subject to the CBDR concept "in light of different national circumstances". The proviso requires an examination into a domestic State's circumstances, which is a qualification which previously did not apply to assistance. Assistance under the Kyoto Protocol was peremptory under Article 11(2)(a) in favour of Developing states without an examination of a Developing Countries' circumstances.

Another notable point of departure is that concrete differentiation has been omitted in the provisions that constitute central obligations under the Paris Agreement. The overriding objective of the Agreement is to keep the increase in temperature "well below" 2 ºC. Each country is free to choose its own target in terms of emissions cuts. This is to be attained through Nationally Determined Contributions which all countries (Developed and

[318] D Bodansky 'The Paris Climate Change Agreement: A New Hope?' (2016) 110(2) *American Journal of International Law* 298.
[319] White House Press Release Website 'U.S.–China Joint Announcement on Climate Change' (Beijing: 12 November 2014) https://obamawhitehouse.archives.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change (accessed 16 May 2018).

Developing) must regularly communicate to the Secretariat. This is a change in direction from Article 3 of the Kyoto Protocol, which provided for targets categorised under Annex I and which excluded Developing Countries who were not obligated under the said regime.

Financial assistance from Developed Countries to Developing Countries is still provided for in the Paris Agreement under Article 9 with respect to aiding Developing Countries with existing obligations. The provision is couched in mandatory language, stating that "Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention." The modalities of this obligation however are not set out in the Agreement. The Agreement is silent on key factors required for a WTO Member to discharge their duty or enforce rights regarding assistance under Article 9, which include *inter alia* rules for requesting financing, frequency of funding, amounts to be disbursed, extent to which obligations shall be accorded and specifying which specific Members are to financially assist particular Developing Countries. It is also notable that Article 9(2) of the Agreement also provides that "other parties are encouraged" to provide or continue to provide such support, which opens doors for emerging Developing Countries to participate in assistance. The above financial assistance clauses are drafted similar to S&DT provisions found under the WTO Uruguay Round Agreements, which will be examined in detail under Chapter 3. The WTO however has new improved S&DT assistance provisions contained under the TFA, particularly Section II of the TFA, which addresses implementation and needs of Developing Countries, which is a significant improvement from the Uruguay Round Agreements and Article 9 of the Paris Agreement.

Technology development and transfer from Developed to Developing States are also present in the agreement under Article 10(6), which also includes financial assistance and support, which carries on the culture established in the Kyoto Protocol. Further, capacity-building for Developing Countries, LDCs and Small Islands is also present under Article 11 of the Paris Agreement. Peremptory language has also been retained in the Agreement, with

the Agreement buttressing that such assistance “should” and “shall” be accorded, which is in line with the Kyoto Protocol.

In conclusion, S&DT under IEL has secured key victories for Developing Countries in the integration and implementation of Agreements. S&DT under IEL developed under principles of equity and sustainable development and has metamorphosed into the central principle of “Common but Differentiated Responsibilities”. It evolved from merely acknowledging the differentiated responsibilities of Developed and Developing Countries into expanding on the three pillars, namely a) Rules which differentiate with regards to central obligations of a treaty, b) Rules which facilitate implementation of a treaty (rules on flexibility), and c) Rules on assistance. The principle however was found to contain very few obligatory provisions, which preclude Developing Countries from enforcing the Agreement. S&DT provisions examined alongside similar CBDR rules, particularly on financial and technical assistance and

Overall, Developing Countries, LDCs and Small Islands have made strong inroads in establishing binding provisions in key agreements, particularly the Kyoto Protocol and the Paris Agreement, with peremptory language on key S&DT areas such as financial assistance. Victories were also secured in attaining differing central obligations in the Kyoto Protocol, which are preferential to that of Developed Countries. The Paris Agreement does, however, mark a crucial point of departure in CBDR. The most progressive IEL Agreement indicates a shift in preferential treatment with regards the notion of CBDR being subjected to “different national circumstances”. This approach indicates the acknowledgement of the emergence of CEITs and the importance of tying S&DT and CBDR with the circumstances of developing States. Despite the inclusion of these principles (different national circumstances and assistance) which are categorised as S&DT, they remain non-obligatory due to general and non-specific language used. They take the form of many Uruguay Round Agreements, as will be elaborated under chapter 3. S&DT in the more advanced and recent WTO instrument, the TFA, contains binding detailed rules on technical and financial assistance, and considering national circumstances. IEL has made significant inroads in incorporating the provisions into its instruments, however, an examination of the rules above indicate that

the current MTS contains significantly more detailed, and enforceable S&DT rules than the those contained under the IEL. IEL utilises CBDR as a general over-arching principle as indicated in *US – Shrimp (Article 21.5 – Malaysia)*,[320] which lacks detail and modalities to effectively bind Members to specific principles.

2.6 S&DT Under Intellectual Property

2.6.1 S&DT in IPR Prior to TRIPS

Prior to International Intellectual Property Rights being regulated under the WTO, many Developing Countries' economies were not as technologically advanced as their Developed Counterparts. Developing Countries, therefore, did not relate to the incentives provided by Intellectual Property Rights (IPR), particularly patents, for investment in research and development.[321] IPR were portrayed as "protection for monopoly imports" for the benefit of exporters at the expense of developing countries' importers.[322]

The Berne Convention[323] and the Paris Convention,[324] which cover patent and copyright enforcement among member nations, were two of the first instrumental agreements which bound Developing Countries in the post-colonial era. The agreements, initially entered into in 1883 and 1886 respectively, were created and predicated on preserving intellectual property rights of signatory Developed States. The Paris Convention created a union for the protection of industrial property through three streams:

a) National Treatment under the guise of Articles 2 and 3, where a party enjoys the same protection and treatment as they would in their country, when filing a patent or a trademark in a foreign country;

[320] *US - Shrimp* (n 298 above) paragraph 7.2.
[321] This is evidenced by the low number of patent applications in Developing Countries, compared with foreign patent applicants.
[322] UNCTAD 'The Role of the Patent System in the Transfer of Technology to Developing Countries' (1975) *UNCTAD* TD/B/AC.11/19/Rev. 1
[323] *Berne Convention for the Protection of Literary and Artistic Work* (1971) as amended September 28 1979 (Berne Convention).
[324] Paris Convention for the Protection of Industrial Property (1883) as amended September 28 1979 (Paris Convention).

b) Priority Right; which under Article 4 provides that an applicant from one contracting State shall be able to use its first filing date in a contracting state as the effective filing date in another contracting state.
c) Common Rules; these are rules that all Contracting States must follow on areas such as patents, the right to be named, and trademarks. Temporary protection for goods shown at International Exhibits; which under Article 11(1) affords states temporary protection to patentable inventions, utility models, industrial designs, and trademarks in official exhibition.

The Paris Convention was concluded predominantly by European Developed Countries, with the United States of America entering into the Agreement shortly thereafter in May 1887.

The Berne Convention, following negotiations and debates in 1967 and 1971 over special provisions for Developing Countries, failed to bridge consensus over issue of exceptions which was seen as a north/south trade issue to some Developed Countries. A majority of developing states entered into the Paris Convention shortly after independence.[325] A large number of Developing Countries which emerged out of colonization sought to integrate themselves as "sovereign equals" into the various Multilateral World Systems. They entered into world agreements with strings attachment, specifically those of the previous colonial masters, as most political, economic and constitutional systems and structures remained unchanged. A number of Developing Countries adopted similar IP International Obligations as their former colonial masters which included South Africa, Kenya, Zambia, Namibia, Eswatini, and Morocco.

S&DT is entrenched in the Berne Convention. The 1971 Berne Convention contains an appendix on Special Provisions Regarding Developing Countries. Article I contains an important clause establishing preferential measures to enable "any Country regarded as a Developing Country" to inform economic situations and its social or cultural needs or in the case where a country does not consider itself immediately in a position to make provision

[325]WIPO website on Contracting parties http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=2 (accessed 22 May 2018).

for the protection of all the rights.[326] The equivalent provision is also contained in the trade context, in the TFA, which was discussed in the sub-chapter on International Environmental Law. This refers to Section II, Article 15 and 16, which enables a Developing Country to notify the Committee of Trade Facilitation on its ability to implement various requirements of the Agreements. This provision has similarities with provisions on notification of needs under the TFA which detail more specific provision on assistance and support regarding delivery of assistance under Article 21, and information on assistance under Article 22.

S&DT under the Paris Convention is not a basic principle enshrined in the text, and it has been argued that this is due to the fact that the Agreement itself is weak.[327] There are, however, obligations in the Agreement which are stringent, such as Article 5A relating to compulsory licensing or forfeiture of patents for non-working or insufficient working of inventions. Developing Countries have requested S&DT in the course of the negotiations for the revision of this section.[328]

Like in the Paris Convention, national treatment is one of the cornerstones of the Berne Convention contained in Article 5. The Berne Convention has S&DT enshrined in its text, unlike the Paris Convention. The Agreement contains an appendix establishing preferential measures to enable Developing Country nationals to secure compulsory licenses on works needed for teaching, scholarship or research, but with no right to export such works.

In conclusion, it has been examined above that the Paris Convention contains no S&DT provisions, and that the Berne Convention is more progressive in incorporating S&DT principles in its text. It has been argued by legal writers that "[…] international property right systems must recognise differences in levels of development between economies".[329] The exclusion of substantial S&DT was due to a number of political factors, particularly that

[326] Berne Convention (n 323 above) Article I of Appendix.
[327] LB De Chazournes & R Dhanjee 'Trade-Related Aspects of Intellectual Property Rights (TRIPs): Objectives, Approaches and Basic Principles of the GATT and of the Intellectual Property Conventions' (1990) 5 *Journal of World Trade* 5-15.
[328] WIPO Document *Sixth Consultative Meeting on the Revision of the Pavir Convention*, PRICMIVIII.
[329] D Nayaar 'India' (1993) G*lobal Dimensions of Intellectual Property Rights in Science and Technology National Academy Press*; Also see L B De Chazournes et al (as above) 13 where it was stated "[…] obligations should be commensurate with the level economic development".

the initial drivers of the Agreements sought to secure IPR protection and did not consider the development agenda. The genesis of these agreements are found in a period of colonial rule, with little consideration adjustments, flexibilities or the transitioning of such states to align themselves with the agreement. Further, Developing Countries had little to no negotiating power over such agreements, and predominantly entered into them shortly after newfound independence as a way of integrating themselves into the international community.

2.6.2 Transitioning IPR from WIPO To the WTO

WIPO also failed to effectively deal with the problem of intellectual property infringement. Under WIPO, Developing Countries exerted enough power as a group to create a stalemate with Developed Countries over revision of the Paris Convention. The GATT 1947 provided a much more effective means for Developed Countries to exert pressure on other countries to modify their intellectual property systems. The US unhappy with progress for protectionism and enforcement under WIPO Agreements, pushed for GATT forums for enforcement mechanisms.[330]

Developed Countries could use trade and access to their markets to encourage adoption of stronger intellectual property enforcement. This was the case with the US, which used a provision named "Special 301" used by US negotiators on IP negotiations at the WTO.[331] Special 301 identified countries that denied adequate and effective protection and enforcement of IPRs or market access for goods embodying IPRs. The Office of the US Trade Representative and other agencies developed a process for reviewing IP regimes of other countries and used it as a mechanism to organise and prioritise bilateral engagement on IP issues. This shift from WIPO to GATT 1994 and the use of trade as a means of encouraging

[330] The USA pointed out the failure of Conferences in 1980 – 1984 to revise the Paris Convention on the Protection of Industrial Property, and, therefore, preferred the GATT Forum for negotiating effective regime for the protection of IP. They pointed out that the GATT Forum provided for effective enforcement of agreements and for dispute settlement mechanisms, which were practically lacking in the WIPO-administered Conventions. BR Staples 'Trade Facilitation: Improving the Invisible Infrastructure' (2012) *Development, Trade and the WTO: A Handbook The World Bank* 140.
[331] The Omnibus Trade and Competitiveness Act (1988) 23, 1988 102 STAT. 1107 Public Law 100-418 100th Congress.

stiffer intellectual property protection gave worldwide intellectual property protection a fundamental trade aspect.

2.6.3 TRIPS and S&DT

TRIPS was set out to create a framework of laws and enforcement procedures for trade related intellectual property protection and enforcement. The heart of TRIPS contains IPR policies and objectives of Developed Countries, which are now binding on most of the global community through the WTO Agreement and its enforcement mechanisms.[332] TRIPS negotiations revealed IP policies and objectives of Developed Countries which were heavily lobbied for and successfully incorporated into the text of the said Agreement,[333] and further, which are still being pursued in "TRIPS-plus" arrangements which represent a higher level of protection norms demanded by Developed Countries that are not prescribed by the WTO TRIPs Regime.[334]

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[332] TRIPS (n 14 above). Part II of TRIPS contains provisions on IP objectives and areas Developing Countries sought protection and enforcement on particularly Trademarks, Geographical Indications, Industrial Designs, Patents and Control of Anti-Competitive Practices in Contractual Licenses. Also see O Gad 'TRIPS Dispute Settlement and Developing Country Interests' in Correa and Yusuf (eds) *Intellectual Property and International Trade: The TRIPS Agreement* (2008) 356; and C Field 'The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations' (2015) *World Trade Organization* 133.

[333] Field (as above). US objectives in the TRIPS negotiations were one of the benchmarks used in evaluating partners' IP standards and enforcement. The US Congress enacted The Omnibus Trade and Competitiveness Act of 1988 (1988 Act) which contained "Special 301" which was used by US negotiators on IP negotiations at the WTO. Before and during the Uruguay Round negotiations, the United States successfully engaged with its trading partners as part of its GSP process and under Special 301 to obtain improvements in IP protection in other countries. For example, Singapore enacted improvements to its copyright law and Korea strengthened its protection of copyrights, patents and trademarks. In the TRIPS negotiations, Special 301 was the target of repeated objections and claims of unilateral action intended to improve the negotiating position of the United States.

[334] TRIPS (n 14 above). TRIPS Agreement merely sets minimum standards of intellectual property rights, countries enter into negotiations and bind themselves to more stringent IP regimes. Developed countries, such as the United States, pursue a policy of negotiating bilateral free trade agreements ("FTAs") that require IP protection far in excess of TRIPS-mandated standards. Such "TRIPS-plus" FTAs were negotiated, such as the USA-SACU FTA, however, were suspended due to diverging views, particularly over the extent of IP protectionism. The EU also adopted a similar strategy, where they departed from their previous "generalist approach", which regulated IP in third-world countries by requiring contracting parties to ratify existing IP-related international agreements. The EU has responded by working to promote the introduction of domestic regulatory discipline in third countries through its FTAs. See *Strategy for the Enforcement of Intellectual Property Rights in Third Countries* (2005/ C 129/03). See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'Global Europe: Competing in the World – A Contribution to the EU's Growth and Strategy' 4 October 2006, Publications Office of the European Union 567.

The general objectives of the Agreement are laid out under Article 7.[335] The primary purpose is the protection and enforcement of IPR, which should contribute to the promotion of innovation and technology transfer. Another objective established is that protection and enforcement of IPR should be for the "mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare".[336] Article 7 attempts to create a balance of rights and obligations to cater for both holders of IPR and development needs. It has been argued that this balance is ambiguous, and cannot be considered by WTO panels.[337] However, the Panel in *US – Shrimp* stated that this principle "controls the exercise of rights by states".[338] The Appellate Body further stated that one application of this principle, the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say reasonably".[339] The Appellate Body does not define or detail what constitutes "abusive exercise". However, Kiss defines abuse of rights as "[…] exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State".[340]

Article 7 has been described it as an idea rather than a principle.[341] However, it reflects the developmental considerations in carrying out its core objective of protectionism and enforcement of IPR. The developmental objective of IPR protection and enforcement that is conducive to social and economic welfare is cascaded throughout the agreement, particularly through flexibilities. S&DT is entrenched in the agreement from the Preamble,

[335] TRIPS (n 14 above) Article 7 that provides that the enforcement of IPR should contribute to inter-alia promotion of technological innovation, transfer of technology in a manner that is conducive to social and economic welfare, and that balances rights and obligations.
[336] TRIPS (n 14 above) Article 7.
[337] J He 'Developing Countries Pursuit of an Intellectual Property Law Balance Under the WTO TRIPS Agreement' (2010) 10(4) *Chinese Journal of International Law* 827.
[338] *US - Shrimp* (n 298 above) para 158.
[339] *As above*.
[340] A Kiss 'Abuse of Rights' (2003) in R Bernhardt (ed) *Encyclopaedia of Public International Law* vol 1 4.
[341] M Shugurov 'TRIPS Agreement, International Technology Transfer and Least Developed Countries' (2015) 2(1) *Journal of Advocacy, Research and Education* 4.

as the Parties recognise special needs of LDCs, particularly in respect of "maximum flexibility in the domestic implementation of laws". [342]

Intellectual Property Law has been part of trade *acquis* and has therefore adopted similar S&DT provisions in its contract. Most provisions in the Agreement are centred around transitional periods regarding implementation of the Agreement, and technical assistance and flexibilities. Article 66(1) provides Least-Developed Countries with a longer time-frame to implement all the provisions of the TRIPS Agreement and encourages technology transfer. TRIPS further provides for the possibility of further extension under the same Article as provided for by LDCs upon motivated request. In 2005 LDCs collectively made use of this provision and Zambia introduced the joint duly motivated request by the LDCs for a 10-year extension of the transitional period.[343]

Subsequently, the exemption was further extended to 1 July 2021 or when a particular country ceases to be the LDC if that happens before 2021. Despite the positive transition extension, the S&DT has its limitations as LDCs are not able to take advantage of such allowance due to constraints voiced, such as capacity problems (LDCs' institutional, human and financial capacities), cost of implementation of TRIPS for Developing Countries and lack of proof that IPRs had played an important role for investment decisions, as well as arguments about the lack of systematic evidence that IPRs had induced Transfer of Technology. Domestic reports of countries such as Bangladesh, an LDC with a strong Pharmaceutical industry, also indicated lack of support in building necessary supply side capabilities as a hindrance to use of transition times.[344]

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[342] TRIPS (n 14 above) Preamble.

[343] Zambia introduced the paper on behalf of the LDC Group, a number of LDCs associated themselves orally with the Zambian statement (e.g. Cambodia, Uganda, Rwanda, the United Republic of Tanzania, Senegal and Lesotho) (IP/C/W/457).

[344] The Example of Bangladesh and LDC highlights the shortcomings of S&DT. Bangladesh has a large pharmaceuticals sector which meets up to 90 per cent of her domestic demand, constraints, particularly Bangladesh's lack of capacity to undertake reverse engineering, use of preferential market access offered under the Declaration on TRIPS and Public Health, has remained largely underutilised. LDCs such as Bangladesh would be in a better position to take advantage of these SDT measures if commensurate support was available to build up the necessary supply-side capabilities. Further, a lack of resources has also prevented Bangladesh from undertaking a national assessment of trade in services which would have facilitated the identification of opportunities to receive SDT in various services-related areas. See M Rahman 'Trade Benefits for Least Developed Countries: the Bangladesh Case, Market Access Initiatives, Limitations and Policy Recommendations' (2014) *CDP Background Paper No. 18* Department of Economic & Social Affairs, ST/ESA/2014/CDP/18 26.

Article 66(2) provides further S&DT by establishing that Developed Country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least Developed Country. TRIPS, however, doesn't contain any further specific provisions which set out ensuring technology transfer. Since the entry into force of the TRIPS Agreement, not much has been done by the Developed Countries to fulfil their obligation under article 66.2. Consequently, this issue was followed through in the Doha Decision on Implementation-related Issues and Concerns.[345] Ministers reaffirmed that the provisions of article 66.2 of the TRIPS Agreement are mandatory and agreed that the TRIPS Council shall put in place a mechanism for monitoring the implementation of this provision. The decision merely asks Developed Countries to submit annual reports with perhaps more detailed information than in the past as well as an opportunity for members to pose questions with regard to information submitted by the Developed Countries. The said review mechanism fails to enforce LDC rights, which have clearly been set out under the said Article.

Further, S&DT is present under Article 67 of GATT 1994 that stipulates that Developed Country members "shall provide […] technical and financial cooperation in favour of developing and LDCs". It calls on LDCs to provide relevant information on priority needs and on Developed Country Members to provide financial cooperation to the LDCs to enable them to effectively address these needs. The extent of technical assistance is to facilitate the implementation of the Agreement, which strengthens IP protection and enforcement in the grand scheme of the Agreement.

TRIPS and S&DT under the agreement have come under intense scrutiny from Developing Countries and trade and IP authors. Tortora advanced that extending longer transition or implementation periods or technical assistance do not solve structural imbalances that impede a developing country from taking advantage of the protection of intellectual

[345]World Trade Organization *Doha Decision on Implementation-related Issues and Concerns* 14 November 2001 Doha Ministerial Conference WT/MIN(01)/17v (*Doha Decision*).

property rights and developing its own technology.[346] Further, that substantive S&DT does not depend upon general obligations assumed by Countries party to a TRIPs agreement and might perhaps take account of the terms of protection granted by Developed Countries in the past. Two key positions relating to TRIPS and other agreements have been advanced by Developing Countries at the WTO. Firstly, the idea that trade liberalisation does not automatically lead to development gains.[347] Secondly, the idea that Developing Countries do not have the same capacity as Developed Countries to take advantage of the opportunities created by trade liberalisation.[348]

A developmental balance is meant to be attained under Article 7, based on the hope that protectionism and enforcement will lead to Developing Countries using technological knowledge in a manner conducive to "social and economic welfare". TRIPS does so without considering the specific needs of LDCs and Developing Countries and restrictively utilises S&DT to allow flexibilities and transition times and technical assistance. Many Developing Countries were, therefore, unable to take advantage of S&DT accorded to them, such as transition times.[349] The Agreement disregards the substantive, which is the agreement itself and obligations required to be discharged by Developing Countries.

There are no "general exceptions" for critical areas such as public health, which diminishes Developing Countries' Policy Space.[350] Compulsory licensing under the TRIPS Agreement is set-out under Article 31. However, this is not a provision for preferential treatment which considers Developing Countries' Public Health needs. TRIPS doesn't specifically list the

[346] Tortora (n 26 above) 6.
[347] Trade liberalisation in the case of TRIPS assumes Developing Countries would benefit long term from I.P transfer, and increased I.P protection. This however, has negative consequences, and anti-development implications particularly with pharmaceutical patents, where under-resourced health services of developing countries are prevented from obtaining access to cheaper generic versions of key anti-retroviral drugs, such HIV/AIDS medication, particularly sub-Saharan Africa.
[348] M Blakeney Intellectual Property and Economic Development in Sub-Saharan Africa (2011) *The Journal of World Intellectual Property*: Volume 14 No. 3/4, 64. For Sub-Saharan African countries to fully exploit intellectual property rights and to harness technological and economic development stemming from intellectual property regimes, intellectual property laws are to linked to policies that link property protection to other national imperatives such as trade, economic growth and competitiveness. This can only be done successfully if countries have the necessary capacity in terms of legal and policy experts, technology and infrastructure.
[349] UNCTAD 'Intellectual Property in the World Trade Organization Turning it into Developing Countries' (2010) *UNCTAD* Real Property 6.
[350] GATT 1994 (n 12 above). MFN and National Treatment, which are core WTO rules, are themselves subject to general exceptions (in both the GATT and the GATS agreements). TRIPS (n 14 above) does not contain any overriding exceptions, which considers Developing Countries unique circumstances.

reasons that might be used to justify compulsory licensing but the Doha Declaration on TRIPS and Public Health confirms that Members are free to determine the grounds for granting compulsory licences and to determine what constitutes a national emergency at paragraph 5(c).[351] This is indicative of how Developed Countries' IP policy emerged dominant in property protection and enforcement within TRIPS[352] as Members are subjected to the same level of IPR. A fundamental feature in the architecture of the TRIPS Agreement is that it doesn't contain typical structural elements of S&DT. TRIPS specifies the same standards of IP protection and enforcement on patents, copyrights, trademarks, etc., for all Members (whether China, Malawi or the US) regardless of developmental levels, internal ability to enforce the Agreement, or special economic considerations. The primary S&DT provisions which TRIPs provides for are with regards to extended time-frames for implementation in Article 66 and technical assistance in Article 67. The above preferential provisions do not address derogation from obligations imposed by the Agreement itself on Developing Countries, particularly LDCs, which are geared to said states' economic and trade and other social and health needs. LDCs, during TRIPS negotiations in 1990, wanted transfer of technology and technical assistance "to be exempt from applying TRIPS obligations in order to adopt measures and policies that would most effectively assist their economic development and not affect their vital interests".[353] LDCs have not realised this, as the lack of S&DT has consequently led to waivers being granted by the General Council under Article IX:3 of the WTO Agreement, such as the 2003 waiver decision to access affordable medicines from third country sources.[354]

It was argued in 1990 by De Chazourne and Dhanjee, prior to TRIPS entering into operation, that should stronger norms for the protection of IP be adopted in a TRIPs Agreement (as has now been the case) then it may be appropriate to mitigate the application of these

[351] TRIPS (n 14 above).
[352] O Gad (n 332 above) 356.
[353] Meeting of Negotiating Group of 12-14 September 1988, GATT document MTN.GNG/NG11/W/50, https://www.WTO.org/gatt_docs/English/SULPDF/92060035.pdf (accessed the 30 March 2019).
[354] World Trade Organization website, https://www.WTO.org/english/tratop_e/trips_e/tripsfacsheet_e.htm (accessed 30 March 2019). In August 2003, WTO members agreed to remove an important obstacle to affordable drug imports: they waived the limitation in the TRIPS Agreement to predominantly supply the local market when generic medicines are produced under compulsory licence. The system established by the decision empowers importing developing and least-developed countries facing public health problems and lacking the capacity to produce generic drugs to seek such medicines from third country producers under "compulsory licensing" arrangements.

provisions to Developing Countries.[355] Further, that in the event of stringent IP provisions to Developing Countries, the said states should be accorded the freedom to tailor their IP regimes in accordance with their technological and developmental objectives.[356] This argument, which was made in an attempt to address the specific needs of Developing States to TRIPS in line with Paragraph 44 of the Doha Development, was not incorporated into TRIPS. TRIPS has applied stringent provisions without S&DT considering specific developmental levels and needs.

Correa explains that there has been technology gap between the North and South that has grown since the TRIPS was adopted.[357] Further, that enhanced protection given to IPRs will not effectively promote the development process but will rather limit access to technology instead, a point which has been voiced by many Developing Countries.[358] The impact of the TRIPS provisions on Developing Countries has been felt in accordance with the level of their economic and technological development.[359] Certain middle-income countries are likely to benefit from spur to local innovation under stronger IPRs, such as Brazil and Malaysia. Countries such as India and China that are endowed with appropriate intellectual property infrastructure, can gain some benefits in the long term from stronger IPRs. South Africa, the continental leader in innovation, would also benefit from optimal stimulation of domestic innovation as a regional technology exporter as the country has a stronghold on certain sectors where it holds comparative advantage such as mining, armaments and baking technology.[360] Mashelkar further concludes that LDCs, with their minimal level of innovative development, will face higher costs without the offsetting of benefits. This speaks to the

[355] De Chazournes *et al* (n 327 above) 13.
[356] De Chazournes *et al* (as above) 13.
[357] C Correa 'Can the TRIPS Agreement foster technology transfer to Developing Countries?' in HJ & Reichman KE Maskus (eds) (2005) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* 253.
[358] WTO website, TRIPS and Public Health - Submission by Developing Countries 19 June 2001 https://www.wto.org/english/tratop_e/trips_e/paper_develop_w296_e.htm (accessed 4th November 2020) IP/C/W/296. The Submission was made by the Africa Group, Barbados, Bolivia, Brazil, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela Each provision of the TRIPS Agreement should be read in light of the objectives and principles set forth in Articles 7 and 8. The protection of intellectual property rights, in particular patent protection, should encourage the development of new medicines and the international transfer of technology to promote the development of manufacturing capacities of pharmaceuticals, without restraining policies on access to medications.
[359] R A Mashelkar 'Intellectual property rights and the third world' (2002) *Journal of Intellectual Property Rights* 308-323.
[360] E Teljur 'Intellectual Property Rights in South Africa: An Economic Review of Policy and Impact' *The Edge Institute* 63. See http://www.tips.org.za/files/Teljeur_IPRs_paper_2003.PDF (accessed the 2 April 2019).

need to contextualise S&DT to specific economic and technological levels within a Country and to avoid blanket-approach S&DT provisions.

IPR has received extensive and comprehensive protection under TRIPS and the WTO system than under previous Arrangements.

In conclusion, the primary outcome from this section is that S&DT under IPR Agreements has been insubstantial, with primary focus being on adjustment measures, transition arrangements and flexibilities. Compliance has been the main premise, as opposed to securing developmental and economic gains for LDCs and Developing Countries. S&DT geared towards technology transfer is aspirational, and non-specific, and TRIPS doesn't contain any further specific provisions which set out to ensure this is attained. A fundamental feature in the architecture of the TRIPS Agreement is that it doesn't contain typical structural elements of S&DT. S&DT under IPR has developed underwhelmingly, due to similar reasons as S&DT under the WTO. Firstly, there are not enough substantive and detailed provisions for Developing Countries in the text of Agreements advancing the development agenda following colonialism. And secondly, due to Developing Countries' lack of meaningful participation at the development of the key IPR Agreements that affects their rights and obligations. Efforts of integrating S&DT and substantive development provisions into Agreements have been more fruitful under other WTO texts, such as the Enabling clause with specific trade preference rules, and the recent TFA which incorporates capacity and assistance modalities, as will be examined in detail in the next chapter. S&DT under trade and IPR needs robust and adequate S&DT provisions that redress colonial and post-colonial Agreements which have not incorporated the development agenda into its Agreements. Further, S&DT needs to focus beyond adjustment measures and transitional measures to provisions which secure meaningful economic gains for Developing Countries.

2.7 Conclusion

This chapter established the legal concept, development and application of S&DT under WTO rules. This chapter also examined key arguments surrounding S&DT, particularly the justification for S&DT and arguments made against it. It was concluded that S&DT can be justified in addressing structural imbalances between developing and Developed Countries in terms of their shares of world trade, access to financing and technology, and institutional capacity. Human resources also have to be acknowledged and addressed for Developing Countries to develop capacity. S&DT can also be justified under the notion of Equity and under WTO general objectives. It is in line with WTO objectives which attain wider objectives under the Preamble of GATT 1994 of raising standards of living, trade liberalisation, and increasing global trade of Developing Countries.

Arguments against S&DT were also addressed, the most fundamental being that S&DT derogates from the primary objective under GATT 1994. This arguments suggests that S&DT provisions undermine the very essence of the MTS, attaining global reduction of tariff prices. The second argument against S&DT is linked to the first, namely that preferential treatment (which is usually short-term) prevents or hinders long term gains for Developing Countries. A third pragmatic argument advanced in this regard is that there is no economic evidence that according S&DT will lead to development in certain WTO Agreements.

Finally, challenges in S&DT were addressed. These form the bedrock of this study and the main problem which is to be addressed when constructing the Framework. The first and most apparent challenge is that multiple S&DT provisions under WTO Agreements lack enforceability, predominantly due to their general, non-specific, and non-binding nature. The second concern with S&DT is the unspecified procedure in establishing the “needs” of Developing Countries. Further, ineffective implementation and monitoring mechanisms have hindered the efficiency and operation of S&DT. A monitoring mechanism is essential in WTO rules to observe the development of S&DT, particularly with regards to monitoring whether the provisions deliver the impact and objective for which they were intended for when it comes to Developing and Developed Countries. And further, they are important to identifying key areas of S&DT which need redressing.

S&DT under international law disciplines was also examined and similarities and challenges were linked to S&DT under WTO rules. The chapter set out an examination of the legal principles of Equality and Sovereignty under S&DT, and it was established that there is a clear distinction between the equality of law and equality before the law. It was pointed out that that legal equality does not mean equality of rights and duties irrespective of states' size, power, and international responsibilities. Non-discrimination under WTO law, which is one of the key bedrocks of the MTS was also examined in relation to S&DT. Non-discrimination was firstly identified as a principle inherent to the principle of equality and other guarantees of human rights, which also includes economic liberties. The above notwithstanding, provisions justifying derogation from non-discrimination were identified, some of which form the S&DT provisions under WTO law.

The chapter examined the development of the S&DT concept under the various MTSs, specifically with regards to historical context. The chapter further examined IEL for principles of S&DT and it was established that at the heart of IEL lies the concept that States shall have “common but differentiated responsibilities and respective capabilities”, which was established in the 1992 Rio Declaration. IEL provisions on CBDR adopt the same general non-specific form that S&DT adopts under the WTO takes, however are far less developed in that they lack detailed rules and modalities which are absent from key Agreements. Developing Countries, LDCs and Small Islands, however, have made strong inroads in establishing binding provisions in key agreements, particularly the Kyoto Protocol and the Paris Agreement, with peremptory language on key S&DT areas such as financial assistance. The key highlight in relation to S&DT under Trade in goods is that the WTO should adopt such language for enforceability and implementation of its provisions.

S&DT at Intellectual Property level had many shortcomings in the Berne Convention and the Paris Convention. Developing Countries entered into world agreements with the strings of previous colonial masters attached, as most political, economic and constitutional systems and structures remained unchanged. The initial drivers of the Agreements (Developing Members, particularly the US) sought to secure IPR protection and did not consider the development agenda. The genesis of these agreements are found in a period of colonial

rule, with little consideration adjustments, flexibilities or the transitioning of such states to align themselves with the agreement. TRIPS included S&DT, however, it represents unsubstantial provisions which do not speak to the development mandate. S&DT under Trade is significantly more advanced, in that it contains detailed rules, which have been implemented and utilised by LDC's and Developing Countries in multiple trade related areas. The most important point gleaned from the examination of IPR in relation to S&DT under trade in goods, is the need to focus beyond adjustment measures and transitional measures (which are the focus of S&DT under IPR) to provisions which secure meaningful economic gains for Developing Countries. The primary outcome after examining S&DT under IP and IEL and the WTO decision which cited the CBDR principle, is that the applicable provisions are written in general and aspirational language, and operate as guiding principles. Whilst many S&DT provisions in the MTS are crafted in similar manner, and have many flaws discussed in this Chapter (non-binding or vague) there are numerous specific and enforceable provision which accord Developing Countries specific preferential treatment structured to impact development objectives contained under WTO Agreements. To this extent, S&DT under trade is considerably more advanced and developed.

CHAPTER 3: S&DT PROVISIONS UNDER WTO LAW – APPLICATION, ENFORCABILITY AND SHORTCOMINGS

This chapter identifies the current framework of S&DT under WTO law by examining and interpreting WTO legal texts, which primarily comprise of WTO Agreements, Ministerial Decisions and Declarations as well as DSU decisions. The primary focus of this chapter is to identify effective S&DT provisions, as well as examine deficiencies, limitations and/or challenges in the provisions throughout the MTS. This is undertaken by grouping S&DT provisions in the MTS and categorising them based on common attributes that the provisions share due to the way the provisions are drafted, as follows;

- Clear and enforceable S&DT provisions;
- Vague or unclear S&DT Provisions;
- S&DT provisions that lack specificity or detail, rendering them un-implementable and un-enforceable at [WTO] law; and
- Non-peremptory S&DT provisions drafted in non-obligatory language;
- Complex S&DT provisions which are difficult for Developing Countries to implement.

The challenges and shortcomings of S&DT regarding Developing Countries will be utilised in the next chapter, which will attempt to establish a S&DT framework with relevant and enforceable provisions, which takes into cognisance the needs and trade goals of Developing Countries and SADC.

3.1 The Scope of S&DT Provisions under the WTO

There are approximately 145 S&DT provisions spread across WTO Agreements crafted to accord Developing Countries special rights or grant them the possibility of favourable or preferential treatment.[361] The provisions are incorporated in Multilateral agreements on trade in goods, the GATS, TRIPS, DSU, WTO Plurilateral Trade Agreements (such as the

[361] WTO *Special and Differential Treatment Provisions in WTO Agreements and Decisions* (n 290 above).

Revised Agreement on Government Procurement) and WTO Decisions. They contain binding and non-binding clauses which apply to the Membership with differing levels of enforceability.

It was established under chapter 1 that the WTO S&DT provisions are conventionally grouped [by the WTO].[362] A cursory overview of the S&DT provisions throughout the MTS shall be examined in this section, the substantive text however will be examined in the following sub-chapters. The primary context that S&DT provisions are examined is to identify deficiencies and shortcomings, it would not be prudent, therefore, to examine all the S&DT in the MTS. The S&DT provisions that fall under the the typology, based on the substantive nature of the preferential treatment are the following;

a) Provisions aimed at increasing trade opportunities through market access;
    - AoA: the Preamble to the Agreement;
    - Agreement on Textiles and Clothing: Article 2.18;
    - GATS: Article IV:1 and Article IV:2, and
    - GATT 1994: Articles XXXVI-XXXVIII, and The Enabling Clause Para 2(a).

b) Provisions requiring WTO Members to protect the interest of Developing Countries (protective measures);
    - SPS Agreement: Article 10.1 and 10.4;
    - Agreement on Textiles and Clothing; Article 6.6(b), 6.6(a) and Annex, paragraph 3(a)):
    - GATS: Article XIX:3;
    - TBT Agreement: Article 10.6; Article 12.1; Article 12.2; Article 12.3; Article 12.5; Article 12.9; and Article 12.10

[362]WTO website https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#:~:text=These%20special%20provisions%20include%2C%20for,treatment%E2%80%9D%20(S%26D)%20provisions (accessed on 3rd June 2020),
Also see World Trade Organization: Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decision: Note by Secretariat, WT/COMTD/W/77 (Oct. 25, 2000) [hereinafter Implementation of Special and Differential Treatment] available at http://www.wto.org.

- Implementation of Article VI of GATT 1994: Article 15;
- Implementation of Article VII of GATT 1994: Annex III.5;
- Agreement on Import Licensing Procedures: Article 1.2; Article 3.5 (a)(iv); Article 3.5(j);
- SCMA: Articles 27.1; and 27.15;
- Agreement on Safeguard: Article 9.1 and Footnote 2
- DSU: Article 4.10; Article 10.8; Article 12.10; Article 12.11; Article 21.2; Article 21.7; and Article 21.8, and
- GATT 1994; Articles XXXVI-XXXVIII and The Enabling Clause Para 2(b)and(c).

c) Provisions on flexibility of commitments;

- AoA: Article 6.2; Article 6.4; Article 9.2(b)(iv); Article 9.4; Article 12.2; Article 15.1; Public stockholding for food security purposes: Annex 2, para. 3, footnote 5; Domestic food aid: Annex 2, para. 4, footnotes 5 & 6; Annex 5, Section B.
- TBT Agreement: Article 12.4;
- GATS: Article V:3 and Article XIX:2;
- TRIMs: Article 4;
- Implementation of Article VII of GATT 1994: Annex III.3 and Annex III.4;
- SCMA: Articles 27.2 (a) and Annex VII; Article 27.4; 27.7; 27.8, 27.9; 27.10; 27.11, 27.12, and 27.13;
- DSU: Article 3.12, and
- GATT 1994; Article XVIII and XXXVI.

d) Provisions that allow longer transitional periods to Developing Countries;

- AoA; Article 15.2.
- SPS Agreement: Article 10.2 and 10.3;
- TBT Agreement: Article 12.8
- TRIMs: Article 5.1 and 5.2;

- Implementation of Article VII of GATT 1994: Article 20.1; article 20.2; Annex III:1; and Annex III.2;
- Agreement on Import Licensing Procedures: Article 2.2, footnote 5;
- SCMA: Article 27.2 (b), Article 27.3, Articles 27.4 and 27.14, Article 27.5, Article 27.6, and Article 27.11;
- TFA Article 14.1 and 14.2;
- Agreement on Safeguard: Article 9.2; and
- TRIPS: Article 65.2 and 65.4.

e) Provisions on technical and financial assistance; and

- SPS Agreement: Article 9;
- TBT Agreement: Article 11.1; Article 11.2; Article 11.3; Article 11.4; Article 11.5; Article 11.6; Article 12.7
- Implementation of Article VII of GATT 1994: Article 20.3;
- GATS: Article XXV:2 and Paragraph 6 of the Annex on Telecommunication;
- TFA Article 21;
- TRIPS: Article 67, and
- DSU: Article 27.2.

f) Provisions specifically for LDCs (and not Developing Countries);

- AoA; Article 16.1 and Article 16.2.
- Agreement on Textiles and Clothing; (the Footnote to Article 1.2, and Article 6.6 (a)).
- TBT Agreement: Article 11.8;
- TRIMs: Article 5.2;
- GATS: Article IV:3.
- TRIPS: Article 66.1; and 66.2,
- DSU: Article 24.1 and Article 24.2, and

- GATT 1994; The Enabling Clause Para 2(d), Decision on Measures in Favour of Least-Developed Countries and Waiver preferential tariff treatment of LDCs.[363]

A considerable number of S&DT provisions under various Agreements are substantively alike, and exist in multiple WTO agreements with similar wording i.e. S&DT provisions on technical and financial assistance. This may result in most of the provisions under multiple WTO Agreements on a particular area, such as provisions on transitional periods, falling within a category based on how they are drafted, for example "Clear and enforceable S&DT provisions." This may particularly be the case for Uruguay Round Agreements which followed a particular format, however may vary for more progressive agreements, such as the TFA.

Despite the existence of mandatory binding S&DT law in the WTO acquis, it is also riddled with many soft law provisions. Soft law is defined as Agreements, principles and declarations that are not legally binding.[364] International organisations often adopt soft law instruments which take the form of guidelines, codes of conduct, understandings and other (interpretative) acts. Under international law, soft law provisions have been used to incorporate political, moral or social normative factors to guide Members in the ILO and IHRL framework. They are used to take on politically controversial subjects, where states are unable to give firm undertakings even though these are urgently needed,[365] and are easy to negotiate and save time due to their flexibility in non-binding nature.

The WTO soft law provisions emanate from resolutions adopted by the organisation's institutional bodies. There are numerous forms of soft-law in the WTO context, which include decisions in the form of recommendations taken by Members in councils or

[363] World Trade Organization *Implementation of Special and Differential Treatment provisions in WTO Agreements and Decisions* 25 October 2000, WT/COMPTD/W/77. The provisions in the TFA (n 24 above) have also been incorporated into the list, as the WTO Note by the secretariat was written to entry into force of the TFA.
[364] See the European Centre for Constitutional and Human Rights, https://www.ecchr.eu/en/glossary/hard-law-soft-law/ (accessed 25th May 2020).
[365] I Duplessis, *Soft international labour law: The preferred method of regulation in a decentralized society* ILO 2008 Governance, International Law & Corporate Social Responsibility 14

committees, guidelines, reports, statements, programmes of action and Declarations.[366] Soft law norms play a role in reconciling some of the antinomies or paradoxes in WTO law.[367] The above notwithstanding, S&DT soft law provisions are unenforceable (as stated above) despite the profound influence they have on instruments, or hard law provisions in Agreements. This form has WTO law characterised as constructive ambiguity.[368] They aid in interpreting and reaffirming diverging positions through previously agreed principles. This can be seen in the manner in which soft law has influenced the development of S&DT that often goes against fundamental principles under the GATT 1994.[369]

It is evident from the Doha Development Round that S&DT under the WTO contains structural problems in its construct. Developing Countries during the preparations for the Fourth Session of the Ministerial Conference called for a framework in September 2001 to elaborate a Framework/Umbrella Agreement on S&DT treatment.[370] The areas of focus were for the framework Agreement to contain mandatory and binding S&DT through the WTO dispute settlement system, reconciliation of the S&DT regime with development targets, and transition periods linked to objective economic and social criteria. In order to develop a framework, it is important to examine the current construct, issues and challenges that emanate from the established S&DT rules, which forms the objective of this chapter.

The provisions shall be examined in their respective categories, however some provisions may possess traits of multiple categories, or fall into two categories, i.e. S&DT provisions

[366] Footer (n243 as above) 9.
[367] J Pauwelyn 'Non-Traditional Patterns of Global Regulation: Is the WTO "Missing the Boat"?' in C Joerges & E Petersmann (eds) (2006) *Constitutionalism, Multilevel Trade Governance and Social Regulation* 201.
[368] P Low 'Hard Law and 'Soft Law' Options for Fostering International Cooperation'(2015*) International Centre for Trade and Sustainable Development and the World Economic Forum* 1.
[369] Soft law plays a fundamental role in creating binding S&DT outcomes as evidenced from the recent Trade Facilitation Agreement. The TFA goes as far as incorporating the influencing Declarations and working programmes in its preamble, indicating how soft law eventually became the final text. The preamble specifically acknowledges previous Declarations which contained provisions which were eventually formulated into hard law, such as;
- the Doha Declaration (n 1 above) para 27;
- Annex D of the Decision of the Doha Work Programme - World Trade Organization *Decision of the Doha Work Programme adopted by the General Council on 1 August 2004* WT/L/579;
- World Trade Organization *Hong Kong Ministerial Declaration* WT/MIN(05)/DEC (*Hong Kong Declaration*).
- Annex E to the Hong Kong Ministerial Declaration.
[370] Doha Declaration (n 1 above). Countries which tabled the proposal were Cuba, the Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe.

that are vague, and use non-peremptory or obligatory language. Such provisions will only be discussed under one category to prevent duplicity. Further, critical S&DT provisions will be examined in the respective categories covering various S&DT typology…i.e. Market Access or Protective Measures. This chapter, however, will not examine all S&DT provisions due to the numerous provisions that exist under the MTS, but rather highlight key provisions and legal texts under their respective Agreements, Decisions, influencing WTO Declarations and Panel and Appellate Body Reports.

S&DT and reference to preferential treatment and development of Developing Countries are also contained in the preamble of various WTO Agreements. An example of this is S&DT and development S&DT language incorporated into WTO Agreements such as the Marrakesh Agreement,[371] and the AoA,[372] and the TFA.[373] S&DT in preambular text will not be examined on their own under the categories in this chapter. This is primarily due to the reason that preambular text is not meant to create specific obligations, and is designed instead to set out the objectives and principles underlying an agreement and to help guide the interpretation of the rights and obligations laid down in the agreement.[374] Preambular text however may be examined in context to other S&DT provisions in the text of Agreements.

3.2 Clear and Enforceable S&DT Provisions

[371] *The WTO Agreement* (n 42 above) Preamble; it provides that Parties to the Agreement "Recognizing further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development."

[372] WTO AoO (n 26 above) Preamble; "Having agreed that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members…"

[373] The Preamble of the Agreement recognises the special needs of Developing Countries and LDC, and re-iterates the objective to increase TF related technical assistance and capacity.

[374] World Trade Organization *Non-mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions* 4 February 2002 Committee on Trade and Development WT/COMTD/W/77/Rev.1/Add.3, 6 (WTO *Non-mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions)*.

When Countries draft agreements they often make choices, like the choice of creating soft law provisions, or to create binding legal provisions, or the decision to omit provisions[375] that may serve to weaken the force and credibility of their commitments.[376] International law is routinely criticised for being too weak [in non-binding provisions] and failing to offer effective enforcement mechanisms; the multilateral trade system is no exception. There are a limited number of S&DT provisions drafted in clear, binding and enforceable language which grant preferential treatment to Developing Countries under the MTS. All WTO provisions are binding on Members. The above notwithstanding, provisions under various Agreements, however, often do not 'bind' Developed Countries to undertake certain positive action related to S&DT. Reference to the 'non-biding' nature of S&DT provisions under this Chapter refers to the latter scenario, which results in Developing Countries being unable to enforce S&DT, or hold Developed Countries to the S&DT provisions.

It was examined under chapter 2 that the deficiencies in binding hard-law S&DT provisions may have flowed from the structure adopted in WTO texts, of attempting to attain WTO primary objectives whilst according Members enough policy space to pursue their trade and development objectives. This is a delicate balance between managing the interests of [Developing and Developed] Members, which has been reflected in non-committal language and non-enforceable preferences. This notwithstanding, there are a number of clear and enforceable S&DT provisions which will be examined under this section.

The clear and enforceable S&DT provisions identified and examined, under this section are the following;

- The Enabling Clause- Paragraph 2(a) and (c);
- GATT 1994 Article XXVIII bis (3)(b) and (c), Article XXXVI:8;
- SCMA Articles 24.1 to 24.4, and Article 27;
- AoA Article 6.2, Article 9.4, Article 12.2, Annex 2 (para 3, footnote 5), Article 15.2;
- TBT Agreement Articles 2.12 to 2.13, Article 5.9 and Article 12.5;

[375] Provision or sections that may be omitted from International Agreements that weaken the Agreement, may be dispute resolution provisions, which would prevent enforcement, or monitoring provisions to ensure compliance.
[376] A Guzman *The Design of International Agreements* The European Journal of International Law 2005 Vol. 16 no.4 580.

- TRIMs Article 4;
- TFA Article 14.1, Article 16; and
- Agreement on Safeguards Article 9.2.

3.2.1 Market Access

The first type of provisions crafted in clear and enforceable language to be examined under this section are market access related provisions. Market access for goods refers to the conditions agreed by Members, tariff, and non-tariff measures for the entry of specific goods into their markets. It is often, but not exclusively, determined by border measures such as tariffs,[377] tariff rate quotas[378] and non-tariff barriers.[379] S&DT provisions regarding market access, therefore, would refer to measures for entry into markets which accord preferential treatment to Developing Countries. Such provisions are designed to increase Developing Countries' trading opportunities.

Market access has been one of the key areas in trade in goods that Developing Countries have sought to increase through S&DT. The 2001 Doha Ministerial Declaration reaffirmed the importance of S&DT provisions and stressed that the integration of Developing Countries into the MTS will require meaningful market access. One of the critical areas of

[377] World Trade Organization website. See https://www.WTO.org/english/tratop_e/tariffs_e/tariffs_e.htm (accessed 8 May 2019). A Tariff is a Customs duty on merchandise imports. Tariffs give a price advantage to locally produced goods over similar goods which are imported, and they raise revenues for governments.

[378] J Womach 'Agriculture: A Glossary of Terms, Programs, and Laws Agriculture' (2005) *CRS Report for Congress* 254. A Tariff-rate quota is trade policy tool used to protect a domestically produced commodity or product from competitive imports. It combines two policy instruments that nations historically have used to restrict such imports: quotas and tariffs. In a TRQ, the quota component works together with a specified tariff level to provide the desired degree of import protection. Imports entering during a specific time period under the quota portion of a TRQ are usually subject to a lower, or sometimes a zero, tariff rate. Imports above the quota's quantitative threshold face a much higher (usually prohibitive) tariff.

[379] R W Staiger 'Non-tariff Measure and the WTO' (2012) WTO Staff Working Paper. See https://www.WTO.org/english/res_e/reser_e/ersd201201_e.pdf (accessed 8 May 2018). Non-tariff barriers (NTB's) or non-tariff measures include any policy measures other than tariffs that can impact trade flows. There are three broad categories of NTB's. The first category of NTMs are those imposed on imports. This category includes import quotas, import prohibitions, import licensing, and customs procedures and administration fees. A second category of NTMs are those imposed on exports. These include export taxes, export subsidies, export quotas, export prohibitions, and voluntary export restraints. A third category of NTMs are those imposed internally in the domestic economy. Such behind-the-border measures include domestic legislation covering health/technical/product/labour/environmental standards, internal taxes or charges, and domestic subsidies.

market-access for Developing Countries is Non-Agricultural Market Access,[380] with negotiations based on the Doha Declaration that call for reducing and eliminating tariffs. S&DT provisions need to be effective, practical and results-oriented, with measures designed to address the specific concerns and needs of beneficiary countries at a national level. One of the positions taken on S&DT by Developing Countries[381] has been to focus on the link between their commitment to liberalisation and the nature of their respective trade requirements and their levels of development. This was in line with paragraph 16 of the Doha declaration which committed to reducing and eliminating tariffs and to Members taking fully into account the special needs and interests of Developing Countries and LDC participants.

The first clear and enforceable S&DT provision to be examined under this section is found under the Enabling Clause. The Enabling clause is not without limitations or shortcomings, which will be examined in the following section, however it also contains critical preferential treatment. The provisions of the Enabling Clause, Paragraph 2(a) enables Developed Countries to deviate from Article I on MFN obligations, and grant Developing Countries with the same level of development (as will be examined in *EC – Tariff Preferences* under section 3.4.1 below). [382]Use of the Enabling Clause, therefore, may result in preferential market access for Developing Countries (both LDCs and Developing Countries), if such treatment is accorded by a Developed Country. Most Developing Countries also enjoy access to Developed Country markets under non-binding, non-reciprocal preferential schemes which are notified under the WTO. The Enabling Clause further provides for better market access for products from Developing Countries to increase economic development through exports, as will be elucidated below. The Enabling Clause is "an integral part of the GATT

[380] World Trade Organization website http://www.WTO.org/french/tratop_f/markacc_f/nama_negotiations_f.htm (accessed 8 May 2019). Products not included in Annex 1 of the WTO agriculture agreement under Article 2 are covered by Non-Agricultural Market Access negotiations. It, therefore, covers 90% of world trade in goods. In this article the term "industrial products" is used to refer to all products which are the subject of Non Agricultural Market Access negotiations.

[381] The position of G-90 which was set up at the Cancun conference and made up of the ACP, the African Union, and the group of Least Developed Countries.

[382] *EC – Tariff Preferences* (n 19 above) para 155. Footnote 3 to paragraph 2(a) stipulates that, in addition to being "non-discriminatory", tariff preferences provided under GSP schemes must be "generalized". According to the ordinary meaning of that term, tariff preferences provided under GSP schemes must be "generalized" in the sense that they "apply more generally; [or] become extended in application"

1994"[383] as stated in *EC – Tariff Preferences*, with the Appellate Body holding that the Enabling Clause is one of the "other decisions of the CONTRACTING PARTIES" within the meaning of paragraph 1(b)(iv) of Language incorporating GATT 1947 and other instruments into GATT 1994. This, therefore, means that the GATT 1994 is "hard law" as it is a WTO Decision that is binding on WTO Members.

A critical aspect of the Enabling clause is also in its justification of preferential RTAs in favour of Developing Countries which operate legally within the rules of the MTS, under paragraph 2(c). Notification of RTAs is made under various distinctive classifications, which are RTAs involving Developed Countries liberalising trade in goods, which are notified under Article XXIV of the GATT 1994 that are considered by the Council for Trade in Goods. Preferential arrangements between Developing Countries, however, are notified under Paragraph 2(c) of the Enabling Clause to the CTD. RTAs between Developing and Developed Countries are legally justified under GATT 1994 Article XXV (on waivers) and the Understanding in Respect of Waivers of Obligations under the GATT 1994 (Uruguay Round result) and waivers under Article IX of the GATT 1994.

The Enabling Clause provides for increased commercial opportunities for Developing Members. Paragraph 2(c) allows Developing Country Members increased market access in entering into regional or global arrangements among themselves only for the mutual reduction or elimination of tariffs and in accordance with criteria or conditions, which may be prescribed by the Contacting Parties, for the mutual reduction or elimination of non-tariff measures on products imported from one another. This allows increase in regional trade through lowered duties, which is a provision that increases market access. One of the most significant and important provisions for Developing Countries regarding market access is contained herein, under Paragraph 2(a), which justifies and legitimises the Generalised System of Preferences (GSP). The provision provides that S&DT may derogate against Article I of the GATT 1994 regarding "[…] preferential tariff treatment accorded by developed

[383] *EC - Tariff Preferences* (n 19 above) para 90.

contracting parties to products originating in Developing Countries in accordance with the Generalised System of Preferences".[384]

GSP allows and enables Developed Members to derogate from the MFN principle and accord differential and more favourable treatment to Developing Members without according such treatment to other Members on a voluntary basis. This has granted and continues to grant critical market access for products from Developing Countries, such as zero or lower duties for products originating from Developing Countries. This has resulted in GSP programmes such as AGOA and the RTAs SADC-EU EPA, which have granted various Developing Countries within SADC increased market-access opportunities.

The enabling clause contains some of the most significant flexibilities accorded to Developing Countries in the MTS. Data on the implementation of measures under Article XVIII indicates that the share of manufactures in developing country exports rose from 52.1 per cent in 1990 to 64.8 per cent in 1997, which marks a considerable increase since the Enabling clause came into effect. A significant surge in PTAs, with 291 in force in January 2019, particularly post 1990,[385] contain non-reciprocal terms in Agreements between Developed and Developing Countries, which Developing Countries have used to secure increased market access. The Enabling clause, therefore, has played a significant role in increasing trade in Developing Countries.

Tariff Bindings

Developing Countries under the MTS also receive important S&DT relating to a central part of the MTS, specifically on tariff bindings. WTO Members under Article II of the GATT 1994 agreed to bind their tariffs at reduced levels and to record such tariff bindings in their Schedules of concessions, which represent their legal commitments on tariffs under the WTO (GATT 1994). This, therefore, means that WTO Members may apply a tariff lower than

[384] *The Enabling Clause* (n 18 above).
[385] World Trade Organization website, Regional Trade Agreement Database http://rtais.WTO.org/UI/PublicMaintainRTAHome.aspx (accessed 12 January 2019).

the bound level. They, however, cannot exceed the bound levels specified in their Schedules of concessions. S&DT provisions in this regard are found in provisions that enable Developing Countries to break away from the rule of reciprocity, and enable opportunities for granting increased market access and trade opportunities by Developed Countries to Developing Countries through asymmetric tariff negotiations. Notwithstanding the fact that the emphasis of this section is on S&DT provisions which have challenges and shortcomings, there are effective S&DT provisions under the GATT 1994 on market access. They are briefly examined to appreciate the context of S&DT provisions under the GATT 1994.

Firstly, Article XXVIII bis of the GATT 1994 provides for general rules on reciprocity and mutual advantage with regards to tariff negotiations. Article XXVIII bis(3)(b) establishes an obligation on Developed Countries to conduct negotiations on a basis which affords adequate opportunity to take into account "[…] 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". Under Article XXVIII bis (3)(b) and (c), it is peremptory for Developed Members to conduct tariff negotiations which "takes into account" needs of LDCs and developmental needs of other Developed Countries. The S&DT provisions break away from the requirement for negotiations to be conducted on a "reciprocal and mutual advantageous" basis on account of developmental needs. The provision is an effective exception which was used by Developing Countries to keep tariff reduction schedules significantly lower than that of Developed Countries, with less than 30 per cent of all tariffs in Developed Countries on the GATT 1994's reduction schedule, as opposed to 80 per cent of Developed Countries. [386]

Another effective and important provision is Article XXXVI:8 under the GATT 1994 for LDCs. The provision provides that Developed Members "do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties". S&DT that flows from the clause results in LDCs being accorded the right to undertake lower levels of binding and higher

[386] J Nakagawa *Managing Development: Economic Globalization, Economic Restructuring and Social Policy* 2016 Routledge 91.

overall tariff protection. Article XXXVI:8 is regarded as the most significant substantive provision of Part IV (Trade and Development Chapter) because it is a hard-law commitment.[387] In *EEC –Bananas II*, the Panel, on interpreting Article XXXVI:8, stated that "… Article XXXVI:8 limits the right of developed contracting parties to demand reciprocity from developing contracting parties in 'procedures' under the General Agreement."[388] The exemption Article XXXVI:8 accords allows a developing country to continue accruing revenue from tariffs and reap rents from quotas and other NTB's such as licensing requirements.[389]

LDCs, specifically, have made significant headway in obtaining preferential market access provisions in Ministerial Decisions. The sixth Ministerial Conference also provided significant progress in market access for LDCs. Decision 36 of Annex F of the Hong Kong Ministerial Declaration of 2005 on Measures in Favour of Least-Developed Countries provided an obligation on Developing and Developed Members to provide duty-free quota-free market access for at least 97 per cent of products originating from LDCs (subject to them being in a position to do so). Another Ministerial Decision of 7 December 2013 on Duty-Free and Quota-Free Market Access for LDCs placed a further obligation on Developed Countries that do not provide DFQF access of 97 per cent to LDCs to "improve their existing duty-free and quota-free coverage for such products".[390] The same decision prescribes that Developing Countries have the same obligation, in that they are mandated to offer DFQF to LDCs if they are "in a position to do so".

Despite making inroads on improved market-access, there are a number of challenges which Developing Countries face, and which may require it being addressed through S&DT. Market access for products of export interest to developing country Members are increasingly dependent on the ability to comply with trade regulatory measures. Developing Countries, particularly LDCs, often lack the necessary capacity to continue to comply with complex

[387] R Bhala (n 68 above) 1080.
[388] EEC – Import Regime for Bananas, 11 February 1994 (Panel Report) , DS38/R (*Bananas II*), para 37.
[389] R Bhala (n 68 above) 1080.
[390] World Trade Organization General Services Ministerial Decision of 7 December 2013 Bali Ministerial Conference WWT/MIN(13)/37 and WT/L/912.

regulatory SPS measures, which may be legitimate but fragment trade, particularly in agricultural exports. Agriculture makes a significant contribution to their economies, including to gross domestic production, export revenue and employment as well as to rural development and livelihood security. A technical note made by UNCTAD in 2015 shows that Developing Countries encounter significant additional costs while adapting their production processes to comply with foreign regulatory measures and standards.[391] This leads to de facto discrimination against exports of those countries that have the highest difficulties to comply with the regulations in export markets due to capacity constraints and/or lack of finance.

3.2.2 Protective Measures

The primary WTO Agreements which address subsidies are the GATT 1994, the SCM Agreement,[392] and the AoA.[393] Most of the S&DT provisions in the SCM agreement and the AoA are well crafted and provide S&DT that is enforceable. This is not the case with S&DT regarding subsidies and domestic support under the GATT 1994, particularly Article XVIII:C of the GATT 1994 that provides for domestic support and subsidies through provision of Government Assistance in order to raise the general standard of living of its people,[394] however this will be explored in the following sections.

Subsidies and domestic support play a significant role in increasing competitiveness, hence increasing market access for Members. Domestic support and export subsidies benefit the exporter of the products concerned by providing access to the subsidised commodities at lower prices. This increases market access for products emanating from the supported/subsidised exporting country. Subsidies and domestic support, however, have negative effects on global trade. They affect world prices through artificially increased global supply, which result in the depression of international prices, the exacerbation of volatility of world prices by insulating domestic markets, and reduction in the scope for contesting

[391] UNCTAD website at https://unctad.org/en/PublicationsLibrary/ditc2015misc4_en.pdf (accessed 28 December 2018).
[392] World Trade Organization *Agreement on Subsidies and Countervailing Measures* 1994 (*SCM Agreement*).
[393] *AoA* (n 25 above).
[394] GATT 1994 (n 12 above) Article XVIII (13).

markets.[395] The Nairobi Decision on Export Competition is one of the four agriculture-related Decisions agreed upon by the WTO Members in December 2015, which foresees the elimination of export subsidies in different timeframes for developed and developing Members. Export subsidies are prohibited for all Members, with a number of exceptions. Firstly, Developed Countries were to eliminate all export subsidies by 2018 under Article 7. A further exception, is that Developing Countries are able to continue to use marketing cost subsidies and internal transport subsidies for five years under Article 9.4 of the AOA. And lastly, LDCs and net food-importing developing countries can also benefit from Article 9.4 until 2030.

Despite the phasing out of export subsidies for [Developing] Members in the Nairobi Decision, the Uruguay round SCM Agreement contained clear and binding S&DT provisions. The provisions are on export subsidies which considerably favoured Developing Countries on granting use of subsidies, and protection on subsidised goods from Developed Countries. S&DT is further contained under Article 27, which provides for various S&DT provisions regarding subsidies. Article 27.2(a) permits Developing Countries to maintain subsidies, particularly Developing Countries with per capita income below US$ 1,000 (and those listed in Annex VII) are exempted from the prohibition on export subsidies. This provision accords preferential treatment to Developing Countries and affords them the ability to increase competitiveness of goods, through domestic subsidies. This is an effective S&DT provision, which has no restrictions on subsidies.

Agriculture remains one of the most critical areas of interest in Developing Countries, particularly the need to protect domestic industries and due to the undiversified nature and reliance on agricultural exports. The AoA also contains provisions which accord Developing Countries preferential treatment regarding subsidies. Export subsidies are presumed to have trade-distorting effects since they allow exporters benefited with such subsidies to sell below the cost of production. This is the case particularly with regards to Agricultural

[395] Hoekman & Messerlin (n 72 above) 195.

subsidies which increase trading opportunities through competitive pricing. The AoA allows the use of export subsidies under two circumstances:

(a) if a Member has reserved the right to use export subsidies in their respective Schedules, subject to the limits and reduction commitments specified in the Schedule; or,

(b) if Developing Countries provide export subsidies consistent with the S&DT provisions.

The AoA provides for Government assistance to low-income and resource-poor producers to encourage agricultural and rural development in line with development programmes.[396] Various subsidies are excluded from the reduction commitments and are not included in the total Aggregate Measurement of Support.[397] This is an exemption from subsidies, as other Members which are to reduce Domestic Support Commitments do not have this preferential treatment.[398]

This also sets the Aggregate Measure of Support for Developed Countries, as prescribed under Article 6.4 of the AoA, at a maximum of five percent (5%), whereas with Developing Countries it comes to ten percent (10%). This "*de minimis"* provision allows for the exclusion of product-specific and non-product specific trade-distorting domestic support. In order for Developing Countries to take advantage of the S&DT, the Members require financial resources to roll out programmes and provide traders with much needed subsidies, up to the prescribed level. This has been reported to be a challenge in a number of Developing Countries,[399] financial constraints would render the S&DT provision obsolete due to inability to implement the said subsidies.

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[396] AoA (n 25 above) Article 6.2.

[397] AoA (as above) Article 6.2. This includes investment subsidies generally available to agriculture, agricultural input subsidies generally available to low-income or resource-poor producers and domestic support to domestic producers to encourage diversification from illicit narcotic crops.

[398] AoA (as above) Article 6.1. Under this Article Members are mandated to make and maintain reduction commitments of domestic support reduction.

[399] FAO Website, http://www.fao.org/3/y4632e/y4632e04.htm (accessed 5th November 2020). The FAO reported challenges in a number of Developing Countries in taking advantage of such subsidies; "Uganda, Jamaica and Senegal are other countries where limited resources prevent major support programmes. In the case of other countries, government support measures have been removed in the context of structural adjustment programmes (Zimbabwe)."

The AoA also contains S&DT flexibilities in critical areas to Developing Countries which are clearly crafted and enforceable. Article 12.2 of the AoA contains a flexibility through an exception for Developing Countries that are net exporters of the foodstuff concerned. The provision exempts the Developing Country from the requirement of giving notice to the Committee on Agriculture and consulting other Members with substantial interest before imposing export-restrictions and prohibitions. This enables the Developing Countries to limit food exports in the instance of high-rising demand in neighbouring Countries, which is useful for ensuring the exporting Developing Countries are able to produce enough for themselves.

Another flexibility provision is found under Annex 2 of the AoA in the form of public stockholding for food security, where Paragraph 3 at footnote 5 of Annex 2 of the AoA provides for governmental stockholding programmes for food security purposes in Developing Countries.[400] Paragraph 6, of the same Annex provides for Domestic food aid, where exemptions are provided on reduction commitments relating to domestic food aid programmes for people in need, which S&DT is accorded provided that products are brought from producers "at market prices".[401] The stockholding provisions take into consideration domestic challenges regarding food security, and accord Developing Countries interests in the above mentioned regard. Developing Countries have utilised all three of these provisions, as reflected in their Schedules which indicate that the provisions are enforceable.[402]

[400] *AoA* (n 25 above). The provision provides that for the purposes of paragraph 3 of Annex 2, governmental stockholding programmes for food security purposes in Developing Countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines shall be considered to be in conformity with the provisions of this paragraph, including programmes under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS.

[401] *AoA* (as above). Annex 2, para 4. Footnotes 5 & 6 allows for the provision of foodstuffs at subsidised prices with the objective of meeting food requirement of the urban and rural poor in Developing Countries on a regular basis at reasonable prices shall be considered to be in conformity with the provisions of this paragraph.

[402] FOA Website, http://www.fao.org/tempref/docrep/fao/008/ae896e/ae896e02.pdf (accessed 6th October 2020) page 22.

Overall, the AoA provides substantive S&DT provisions regarding subsidies, which present opportunities for increased market access.[403] The Agreement contains provisions which directly and clearly establish the extent to which subsidies are accorded to Developing Countries, which are more preferential than their Developed counterparts. This is not to be examined on its own, as the challenge of Developing Country Governments which cannot afford to maintain subsidies reduces the practical usage of the S&DT.[404] Export subsidies are ineffective if Developed Countries and LDC Governments and Institutions do not have the financial means or capacity to take advantage of the said preferential treatment and provide subsidies.[405] If Developing Countries and LDC Governments do not have the financial means and technical capacity to support their agricultural producers with regards to providing marketing cost subsidies and internal transport subsidies under provisions such as Article 9.4 of the AOA and the Nairobi Decision, the use of the S&DT provision would be futile, as explained in the previous paragraph. Export subsidy provisions therefore allow Developing Countries to be more competitive in exports where a Member, and its internal institutions, is able to provide assistance.

Clear and enforceable S&DT also exists under the TBT Agreement.[406] The phrase "technical barriers to trade" refers to the use of the domestic regulatory process as a means of protecting domestic producers.[407] TBTs are used by Governments and/or industries to drive regulatory policy by setting technical regulations and standards,[408] and have been used by political leaders as a means of protecting their industries or domestic producers ,[409] which counteracts market-access, and hence them being referred to as 'barriers to trade'. They protectionist use of TBT has resulted in them being regarded as NTM.[410] The TBT Agreement's primary objective is to "…ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of

[403] *AOA* (as above) Article 9.4. The provision was examined above, particularly regarding Developing Countries being able to continue to use marketing cost subsidies and internal transport subsidies which for five years.
[404] FAO Website (n402 as above).
[405] FAO Website (as above).
[406] World Trade Organization *Technical Barriers to Trade Agreement* (1994) (*TBT Agreement*).
[407] UNCTAD 'Dispute Settlement – WTO' UNCTAD/EDM/Misc.232/Add.22 https://unctad.org/en/Docs/edmmisc232add22_en.pdf (accessed 4 June 2019).
[408] WTO website, https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm (accessed 6th November 2020).
[409] UNCTAD (n 406 above) page 3.
[410] WTO website, https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

conformity with technical regulations and standards do not create unnecessary obstacles to international trade."[411]

TBT measures are also needed for Members to retain sufficient regulatory autonomy to accomplish domestic policy goals.[412] This is recognised by the WTO Members which entrenched regulatory goals that are deemed "legitimate" for regulatory purposes in the TBT Agreement.[413] The list however, is not exclusive.[414] The WTO and the TBT Agreement, therefore, walk the line of assuring that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to international trade, while leaving Members adequate regulatory discretion for "legitimate" policy interests.

TBTs are a hurdle for WTO Members in general. Developing Countries, however, are more pre-disposed to losing market-access due to their inability to conform to technical standards and procedures due to deficiencies in financial and technical capability and poor institutions. The TBT Agreement acknowledges this need by stating that S&DT "… may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures."[415] TBT S&DT provisions under the WTO are important for Developing Countries to ensure that trade measures adopted by Developed Countries, in particular technical regulations and standards, do not deprive them of market access. TBT provisions are also important for Developing Countries which seek to apply social policy goal objectives to increase trade opportunities. Developed Countries also feared that the TBT Agreement will be applied too strictly and that they will not have the flexibility to apply trade measures aimed at addressing social policy issues.[416] S&DT provisions in this regard are central to

[411] *TBT Agreement* Preamble.
[412] UNCTAD 'Dispute Settlement – WTO' (n 407 above) page 4.
[413] *TBT Agreement* (n 406 above) The Preamble and Article 2.2. The provisions set out that legitimate TBT objectives include the protection of life/health (human, animal and plant), safety (human), protection of national security, protection of the environment, and prevention of deceptive marketing practices.
[414] UNCTAD 'Dispute Settlement – WTO' (as above) page 4. While not specified, it is widely agreed that technical harmonisation (i.e. regulations that standardise electrical products or computers etc.) and quality standards (example grading requirements for produce and commodities) are legitimate. Both technical harmonisation and quality standards are already widely utilised, particularly by developed country Members.
[415] *TBT Agreement* (n 406 above) Article 12.8.
[416] UNCTAD 'Dispute Settlement – WTO' (n 407 above) page 5.

securing rights for flexibility to apply trade measures and ensuring market access for Developing Countries to Developed Countries markets through their reduced TBT measures.

S&DT in the TBT is scattered in the Agreement. There is, however, a dedicated chapter on S&DT in Article 12 of the Agreement. Articles 2.12 and 5.9 of the TBT Agreement provide for important preferential treatment in favour of Developing Countries. They provide for a key aspect of market-access, which is the introduction of technical regulations and their application to export products from Developing Countries. Article 2.13 provides that except in "urgent circumstances", Members are to allow a reasonable interval between the publication and entry into force of measures to allow producers in exporting Members, particularly developing country Members, the opportunity to adapt their products or methods of production. This provision, coupled with Article 11 which provides for technical assistance, better enables Developing Countries to adapt to new regulations. The TBT Agreement further provides for the exclusion of Developing Countries from the use of international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.[417] It allows a Developing Country to continue to use its own policy instruments, the exemption aids in relaxing export commitments and, therefore, it assists in improving market access.

A considerable number of S&DT provisions under the SCM Agreement are clear, and binding, with the majority of the provisions relating to transitional periods. Article 27 contains a considerable number of transitional clauses, with Article 24.1 to 24.4 prescribing the phasing out of export subsidies. Export subsidies were eventually phased out during the WTO's Tenth Ministerial Conference in the Nairobi Decision on Export Competition in 2015, with different commitments from LDCs and Developing Countries respectively.[418] S&DT under the SCM considers levels of development, as Developing Members receive various levels of preferential treatment, with the lowest receiving more preferential treatment. The

[417] *TBT Agreement* (n 406 above) Article 12.4.
[418] WTO Nairobi Decision - Export Competition 2015 WT/MIN(15)/45 — WT/L/980. LDCs agreed to eliminate export subsidies for agricultural products by the end of 2018 (until 1 January 2017 in relation to cotton exports), while developed nations agreed to eliminate most such subsidies immediately (*WTO Nairobi Decision Export Competition*).

SCM recognises three categories of Developing Country Members;[419] Annex VII of the Agreement recognises LDCs as designated by the UN which are WTO members.[420]

The primary S&DT provisions under the SCM are Article 27.9 and 27.10. S&DT contained under Article 27.9, which accorded Developing Countries relaxed provisions in respect to actionable subsidies granted or maintained.[421] The Panel in *Indonesia – Autos* confirmed the binding nature of the provision.[422]

The most beneficial S&DT regarding Countervailing Duties is found under Article 27.10. Developing Members are accorded S&DT by being exempted from Countervailing Duties through the termination of investigations regarding a product originating in a Developing Country Member below various levels of subsidies.[423] The resulting effect of the above is that no action can be taken against subsidised exports so long as the subsidy is below *de minimis* level (both in value and volume terms). A WTO case that touched on the issue is *US – Carbon Steel*, where the AB AB noted that Article 27.10 and 27(11) of the SCM Agreement require termination of a countervailing duty investigation with respect to a developing country Member when "'the overall level of subsidies granted does not exceed' 2 or 3 per cent. These provisions require authorities, in a countervailing duty investigation, to apply a

[419] The three categories of Developing Countries are; a) LDC's, b) Members with a GNP per capita of less than $1000 per year which are listed in Annex VII to the *SCM Agreement* (n 392 above), and c) other developing countries.
[420] *SCM Agreement* (n 392 above) Annex VII. Developing Country Members Referred to In Paragraph 2(A) Of Article 27 (a).
[421] *SCM Agreement* (as above) Article 27.9. Where a Developing Country has an actionable subsidy granted, action may not be authorised or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidising developing country Member or unless injury to a domestic industry in the market of an importing Member occurs. The exception to this, however, is with regards to Article 6.1 of the same agreement, where serious prejudice has been suffered.
[422] *Indonesia — Certain Measures Affecting the Automobile Industry* adopted on 23 July 1998 (Panel Report) WT/DS54/R WT/DS55/R WT/DS59/R WT/DS64/R (*Indonesia – Autos*) at para 14.156. Article 27.9 provides that, in the usual case, developing country Members may not be subject to a claim that their actionable subsidies have caused serious prejudice to the interests of another Member. Rather, a Member may only bring a claim that benefits under GATT have been nullified or impaired by a developing country Member's subsidies or that subsidised imports into the complaining Member have caused injury to a domestic industry".
[423] *SCM Agreement* (n 392 above) Article 27.10 (a) and (b) establish that the levels are:
"a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or
b) the volume of the subsidised imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member."

higher *de minimis* subsidization threshold to imports from Developing Country Members."[424]

S&DT is also incorporated into Article 27.15 of the SCM Agreement, which allows for reviews of specific countervailing measures by the WTO Committee on Subsidies and Countervailing Measures where a Developing Country calls for it.[425] This allows Developing Countries to utilise a WTO body to assess S&DT under Article 27(10) and 27(11) which is a mechanism designed to assist Developing Countries in initiating its right to S&DT. The provision is clearly drafted, and provides an enforceable right. Article 20(15) however is not effective, as it has not resulted in reviews. The examination of S&DT under this section indicates that S&DT provisions on Countervailing Measures, specifically under the SCM, are clear and well drafted and sets out clear rights that are enforceable.

3.2.3 Flexibilities

Flexibilities under WTO are regarded as the most advanced level of S&DT treatment.[426] The provisions accord rights to Developing Countries to derogate from the general application of certain WTO rules. There are a number of justifications for according flexibilities to Developing Countries and they primarily revolve around economic needs of the said Member, and lack of capacity in implementing an Agreement. Flexibilities in the MTS that is predicated on liberalisation of trade in goods and reduction of tariffs are needed in order for Developing Counties to foster industrialisation, promote diversification, and facilitate structural transformation in Developing Countries' economies.[427]

The Provisions on flexibility of commitments under the WTO law relate to the following;

- exemptions from commitments otherwise applying to WTO Members in general;

[424] *United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* adopted 19 December 2002 (Appellate Body Report) WT/DS213/AB/R para 82 (*US – Carbon Steel*).
[425] *SCM Agreement* (n 392 above) Article 27.15.
[426] B S Chimni 'Developing Countries and the GATT/WTO Legal System: Some Observations' http://www.law.umn.edu/uploads/pL/nW/pLnWjeTT0mev12du94vxjQ/WTO-chimni.pdf (accessed 7 January 2019).
[427] World Trade Organization *Report by the Chairperson of the Committee on Trade and Development in Special Session, Ambassador Tan Yee Woan (Singapore), to the Trade Negotiations Committee* 27 November 2017, TN/CTD/32, para 1.12.

- actions Developing Countries may undertake through exemptions from disciplines otherwise applying to the WTO Members in general; or
- a reduced level of commitments Developing Countries may choose to undertake when compared to other WTO Members in general.

Generally, LDCs are accorded additional flexibilities over and above those Developing Countries receive. There are, however, numerous instances where they are given the same preferential treatment terms than Developing Countries.[428]

The first clear and enforceable S&DT flexibility provision to be examined is Article 27.13 of the SCM Agreement, which extends the flexibility of immunity from action over a number of subsidies to Developing Countries. This is an important provision which excludes direct forgiveness of debts and subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities made in the context of the privatisation programmes of Developing Countries. WTO data indicates that as of 29 March 2019, only one WTO member (Brazil) notified the SCM Committee of a privatisation subsidy programme under Article 27.13.[429] The flexibilities in the provisions under Article 27 are binding S&DT.

Clear and binding S&DT provisions are also found under TRIMs. The TRIMs Agreement's primary objective is to prevent Members from resorting to measures that violate non-differential treatment between domestic and foreign investors.[430] The Agreement recognises that certain investment measures can restrict and distort trade.[431] It states that WTO Members may not apply any measure that discriminates against foreign products or

[428] The Agreements include specifically GATT 1994 (Article XVIII and Article XXXVI), the Agreement on Agriculture, Technical Barriers to Trade, Trade-Related Investment Measures, Subsidies and Countervailing Measures, GATS, Understanding on Rules and Procedures Governing the Settlement of Disputes, GATT 1994 Article XVIII, the Enabling Clause and WTO Implementation of Special and Differential Treatment provisions in WTO Agreements and Decisions.
[429] World Trade Organization *Notification Provisions under the Agreement on Subsidies and Countervailing Measures Committee* 29 March 2019 Subsidies and Countervailing Measures G/SCM/W/546/Rev.10 40.
[430] World Trade Organization *Trade Related Investment Measures* 1994 (*TRIMs*) Article 2.
[431] TRIMs (as above) Article 2 established National treatment, regarding investors, as one of the primary obligations under TRIMs.

that leads to quantitative restrictions, both of which violate basic WTO principles.[432] The flexibility under TRIMs is contained in Article 4, which provides that:

> "A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of GATT 1994, the Understanding on the Balance-of-Payments Provisions of GATT 1994, and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209) permit the Member to deviate from the provisions of Articles III and XI of GATT 1994".

The flexibility buttresses flexibilities or exceptions that Developing Members are accorded under the above-mentioned provisions. This allows the Members the flexibility to deviate from National Treatment under Article III and impose quantitative restrictions under Article XI of the GATT 1994. Article 4 of TRIMs therefore carries on flexibilities (S&DT) accorded in the GATT 1994 and other clauses under the trade related investment measures. The provision is well crafted and specific to exceptions granted under the GATT 1994 and is enforceable.

3.2.4 Provisions that allow longer transitional periods to Developing Countries

One of the rationales or objectives of S&DT as elucidated in this study is not only to increase Developing Countries' share in the MTS, but to help the Members to integrate into the trading system. This thesis has already identified challenges Developing Countries face in complying with WTO rules, which include *inter alia* access to finance and technology, institutional capacity, and human resources capacity. Developing Countries, particularly LDCs, who implement WTO Agreements, therefore, face an uphill compliance battle. Transition clauses are central to adjustment and integrating Developing Countries into the MTS.

[432] TRIMs (as above) Article 2. The Article on National Treatment and Quantitative Restrictions provides at Article 2.1 that no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994 (without prejudice to rights and obligations under GATT 1994).

Transitional time period provisions relate to time bound exemptions from disciplines otherwise generally applicable. Most WTO Agreements contain transitional time periods which apply respectively to Developing Countries and LDCs. In some instances, the relevant transitional provision in addition to specifying a time-period, include modalities through which an extension might be sought. It is essential to examine S&DT contained in transitional time periods to examine the gradual modification of the clauses from the Uruguay Round to the most recent Trade Facilitation Agreement (TFA). This will mark progressive shifts and approaches to SD&T with regards to transitional time periods and their effectiveness in considering Developing Countries' needs in line with paragraph 2 of the Doha Declaration.

It should be noted that numerous transition time periods in different agreements have elapsed and, therefore, are no longer applicable. This study will only examine a number of elapsed provisions for comparison purposes with other Agreements and will primarily focus on currently binding provisions.

Transitional periods by nature are S&DT provisions which are not as complex as other S&DT provisions particularly market access and flexibilities, as they require less conditions, and prescribe certain dates which are mandatory. This is the common trend with Uruguay Round agreements, which prescribed fixed, mandatory time-lines, as opposed to the TFA which allows Developing Countries to self-designate their transition periods and to make their implementation conditional on the provision of assistance. There are approximately 20 such provisions across the following nine agreements, namely the AoA, SPS Agreement, TBT Agreement, TRIMs Agreement, Implementation of Article VII of GATT 1994, Import Licensing Procedures Agreement; SCM Agreement and the TFA.

Clear and enforceable transitional S&DT provisions in the Uruguay Round Agreement will be examined first. The AoA, in Article 15.2, established two S&DT transitional time periods for Developing Countries and LDCs respectively. The provisions are clearly drafted and

enforceable. Developing Country Members were provided with the flexibility to implement reduction commitments over a period of up to 10 years (as opposed to Developed Countries which had a 6 year period), while LDCs are not required to undertake reduction commitments. In the market access pillar, Article 15.2 provides LDCs with an exemption from reducing their bound agricultural tariffs during subsequent negotiations, therefore Article 15.2 is pivotal in the area of agriculture for LDCs. The schedule of commitments is also with respect to domestic support and export subsidies during agreed years.[433]

The transitional time in the context of the AoA are in respect to commitments specific to the implementation of the Agreement. Whilst LDCs enjoy the flexibility of exemption of commitments, Developing Countries were given a fixed period of 10 years, which does not consider specific needs or implementation challenges. The S&DT under the AoA in this regard does not tie implementation of the Agreement and reduction commitments to a Developing Country's ability to comply. The above notwithstanding, the provisions are binding S&DT which is clearly drafted.

Flexibilities under Article 27.4 SCM were provided to Developing Countries under the Procedures for Extensions under for Certain Developing Country Members on 20 November 2001.[434] This further extended the benefits Developing Members could enjoy as this provision established a Mechanism for extension. Another extension was granted on 27 July 2007 - the General Council adopted procedures regarding the continuation of previously granted Article 27.4 extensions for certain subsidy programmes.[435] Further, with regards to extensions that have been granted, WTO data indicates that Article 27.4 has been used regularly by Developing Countries, with a considerable number of Developing Countries

[433] WTO website, https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm (accessed 8th November 2020).
[434] WTO *Procedures for Extensions Under Article 27.4 for Certain Developing Country Members*, 20 November 2001 Doha Ministerial Declaration G/SCM/39. Paragraph 1 (a) provides that a Member that maintains programmes meeting the criteria set forth in 2 and that wishes to make use of these procedures shall initiate Article 27.4 consultations with the Committee in respect of an extension for its eligible subsidy programmes
[435] World Trade Organization *Procedures for Continuation of Extensions Pursuant to Article 27.4 of the SCM Agreement of the Transition Period under Article 27.2(b) of the SCM Agreement for Certain Developing Country Members*, 31 July 2007 WT/L/691.

seeking even further extensions.[436] Article 27.4 therefore, has granted substantial S&DT (flexibilities) which have been operationalised and used by Developing Countries.

Article 27.7 of the SCM Agreement also contains a clear and enforceable transitional provision. The SCM contains further binding and clear extension of time under Article 27.12. The provision provides simply that "[t]he provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15". The provision enables Developing Countries to continue to also benefit from an increased *de minimis* rule discussed above under Articles 27.11. The increased *de minimis* rules are, therefore, stretched by Article 27.12 to cumulation determinations for injury purposes under Article 15.3.[437] The provision extends preferential treatment Developing Countries accrue regarding subsidies through increased *de minimis* levels and defining negligible levels of imports.

The SCM Agreement however, also contains a number of other transitional provisions under Article 27, that contain ambiguity in the wording, and therefore will not be discussed under provisions that are clear and enforceable. Transitional provisions Agreements under the SPS Agreement, and under the TBT Agreement also contain vague or un-enforceable elements and therefore cannot be concluded to be regarded as clear and enforceable. The provisions will be examined, and this issue will be further elucidated and in the following sections.

Further transitional S&DT provisions are found under Article 9(2) of the Agreement on Safeguards. The provision provides for the right for Developing Countries to extend the period of application of a safeguard measure for a period of up to two years beyond the

[436] WTO *Minutes of the Regular Meeting Held on 23 October 2012 Committee* Subsidies and Countervailing Measures G/SCM/M/83 paras 23-28. At its meeting on 23 October 2012, the Committee granted the final extensions, for calendar year 2013, to 19 developing country Members pursuant to these procedures. These 19 Members consist of: Antigua & Barbuda; Barbados; Belize; Costa Rica; Dominica; Dominican Republic; El Salvador; Fiji; Grenada; Guatemala; Jamaica; Jordan; Mauritius; Panama; Papua New Guinea; Saint Lucia; Saint Kitts and Nevis; St. Vincent and the Grenadines; and Uruguay.

[437] SCM Agreement (n 392 above) Article 15.3. The provision provides that "[w]here imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidisation established in relation to the imports from each country is more than de minimis as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product".

maximum period provided of eight (8) years.[438] A further exception is provided in the same Article which allows Developing Countries to be exempted from safeguard restrictions under Article 7.5, whereby Developing Countries may apply safeguard measures on the importation of a product which had previously been subject to such measures, after a period of time equal to half that during which such a measure has previously been applied, as opposed to the full such period for Developed Countries, subject to the same minimum period of two years that applies to Developing Countries. The two S&DT exemptions under Article 9.2 accord increased protectionism for Developing Countries, which derogates against general liberalisation objectives of the WTO. The provisions are crafted to increase defence of interests and domestic and infant industries in Developing Counties.

The TFA, being one of the most progressive [with advanced S&DT] and recent WTO trade Agreements enacted, contains a significant number of clear and binding transition provisions. The TFA aims to improve (through clarification and detailed rules) relevant aspects of Articles V, VIII and X of the GATT 1994.[439] The objective of the agreement is to expedite the movement, release and clearance of goods, including goods in transit.[440] It further contains numerous provisions of good governance to ease the movement of goods.[441]

The TFA establishes a unique approach to transitional time-provisions regarding implementation. The mandate of the TFA establishes that developing and Least-Developed Members would not be obliged to undertake investments in infrastructure projects beyond

[438] *Agreement on Safeguards* (n 21 above) Article 7(3). The Agreement on Safeguards provides for the maximum period that safeguard measures are to be imposed by Members.
[439] GATT 1994 (n 12 above). Article V of the GATT addresses freedom of transit of goods through territories, customs and formal regulations incidental thereto. Article VIII addresses fees and formalities connected with importation and exportation. The Article loosely addresses costs of services by stating that the contracting parties recognise the need to minimise "the number and diversity of fees and charges referred to in sub-paragraph" under Article 1(b). And further to minimise "the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements" under Article 1 (c). Article X addresses the publication and administration of trade regulations and sought to encourage Members to publish and disclose trading rules and regulations to all bodies and traders in a uniform manner.
[440] *TFA* (n 24 above).
[441] H Wang 'The Agreement on Trade Facilitation and its Implications: an Interpretative Perspective' (2014) 9(2) *Asian Journal of WTO & International Health Law and Policy* 453. Wang notes that the *TFA* imposes requirements for good governance which includes WTO transparency requirements and impartiality.

their means.[442] Developing Countries and LDCs under the TFA only apply substantive provisions of the TFA, which they have indicated they are in a position to do so from the date of the TFA's entry into force. In order for an LDC or developing country to benefit from S&DT and Development cooperation, the WTO Members are required to categorise every provision of the Agreement as categories A, B or C as defined under Article 14.1;

- Category A: Provisions that an LDC or developing country designates for implementation within one year after the TFA has entered into force.
- Category B: Provisions that an LDC or developing country designates for implementation on a date after a transitional period of time after the TFA has entered into force.
- Category C: Provisions that an LDC or developing country designates for implementation on a date after a transitional period following the entry into force of the Agreement and requiring the acquisition of assistance and support for capacity building.

The LDC/developing country would have to notify other WTO Members of these categorisations in accordance with specific timelines outlined in the Agreement.[443] The Agreement is ground-breaking in that for the first time in WTO history, the commitments of Developing Countries and LDCs are linked to their capacity to implement the TFA.

Article 16 of the TFA accords S&DT as categorisation is tailor-made and specific to meet the specific needs and capabilities of the Country and the type of reform that will be required and implemented. This will also encourage increased compliance among LDCs and Developing Countries, which are able to gauge their ability to conform and implement the Agreement accordingly.

[442] *TFA* (n 24 above) Preamble. The *TFA* Preamble provides the recalling and reaffirmation of:
*"…*the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) and in Annex D of the Decision of the Doha Work Programme adopted by the General Council (n 369 above), as well as in paragraph 33 of and Annex E to the Hong Kong Ministerial Declaration (n 369 above)"

[443] *TFA* (as above) Article 16.

There are further progressive, well-crafted and enforceable assistance rules under the TFA. Transparency provisions regarding assistance are also provided under Article 23 at paragraph 1.1 of the TFA, administered by the Committee on Trade Facilitation.[444] The WTO secretariat also set up the Trade Facilitation Agreement Facility which became operational on 27 November 2014, tasked with supporting Developing Countries and LDCs with implementation of the Agreement.[445] Its functions are to support the development and delivery of assistance and support for capacity building.[446] It is set up to also support Developing Countries and LDCs to access available implementation assistance from regional and multilateral agencies, bilateral donors and other stakeholders.

Finally, it coordinates assistance and ensures support is appropriately aligned to the identified needs, as well as to individual development, financial and trade needs of Members. This is a significantly different and important approach in assistance, as it allows for effective monitoring and delivery of assistance. By establishing Mechanisms and through the WTO establishing supporting institutions to compliment S&DT rules in the TFA, assistance will be targeted to ensure increased implementation of the TFA by Developing and Developed Countries. The TFA, however does have shortcomings in its assistance rules which will be address further on in this chapter.

3.3 Vague or Unclear S&DT Provisions

One of the most prevalent and common problems which hinders effectiveness of S&DT and its application by Developing Countries under the MTS, is that of vague and unclear S&DT provisions. Vague S&DT provisions in the MTS refer to provisions that are not clearly expressed, which are stated in indefinite terms. Unclear provisions refer to ambiguous provisions that are open to multiple interpretations. These provisions are usually reflected through legal drafting of S&DT provisions in Agreements characterised by open-ended

[444] *TFA* (as above) Article 22.1.
[445] World Trade Organization Trade Facilitation Agreement Facility website, https://www.tfafacility.org/about-the-facility (accessed 10 January 2019).
[446] *TFA* Facility website (as above).

phrases and language. Unclearly drafted provisions also prevent Developing Countries from utilising the provisions, as imprecise rules prevent preference granting and receiving Members from understanding their rights and obligations. Vague provisions are rendered either unenforceable due to their inability to establish definite rights and obligations, or difficult to enforce due to either ambiguous meaning. They therefore lack of binding effect, as will be explored. The primary problem with S&DT provisions that fall into this category, are S&DT provisions that are a "best of endeavour" nature which do not bind Developed Countries.[447]

Vague and unclear S&DT provisions identified and examined under this section are the following;

- GATT 1994 Article XVIII 4(a) and (b), Article XXXVI:8;
- ADA Article 15; and
- Import Licensing Agreement Article 1.2.

3.3.1 Market Access and the GATT

The development chapter under the GATT 1994 contains a number of vague and ambiguous S&DT provisions. Article XVIII of the GATT 1994 addresses modification of schedules. Similar to the above-examined Article XVIII bis, Article XVIII contains S&DT provisions. However, there are a number of notable shortcomings regarding the provisions therein. Article XVIII of the GATT 1994 sets out numerous S&DT provisions for Developing Countries that provide for Governmental Assistance to Economic Development. The provision provides for economies in early stages of development and those in the process of Development to be accorded S&DT for the parties to enjoy additional facilities or remedies to enable them to:

[447] WTO website, https://www.wto.org/english/tratop_e/devel_e/sem01_e/sdtmus_e.htm , (accessed on 8th November 2020). A Statement by H. E. Ambassador D. Baichoo of the Republic of Mauritius, was made, where the Ambassador elucidated that "A number of participants have in their interventions, emphasised that the main reason, for general "non compliance" by developed countries of these provisions is that they impose on countries to make only "their best endeavours" to comply. Since they do not impose more binding obligations than to make "best endeavours", they are under the WTO law not enforceable under the WTO dispute settlement procedures."

"(a) maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry; and

(b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development".[448]

The first shortcoming under Article XVIII is that it is difficult to utilise by Developing Countries due to misalignment in classifying Developing Countries. Article XVIII 4(a) and (b) classifies Members who have access to the remedies under Article XVIII Section A, B and C (which will be expounded below) as those where a contracting party "can only support low standards of living" and those that are "in the early stages of development". The provisions then proceeds to classify a second group of Members, which have access to Article XVIII D as those "in the process of development".

The defining of Members under Article XVIII creates a disconnect in nomenclature under the current trade dispensation, which traditionally defines two categories of Developing Countries, namely LDCs and Developing Countries. Despite the apparent vagueness of the categories, the phrase "in the early stages of development" was interpreted by the WTO to be inclusive of any Member "undergoing a process of industrialisation to correct an excessive dependence on primary Production" at Annex I on Notes and Supplementary Provisions.[449] The classification of Parties that "can only support low standards of living" is also further explained in the Ad-notes and requires Members to "take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party".[450] These definitions are inconsistent with the current structure regarding categorisation of Members in the WTO.[451] There is no definition of "Developing

[448] GATT 1994 (n 12 above) Article XVIII (2).
[449] GATT 1994 (n 12 above) notes ad Article XVIII Paragraphs 1 and 4.
[450] GATT 1994 (as above).
[451] Members are categorised as Developed, Developing and LDCs.

Countries" in the GATT and, therefore, Members designate themselves as Developing or not and their action under S&DT may then be challenged by other members.[452]

Article XVIII allows economies in "early stages of development" and those that "can only support low standards of living" to deviate from other provisions of the GATT 1994 as provided under Sections A, B and C.[453] The deviation from the GATT 1994 is as follows:

- Section A of Article XVIII states that "in order to promote the establishment of a particular industry* with a view to raising the general standard of living of its people", the above-mentioned WTO Developing Country may notify the CONTRACTING PARTIES to enter into negotiations with any contracting party "to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement".[454] The request can be acceded to or compensatory adjustment may be offered in this regard if no Agreement has been reached in sixty days.[455]
- Section B states that Members experiencing balance-of-payments difficulties as a result of their development phase[456] may "… safeguard their external position these countries may need over a period of time to control the general level of their imports in order to prevent that level from rising beyond the means available to pay for imports as the progress of development programmes creates new demands".[457]
- Section C makes provision for an aforementioned Developing Country to introduce specific measures which derogate from the Schedule of the GATT, through Governmental assistance in order to promote the establishment of a particular industry to raise the general standard of living of its people.[458]

[452] G Sacerdoti & K Castren 'Art I GATT' (2011*)* WTO- Trade in Goods *Max Planck Commentaries*, para. 30.
[453] GATT 1994 (n 12 above) Article XVIII (4)(a).
[454] GATT 1994 (as above) Article XVIII (7)(a). The Ad Note clarifies the phrase "in the early stages of development," as addressed above, which is qualified as "not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production."
[455] GATT 1994 (as above) Article XVIII (7)(b).
[456] GATT 1994 (as above) Article XVIII (8).
[457] The Report of the Review Working Party on "Quantitative Restrictions" L/332/Rev.1 and Addenda, adopted on 2, 4 and 5 March 1955, 3S/170, 183, para. 44
[458] GATT 1994 (n 12 above), Article XVIII (13) and (14).

Article XVIII further creates a second category of Developing Countries to deviate from other provisions of the GATT 1994 under Section D. The Category is set-out under Article XVIII:4 (b) as "[a] contracting party, the economy of which is in the process of development, but which does not come within the scope of subparagraph (*a*)". This definition is not expounded in Annex I of the GATT 1994 on notes and Supplementary provisions. However, from the definition of the category, this would mean Developing Country parties that are not in the "early stages of development" and those that cannot "only support low standards of living" would be able to benefit from these provisions. This deviation would lead Developing Countries under Section D of Article XVIII of the GATT 1994 to introduce specific measures which derogate from the Schedule of the GATT, through Governmental assistance in order to promote the establishment of a particular industry to raise the general standard of living of its people.[459]

There are considerable limitations that Developing Countries face in the use or application of these apparent S&DT provisions set out under Sections A, B and C of Article XVIII. The provisions overall provide for flexibility at face value, however, vagueness, over-complex procedures, and lack of enforceability has resulted in ineffective S&DT. This will be justified further in this chapter.

Lastly under the GATT 1994, Article XXXVI:8 established that "[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." The drafting of the provision, in utilising the phrase "do not expect," creates both a vague and non-peremptory interpretation. This does not establish any clear rights or obligation, however it can be interpreted as a 'best endeavour' clause. The provision does not address the issue of reciprocity and expectations under the MTS, but instead uses an open ended phrase such as "do not expect," which is uncommon in International multi-

[459] GATT 1994 (as above) Article XVIII (22) and (23).

lateral agreements, and under the MTS.[460] The language of the S&DT provisions merely encourage Developed Countries to help developing countries, which flows from the general tone established under Part IV of GATT 1994 which existed only as a moral commitment, whose primary significance lay in "its value as an agreed statement of principle."[461] The use of common phrases such as “do not expect” and “there is need” lead to the conclusion that the commitments under Part IV are thus "never more than a set of 'best endeavour' undertakings with no legal force."[462]

3.3.2 Protective Measures

Under protective measures, one of the most important defence mechanisms for Developing Countries is established under Article 15 of the ADA. The provision requires Developed Country Members, when considering whether to impose anti-dumping duties, to give “special regard to the special situation of developing country Members”. This is a vague requirement.

In applying WTO case law, the Panel in *US – Steel Plate* found that it “imposes no specific or general obligation on Members to undertake any particular action” because “Members cannot be expected to comply with an obligation whose parameters are entirely undefined”.[463] There is no interpretation or explanation of the parameters of ‘special regard’ to create rights or obligations.

The second part of Article 15 of the ADA states that “Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties

[460] A Keck & P Low ‘Special and Differential Treatment in the WTO: Why, When and How?’ (2004) *Economic Research and Statistics Division, Staff Working Paper* ERSD-2004-03,10, page 9. The Authors indicated that the language used was does not lead to “to formal legal interpretation.” An interpretive note to this provision states that developing countries "should not be expected, in the course of negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs....". Further that “It is noteworthy that the language both on non-reciprocity and graduation is couched in terms of expectations.”

[461] B M Carl *Trade And The Developing World In The 1st Century* 2001 Transnational Publishers 83.

[462] P Lichtenbaum Reflections on the WTO Doha Ministerial: "Special Treatment" vs. "Equal Participation": Striking a Balance in the Doha Negotiations 2002 17 *AM. U. INT'L L. REV.* 1012.

[463] *United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from India* adopted 29 July 2002 (Panel Report) WT/DS206/R (*US - Steel Plate*) para 7.110.

where they would affect the essential interests of developing country Members." A number of other Panels have found that a Member cannot breach the obligation imposed by the second part of Article 15 before the application of anti-dumping duties.[464] Article 15 is phrased in non-binding unclear obligations, which leaves Developing Countries with any better or preferential preventative measure for protection against anti-dumping measures, as compared to Developed Countries. This, therefore, means that Developing Countries are unable to utilise or enforce the provisions. Article 15, and other similarly ineffective provisions, and the vague non-mandatory nature of most S&DT provisions are a "birth defect", as rightly summarised by Olivares.[465]

There are a considerable number of cross-cutting S&DT provisions in other agreements which, like Article 15 of the ADA, fall under both the vague or unclear provisions category, and other categories, such as provisions that lack specificity rendering them un-implementable. A majority of vague provisions are characterised by vague and unclear (ambiguous) phrases such 'special consideration', 'further improve', or 'special regard' regarding obligation. The provisions exist under multiple Agreements in the respective categories under this Chapter, particularly non-peremptory provisions and provisions that lack specificity, together with the vague and unclear provisions.

Import licensing and procedures related thereto can be an obstacle to trade, or a type of TBT and must therefore be examined in this study. Import licensing can be defined as administrative procedures requiring the submission of an application or other documentation (other than those required for customs purposes) to the relevant administrative body as a prior condition for importation of goods.[466] The Agreement on Import Licensing Procedures sets out that import licensing should be transparent and

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[464] *European Communities-Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* adopted 18 August 2003 (Panel Report) WT/DS219/R (*EC – Tube or Pipe Fittings*) para 7 .82.
Also see *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, adopted 12 March 2001, (Panel Report) WT/DS141/R (*EC – Bed Linen*) paras 6.258– 6.260.

[465] G Olivares 'The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs' (2001) 34(3) *Journal of World Trade* 551.

[466] World Trade Organization website - https://ecampus.WTO.org/admin/files/Course_385/Module_1577/ModuleDocuments/ILP-L2-R1-E.pdf (accessed 5 January 2019).

predictable so as not to become an obstacle to trade.[467] It establishes that Members are to apply import licensing procedures neutrally and administer them in a fair and equitable manner.[468] It provides for the publication of rules and procedures,[469] requires simple forms and procedures,[470] and prescribes rules for automatic and non-automatic licensing.[471]

There are, however, vague S&DT provisions which are incorporated into the text of the Import Licensing Agreement. The Agreement contains preferential treatment under Article 1.2 which requires Members to ensure that administrative procedures used to implement licensing schemes conform to GATT 1994 provisions, "taking into account development, financial and trade needs of developing country Members".[472] The provision is a common clause (which exists in other trade Agreements)[473] which places an obligation in implementing the Agreement on licensing to consider Developing Countries' positions. This provision, however, does not operate as an exemption to rules established under the Agreement.

The Panel in *EC – Bananas III* also addressed the legal significance of the reference in Article 1.2 to Developing Country Members, and found that:

> "[T]he Licensing Agreement does not give guidance as to how that obligation should be applied in specific cases. We believe that this provision could be interpreted as a recognition of the difficulties that might arise for developing country Members, in imposing licensing procedures, to comply fully with the provisions of GATT 1994 and the Licensing Agreement. In the alternative, Article 1.2 could also be read to authorise,

[467] World Trade Organization *Agreement on Import Licensing* 1994 (*Agreement on Import Licensing*) Preamble.
[468] *Agreement on Import Licensing* (as above) Article 1.3.
[469] *Agreement on Import Licensing* (as above) Article 1.4.
[470] *Agreement on Import Licensing* (as above) Article 1.5.
[471] *Agreement on Import Licensing* (as above) Article 2.1 and 3.1.
[472] *Agreement on Import Licensing* (as above) Article 1.2.
[473] The provisions exists under the *TBT Agreement* (n 406 above) at Article 12.2 to 12.4, and *SPS Agreement* (n 90 above) at Article 10.3.

but not to require, developed country Members to apply preferential licensing procedures to imports from developing country Members".[474]

The Panel in this case was unable to deliberate on whether the EC met its obligation as it was not presented with evidence suggesting that, in its licensing procedures, there were factors that the EC should have but did not take into account under Article 1.2.[475] The above, however, does indicate that there is a positive obligation to consider development, financial and trade needs of developing country Members, which have to be notified or indicated by the Developing Country, and this may result in authorised preferential licensing procedures to imports from developing country Members. Article 1.2 may, therefore, be useful in obtaining exemptions or flexibilities in import licensing requirements in order to secure increased market access for export goods, however, its unclear nature renders the provision non-obligatory. Further vague provisions will be examined under the following sections below.

3.4 S&DT Provisions that Lack Specificity or Detail Rendering them un-enforceable or un-implementable at [WTO] Law

This section explores S&DT provisions that lack specificity or detail, rendering them un-implementable at WTO law. The inability to establish specific rules, details or modalities under the MTS results in indefinite rights and obligations of Members, and lack of clarity on how to apply rules. Like vague and unclear provisions, this renders trade rules difficult or impossible to enforce or implement for Developing countries, due to the unspecified substantive and sometimes procedural details missing from the clauses. WTO panel and AB decisions on this issue will be examined which have shed light on the S&DT that lack detail.

[474] WTO *European Communities – Regime for the Importation, sale and distribution of Bananas – Recourse at Article 21.5 by Ecuador* (Panel Report) 12 April 1999 WT/DS27/RW/ECU (*EC - Bananas III*) paras 7.272-7.273.
[475] EC – Bananas (as above) paras 7.272-7.273.

Shintaro categorised technical assistance into four distinct categories; binding and specific, non-binding and specific, binding and non-specific, and non-binding and non-specific.[476] This was well elucidated in the figure below.[477]

Table 6.1 Examples of binding and specific obligations

	Binding	Non-binding
Specific	"Member shall provide technical assistance through the organization of seminars and exchange of staff."	"Technical assistance may include the organization of seminars and exchange of staff."
Non-Specific	"Member shall provide technical assistance."	"Members shall consider technical assistance "Members shall provide technical assistance, on mutually agreed terms and conditions."

The figure above is indicative of the common provisions found under the WTO law, with particular focus on binding and specific nature of provisions. It reflects the standard which Developing Countries' have contended the MTS falls short of during the Doha Round, which is to create binding and specific [precise] S&DT provisions.[478] It examines binding specific provisions, as discussed earlier in this chapter. Shintaro further discussed how a considerable number of S&DT provisions have been drafted in non-specific [broad and general] terms, with best endeavour provisions being common which are not legally enforceable. WTO aquis also contains rules that are drafted in clear terms, with peremptory language used to bind Developed Countries or particular Members, that lack specificity. The language of the clauses themselves may not necessarily be vague, however the absence of detailed rules or modalities, compromises the binding effect. The consequence, and legal effect of these provisions is that Members would not be held strictly accountable for not implementing the commitments. WTO case law regarding this point will be examined under this section.

[476] H Shinatoro *Asian Free Trade Agreements and WTO Compatibility: Goods, Services, Trade Facilitation and Economic Cooperation* 2014 World Scientific 208.
[477] Shinatoro (as above) 209.
[478] *Doha Decision* (n 345 above) Paragraph 44.

S&DT provisions that lack Specificity or detail rendering them un-enforceable or un-implementable at [WTO] Law identified and examined under this section are the following;

- The Enabling Clause Article 2(a);
- SCMA Article 27.14;
- Agreement on Safeguards Article 9.1;
- SPS Agreement Article 10.2;
- TBT Agreement Article 11, and Article 12.8;
- SPS Agreement Article 10.3;
- TRIMs Article 5.3; and
- TFA Article 21.

3.4.1 Market Access and the Enabling Clause

The first provisions to be examined which falls into this category [S&DT provisions that lack specificity] is found under the Enabling Clause. The importance and effectiveness of the Enabling Clause regarding market access has already been examined in this section, with Article I establishing the principle that enables Members to derogate from the MFN rule and offer favourable treatment in favour of Developing Countries. Article 2(a) builds on this and provides that Paragraph 1 shall apply to;

> "Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences."

Articles 1 and 2 of the Enabling clause are the primary basis, and legal justification, for GSPs. Like other WTO Agreements including the GATT 1994, the Enabling Clause is not specific on the list of countries that it contemplates should be preference-granting countries, and on the range of goods which are to be included in GSPs. This, therefore, means that Developed Countries or preference-granting Countries enjoy significant discretion for picking and choosing beneficiary countries and eligible products. Ornelas notes that one consequence is

the wide discrimination across recipients,[479] which contrasts with the original goals of UNCTAD that stated that the preferences should be non-discriminatory across the beneficiaries (with the exception of LDCs which may be offered better treatment). [480] The Enabling Clause is vague on the range of goods and the list of countries that should, or could, be contemplated by preference-granting countries. This raises fundamental questions in the MTS alluded to in chapter 2 of this Thesis that are contentious or unresolved, such as the criteria for Member-States to receive S&DT, and the extent to which Developing Countries are to be accorded preferential treatment. The WTO has the tough responsibility of reconciling the non-discrimination principle, with S&DT which inherently derogates against it. Preferential treatment is inherently discriminatory. The argument raised particularly by Developing Countries,[481] however, is that Members eligible to receive S&DT [Developing Countries] should not be discriminated upon in receiving the preferential treatment.

The EC, in their submissions to the Appellate Body in the *EC – Tariff Preferences* dispute,[482] described the format the WTO undertook when drafting of the Enabling Clause as follows:

> "The Enabling Clause embodies a delicate compromise between developed and developing countries. It was drafted in broad, sometimes quasi-programmatic terms, so as to afford a margin of discretion to the preference-giving countries in order to design their individual GSP schemes".[483]

The above passage also highlights the autonomy and discretion that Developed Countries have in designing preference schemes. Another significant issue is that unlike most other GATT 1994 concessions, GSP can be changed or withdrawn at any time, at the will of the donor country, which results in the loss of trade preference and access to markets by

[479] Ornelas (n 70 above) 9.
[480] Ornelas (as above) 9.
[481] World Trade Organization *The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness* 18 February 2019 Communication from China, India, South Africa and the Bolivarian Republic of Venezuela WT/GC/W/765/Rev.1 (WTO *The Continued Relevance of Special and Differential Treatment)*.
[482] *EC – Tariff Preferences* (n 19 above).
[483] Appellant Submissions in EC - Tariff Preferences, see EU Trade Website https://trade.ec.europa.eu/doclib/docs/2004/february/tradoc_115936.pdf. Also see *EC – Tariff Preferences* (n 19 above).

Developing Countries. S&DT, therefore, under the Enabling Clause under GSPs is not secure. The non-security of Developing Countries of the enjoyment of the GSP programme has been highlighted through the GSP+ Program. The GSP+ program is on a "nonreciprocal basis" satisfying the Enabling Clause to the extent that the Developed Countries do not require equivalent market-access.[484] The vulnerability of the preferential treatment of GSP+ lies in the conditional extension of GSP+ preferential treatment, if vulnerable Developing Countries sign up to a series of conventions on core human and labour rights, the environment and other "good governance standards" across 27 international conventions.[485] The European Commission states that "since 2005, the scheme has taken up a new role: to provide incentives to those vulnerable countries committed to promote sustainable development and good governance".[486] This derogates against WTO jurisprudence that donor countries maintaining GSP schemes under the Enabling Clause must treat "similarly" Developing Countries in "similar conditions" on the basis of objective criteria which is related to "legitimate objectives", which were to be determined.[487] There is currently no clearly established objective criteria of "legitimate objectives," development of such a criteria could create predictability. It would be envisaged that such a criteria would be based on Developing Countries' needs and level of development. A similar approach was adopted in *EC – Tariff Preferences* which interpreted Paragraph 2(a) of the Enabling clause that granting different tariff preferences to products originating in different GSP beneficiaries is allowed under the term 'non-discriminatory' (in footnote 3 to para. 2) provided that the relevant tariff preferences respond positively to a particular "development, financial or trade need" and are made available on the basis of an objective standard to "all beneficiaries that share that need."[488]

The challenge in GSP+ preferences is that Developing Countries could possibly face considerable loss to their economies and critical market-access due to non-direct trade

[484] EU Website, https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/generalised-system-preferences_en (accessed 11th November 2020).
[485] European Commission Website, https://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/ (accessed 11th November 2020).
[486] EU Trade website http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153732.pdf (accessed 30 December 2018).
[487] EC – Tariff Preferences (n 19 above) Appellate Body Report para. 173.
[488] EC – Tariff Preferences (n 19 above) Appellate Body Report para. 165.

related issues, such as governance and human rights. GSPs are legitimised under the Enabling Clause with development, financial and trade needs as the motivating factors in implementing the schemes, as provided for under Article 3(c). Non-trade policy objectives, however, such as sustainable-development and human-rights, are not included in the scope of GSPs under the Enabling Clause, nor through express provisions in the MTS. Despite cross-cutting themes and trade related issues relating to these non-trade policy objectives, they do not form part of the trade agenda, and therefore should not be utilised as instruments or conditions to granting preference. This is a lengthy topic which will not be fleshed out in this Thesis, however it is relevant to the issue of S&DT. The MTS is silent on the issue, with no current rules legitimising or delegitimise the non-trade conditions, and enforcement rules and remedies.

Conditional GSP, which is tied to factors developed by the preference-granting Member, could potentially amount to influencing domestic decisions of Developing Countries regarding a number of issues, such as on governance, business practice, legislation, human rights issues, and the selective criteria of choosing beneficiaries may not be WTO compliant.[489] An example of this particular challenge is with regards to the GSP+ and Sri-Lanka, which lost GSP+ concessions granted by the European Union, its biggest trade partner, in August 2010 following the withdrawal by the EU on account of a report of human-rights violations and shortcomings in implementation of UN Human Rights conventions,[490] following the end of the civil war in 2009. The withdrawal had significant negative consequences on Sri Lanka's economy, having experienced 54% growth in export value and 39% in export quantity between 2006 and 2010 under the GSP+.

The Author's proposition regarding GSP+ is to ensure mutually applicable rules are developed under the MTS. These rules should establish the extent to which a WTO Member is prohibited and allowed to apply GSP+ issues, considering factors such as sustainability and human-rights violations in preference-receiving Countries, as opposed to the unilateral

[489] L Bartels 'The WTO Legality of the EU's GSP+ Arrangemenet' Journal of International Economic Law 10 (4). Bartels opined that the substantive criteria chosen by the EU to select GSP+ beneficiaries, which do not meet the Appellate Body's criteria for differential tariff treatment of developing countries in EC—Tariff Preferences.
[490] M Withenawasam (n 71 above).

imposition of GSP+ which is currently being applied under the MTS. This would ensure fairness and objectivity is added to trade rules, which are robust enough to redress discriminatory practices on individual rights. Such envisaged trade rules should be adapted to prevent Developing Members from benefitting from trade preferences where human-rights violations [on minority groups, such as in the Sri Lankan case] are established, whilst ensuring such a decision is not unilateral but rather based on established modalities .

The concern is not only an economic one, but that GSP+ violates the Enabling Clause. The violation is in relation to selective beneficiaries of the scheme, where similar situated or Developing Countries in "similar conditions" are not accorded S&DT. Sri-Lanka in this instance, prevented from GSP+ preferences, has competitors which are "similarly situated" which continue to have preferential access to EU Members, particularly in the apparel industry, despite the loss of preferential benefits for Sri Lanka under this arrangement. Sri Lanka is currently undergoing the same challenge regarding possible GSP+ withdrawal in 2019 after GSP+ was re-introduced in Sri Lanka in May 2017.[491] This shortcoming falls into the category of S&DT provisions that are non-specific, however, the provision is detailed enough to be implemented by Members.

3.4.2 Protective Measures

A further non-specific provision can be found under the SCM Agreement. It was elucidated above that S&DT is primarily contained under Article 27 of the SCM Agreement. Article 27.14 allows for reviews of specific export subsidy practices in order to consider their developmental needs.[492] This ability for review affords Developing Countries a mechanism to motivate imposition of subsidies. It is apparent, however, that no detailed or peremptory criteria are set to provide for instances where certain "export subsidy practices" may be permitted. The provision marginally allows a forum to consider developmental needs, which is a common provision without any binding real rights in favour of Developing Countries.

[491] Reuters News Website https://www.reuters.com/article/us-sri-lanka-politics-trade-exclusive/exclusive-sri-lanka-risks-eu-trade-concessions-if-any-back-sliding-on-rights-idUSKCN1N70G2 (accessed 13 May 2019).
[492] *SCM Agreement* (n 392 above) Article 27.14.

This, therefore, is a S&DT provision that falls into the category of S&DT provisions that lack enforceability.

A further protective measure provision that lacks specificity, is S&DT under Article 9 of the Agreement on Safeguards. This Article was discussed under this section on clear and binding S&DT Provisions, and falls into the said category, however the provisions could be greatly improved by including further details. Article 9.1 provides for exemptions against products originating from Developing Country Members, with the exception that its share of imports of the particular product of the importing Member doesn't exceed 3 per cent.[493] This is referred to as the *de minimis* import volume exemption, which rationale is to prevent safeguard measures from being applied to low volume imports from developing country Members.[494]

The obligation that Article 9.1 imposes on WTO Members (Developing and Developed alike) is for them to take reasonable steps to exclude such duties from Developing Countries exporting below *de minimis* levels in accordance with Article 9(1). This was re-iterated in *US – Line Pipe* where the Appellate Body upheld the Panel's findings which were based upon the statistical evidence, and concluded that the importing Member acted inconsistently with Article 9.1 by failing to "take all reasonable steps it could, and exclude Developing Countries exporting less than *de minimis* levels in Article 9.1".[495] A similar position was also adopted in *Dominican Republic – Safeguard Measures* by providing that "Members which apply safeguard measures are obliged to adopt all reasonable measures available to them to exclude all Developing Countries that meet the requirements in Article 9.1 of the Agreement on Safeguards".[496] The application of *de minimis* should have also applied to Thailand, as it was a in a similar position to countries who were excluded, such as Colombia, Indonesia and

[493] *Agreement on Safeguards* (n 21 above) Article 9(1). There is also a proviso in the clause which states that the exemption may take place provided that Developing Country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.
[494] World Trade Organization website, Technical Information on Safeguard Measures, https://www.WTO.org/english/tratop_e/safeg_e/safeg_info_e.htm (accessed 20 December 2018).
[495] *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* adopted 8 March 2002 (Appellate Body Report), WT/DS202/AB/R (*US - Line Pipe*) para 132.
[496] *Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric* adopted 22 February 2012 (Panel Report) WT/DS415/R para. 7.393 (*Dominican Republic – Safeguard Measures)*.

Panama which did not export to the Dominican Republic.[497] Based on the above, the Panel held that Thailand was treated differently and was not included specifically in the list of countries excluded from the measures with no reasonable explanation from the Dominican Republic.[498]

An issue raised by the US in the above-mentioned *US – Line Pipe* dispute was that there is no specific list of the Members excluded from the safeguard measure under Article 9.1. The Appellate body concluded that "…it is possible to comply with Article 9.1. without providing a specific list of the Members that are either included in, or excluded from, the measure…" and further held that Article 9(1) does not mandate such a list.[499] The AB then proceeded to acknowledge that "such a list could, and would, be both useful and helpful by providing transparency for the benefit of all Members concerned".[500] This is an important re-occurring issue to note in S&DT discourse; which countries are eligible for S&DT, and to what extent or level of preferential treatment the said eligible countries should receive over the others. The lack of a criteria of according preferential treatment falls into the category of S&DT provisions which lack specificity. It would not fall under the category of "Provisions that lack specificity or detail, rendering them un-implementable and un-enforceable under [WTO] law," due to its applicability and enforceability. The provision's enforceability and interpretation could however be significantly improved and enhanced (as with a significant number of S&DT provisions) by detailing a Member list.

3.4.3 Transitional Provisions

There are transitional provisions that lack the requisite specificity or details to enforce. The SPS Agreement provides for non-specific transitional time periods, however, it links implementation of the Agreement and commitments to products of interest to Developing Members. Article 10.2 provides:

[497] *Dominican Republic – Safeguard Measures* (as above) paras. 7.400-7.401.
[498] *Dominican Republic – Safeguard Measures* (as above) paras. 7.400-7.401.
[499] *US - Line Pipe* (n 494 above) paras 127-128.
[500] *US - Line Pipe* (as above).

> "Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports".

In reviewing the operation and implementation of the Agreement, the SPS Committee noted that it had no information on the extent to which the provision had been applied to a Developing Country, or how the said Members had made use of it.[501] Developing Countries Members highlighted that there was little information regarding whether Members were in fact providing longer time frames for compliance on products of interest to Developing Countries.[502] Article 10.2 has shortcomings, in that it doesn't detail how Developing Countries can enforce the said "longer time-frames for compliance on products of interest" or detail implementation mechanisms of use of this right.

Article 10.2 indicates that S&DT accorded by transitional-time periods can be unclear and non-specific. Further, that the Philippines had experienced difficulties in the application of new methodologies and that she expressed hope that guidelines on Article 10.2 could address the concerns of Developing Countries in specific areas such as Hazard Analysis Critical Control Process (HACCP).[503] This request recognises the inadequacy of the provision which is difficult to operationalise.

The TBT Agreement's transitional timeframe also creates linkages between a Developing Country's ability to comply with obligations under the Agreement, by enabling Developing Countries to apply for time-limited exemptions from the Agreement in whole or in part.

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[501] *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures 11 March 1999* Committee on Sanitary and Phytosanitary Measures G/SPS/12, para 13.

[502] WTO *Summary Of The Meeting Held on 7-8 July 1999 29 October 1999* Committee on Sanitary and Phytosanitary Measures G/SPS/R/15, para 34-37.

[503] Safe Food Alliance Website https://safefoodalliance.com/food-safety-resources/haccp-overview/ (accessed 17 May 2019). Hazard Analysis Critical Control Points (HACCP) is an internationally recognised method of identifying and managing food safety related risk. HACCP is a management system in which food safety is addressed through the analysis and control of biological, chemical, and physical hazards from raw material production, procurement and handling to manufacturing, distribution and consumption of the finished product.

Article 12.8 also goes as far as listing the criteria which the Committee on Technical Barriers to Trade shall consider, namely;-

- "the special problems in the field of preparation and application of technical regulations";
- "standards and conformity assessment procedures"; and
- "the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement."

The provision then concludes by re-emphasising that the Committee on Technical Barriers to Trade shall, in particular, take into account the special problems of the LDC Members.

Article 12.8 of the TBT Agreement, like the Article 10.3 of the SPS Agreement, has never been utilised by a Developing Country or an LDC.[504] A number of reasons for lack of use are capacity related.[505] Another reason, however, relates to the clause itself. It appears that the lack of use of the provision by Members is due to the lack of detailed procedures guidelines to be utilised. The provision states the criteria that the committee is to utilise, however, it fails to set out how Developing Countries which seek to use the provision are to raise their request for exemption. S&DT in this regard is deficient in lack of specificity, which reduces the usefulness or substance of the transition-provision.

The construct of transitional time-periods under Uruguay Round Agreements indicate many challenges from the application of the provisions. This may be due to the fact that "the approach Members take to S&DT and transition periods in the context of WTO accession […] is mostly governed by convention rather than strict disciplines".[506] An indication into the

[504] UNDP Website (n 457 above).
[505] UNDP Website (as above). The challenges identified and reasons for absence of requests included that countries lacked understanding of the exception provision from obligations under the TBT (as indicated by Lesotho and Cayman Islands). The second reason was the non-existence of a national authority in charge of the implementation of the TBT obligations (raised by Togo).
[506] B Czapnik 'Will the Trade Facilitation Agreement's Novel Architecture and Flexibilities Have Unforeseen Consequences? An Analysis in the Context of World Trade Organization Accessions,' (2017) 12(1) *Global Trade and Customs Journal* 2.

cause of challenges that arise in the construct of transitional time-periods under the TBT and SPS Agreement appears from Article 5.3 of the TRIMs. Like aforementioned Article 10.3 of the SPS Agreement, and 12.3 of the TBT Agreement, a Developing Country applies to the Council for Trade in Goods for an extension to an obligation (under Article 5.1), which takes the Member's development, financial and trade needs into consideration. Minutes of the Council for Trade in Goods meeting in 2000 which address requests under Article 5.3 clearly indicate the lack of modalities to be followed in demonstrating that a Member had particular difficulties in implementing the provisions of the TRIMs Agreement.[507] It also appears further that the CTG has not developed modalities or guidelines for requests under Article 5.3.[508] India, in seeking clarity of the procedure to be utilised, questioned whether the requests to the CTG were to be dealt with individually or multilaterally.[509]

The above clearly indicates that transitional time-periods which require special requests by a Developing Country need modalities and guidelines in how to apply to the Committee in question. The lack of detail or specific provisions has resulted in inoperable transition time-periods in the TBT and SPS Agreements. This, therefore, means that extensions accorded with respect to time or mentioning of the "needs" of Developing Countries and LDCs are ineffective if clear specific rules are not established.

3.4.4 Technical and Financial Assistance

Lastly, there are a considerable number of technical and financial assistance provisions which fall under S&DT provisions that lack specificity and detail, rendering them un-implementable or un-enforceable. Technical and financial assistance to Developing Countries has an important role to play in ensuring the Members fulfil the Doha Mandate of

[507] WTO *Minutes of Meeting Held in the Centre William Rappard on 24 January 2000*, 29 February 2000 Council for Trade in Goods G/C/M/42, para 15.
[508] WTO (as above) para 27.
[509] WTO (as above) para 18. The report provides that "[t]he second point related to whether the specific requests should be dealt with individually or multilaterally. Individual consultations could in no way replace the multilateral consultations which were provided for and which had been specifically mandated to the CTG in Article 5.3. Individual consultations could be at best in addition to the multilateral consultations. Members had emphasised both the non-discriminatory treatment of individual applications and the need to insure transparency in the treatment of individual applications; these could only be ensured through a multilateral process".

increasing Developing Countries' share in global trade.[510] Assistance entrenched in WTO Agreements underline the need for support for Developing Countries to adjust or meet their obligations under the WTO Agreements in question. Assistance is pivotal for Developing Countries to better integrate themselves in the MTS.

Complex WTO rules and the incapacity or inability of Developing Countries to implement or meet requirements, particularly with regards to LDCs, has been the justification for technical and financial assistance. This was buttressed in the 2017 LDC Trade Ministers' meeting which referenced areas of great concern for LDCs, such as SPS and TBT measures.[511] Developed Countries were urged to provide financial and technical assistance to enable LDCs to comply with measures introduced and maintained by them.[512] Priority for technical assistance and financial assistance under WTO Agreement has been accorded to LDCs, however, the Doha Declaration shifted focus to small, vulnerable, and transitional economies as well as to members and observers without representation in Geneva.[513]

Paragraph 38 of the Doha Declaration recognised that technical cooperation and capacity building are core elements of the development dimension of the MTS. The Secretariat was given the mandate to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction. The rationale or delivery of WTO technical assistance is "designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system."[514]

Most provisions relating to assistance in WTO Agreements, decisions and declarations are in respect of technical assistance, as opposed to financial assistance. Newer legal texts, such as the TFA, incorporate financial assistance for Developing Countries for the implementation of

[510] Panel Report, *EC – Tariff Preferences* (n 19 above) para. 7.52.
[511] *LDC Trade Ministers' Meeting Buenos Aires Argentina 9 December 2017*, LDC Ministerial Declaration WT/MIN(17)/40, 10-13 December 2017.
[512] WTO *LDC Trade Ministers' Meeting (as above) 10-13.*.
[513] Doha Declaration (n 1 above) para 38.
[514] WTO Analytical Index: Volume I 2007 *Cambridge University Press* page 78.

the Agreement, as will be expounded below. Almost all WTO Agreements, particularly Uruguay Round Agreements, contain a clause which makes reference to the provision of technical assistance, particularly on implementation issues. The provisions usually contain a general clause recognising Developing Countries' right to assistance or indicating that assistance shall be provided, and the provisions usually specify the end to which assistance is to be provided.[515] These clauses shall be examined below to determine the effectiveness, shortcomings, challenges and effect of the provisions.

A considerable number of technical and financial assistance S&DT provisions under Uruguay Round Agreements are unclear, and lack enforceability with provisions lacking specificity required to implement the provisions, as will be examined further in this section. The first Agreement to be examined with regards to assistance is Article 11 of the TBT Agreement. It was examined under this chapter that the TBT does contain a number of specific, clear and binding rules on assistance. It does however also contain highly deficient, unspecific rules. Most of the provisions under Article 11.7 requires the preference granting Members to "consider" the assistance, or grant assistance on "mutually agreed terms and conditions" as provided under Articles 11.2 to 11.6. The parameters to which this extends to is unspecified and is limited and discretionary, which takes away from the obligation to grant the assistance. The proviso limits enforceability by placing conditions and creating a de-facto soft-obligation.

The proviso enables a member, although legally obliged in principle, to de facto block the obligation from taking hold by avoiding the required mutual agreement on terms and conditions. This arguably dilutes the legal force, and hence the entitlement of the potential recipients. The latter problem is a point raised repeatedly in the ongoing Doha Development

[515] *SPS Agreement* (n 90 above) Article 9.1 prescribes that "Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, inter alia, in the areas of processing technologies, research and infrastructure…."
TBT Agreement (n 406 above) Article 11.2 states that "Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies…"

Round negotiations on S&DT provisions.[516] Assistance provisions under Article 11, therefore, are unenforceable and non-binding due to lack of obligatory provisions. In 2003 it was reported that no Developing Members had made a request under the TBT for assistance.[517] This could be attributed to the lack of binding nature of the provision, as indicated by the non-legally binding phrase to "consider," under Article 11, assistance under the TBT therefore can also be categorised as S&DT that falls into provisions that use non-peremptory language.

Further non-specificity comes from the pre-condition to the clauses, which state that in rendering such assistance the measures must be "reasonable and available to them" under Article 11.4. The parameters of a Member's obligations to providing S&DT are that; i) such request must be reasonable, and ii) that the Member according such assistance must have the means to render such assistance. The challenge lies in the subjectivity with which Members interpret the provision's wording, "reasonable and available". No modalities or specific details regarding the said phase have been developed, or criteria establishing the extent to such reasonableness. This is a highly subjective test which derogates from the obligation a Developed Country would have in according such S&DT.

Non-specific assistance is also contained in the SPS Agreement. Article 9.1 of the Agreement provides for the "facilitation" of technical assistance to Developing Countries by "Members" either bilaterally or through the appropriate international organisations.[518] The objective of the assistance is to allow Developing Countries to adjust or comply with sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.[519]

Article 9.1 of the provision, read alone, lacks specificity to be legally enforceable. It does not place an obligation on any specific Members to render technical assistance but rather calls

[516] UNCTAD, Reflections on a Future Trade Facilitation Agreement https://unctad.org/en/PublicationsLibrary/dtltlb20102_en.pdf (accessed 4th June 2020).
[517] E Zedillo and P Masserlin Trade for Development 2005 Earthscan UN Millennium Project Task Force on Trade 223.
[518] *SPS Agreement* (n 90 above) Article 9(1).
[519] *SPS Agreement* (as above) Article 9(1).

on the general Membership to "facilitate" such assistance. This raises the question of whether a Developing Country can request a particular Developed Member to render technical assistance under the auspices of Article 9.1. There is also no indication of the extent to which assistance is to be provided, however, the provision does provide for the forms of assistance.[520] One such form is in donations and grants, which constitutes a form of financial assistance. This Article further does not expound on how Developing Countries may either exercise this provision to request for assistance or enforce the right of assistance.

As was raised in paragraph 3.3.2 above, in *US – Steel Plate* the Panel found that "Members cannot be expected to comply with an obligation whose parameters are entirely undefined" and that the provision "imposes no specific or general obligation on Members to undertake any particular action".[521] The above-mentioned provision does not establish the parameters of the obligation to provide technical assistance and, therefore, Members cannot be bound to the provision.

Applying the Panel Report to Article 9.1 of the SPS, *US – Steel Plate*, the Panel narrowly interpreted a word similar to "consider". [522] The verb "explore" was narrowly interpreted so as to mean that Developed Members merely need to go through the motions of considering constructive remedies, however, they were not obligated to take action. Applying this, the obligation to "consider", in the reasoning of the Panel above, results in a non-peremptory provision that does not mandate technical assistance. The obligation imposed is simply to go through the motions of considering facilitating technical assistance to discharge their duty. The provision, therefore, is non-enforceable.

Article 9.1 of the Agreement goes on to define the areas of such cooperation, which include but are not limited to processing technologies, research and infrastructure, including in the establishment of national regulatory bodies. The language of the Agreement indicates that

[520] *SPS Agreement* (as above) Article 9.1. Article 9.1 goes to explain the forms in which assistance is to be provided, namely in advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment.
[521] *US – Steel Plate* (n 463 above) para 7.110.
[522] *US – Steel Plate* (as above) para 7.114. Also see *EC - Bed Linen* (n 464 above) para 6.233.

the areas of cooperation are not exhaustive as it states that "such assistance may be, *inter alia"* in the above-mentioned areas.[523] This means the provision is not restrictive in nature.

The Decision on Measures in Favour of Least-Developed Countries which reaffirms the Enabling Clause in its preamble also provides for technical assistance. The Decision, however, makes particular reference to the provision of technical assistance to LDCs. Paragraph 2(v) of the Decision provides that LDCs shall be accorded;

> "substantially increased technical assistance in the development, strengthening and diversification of their production and export bases including those of services, as well as in trade promotion, to enable them to maximise the benefits from liberalised access to markets".

The provision defines the scope of the assistance into broad categories such as assistance in "development" but it further provides more detailed direct trade-related objectives, such as diversification of production and export bases. Paragraph 2(v) also uses mandatory language by providing that the assistance in question "shall" be accorded.

Paragraph 2(v) of the Decision is significant in according LDCs with preference to such assistance over other Developing Countries and WTO Members. This appears to be as far as the provision goes in enforceability, as it shares a similar challenge that the SPS Agreement has; there is no direct obligation placed on specific WTO Members to provide the assistance aforementioned in the provision. The paragraph calls on Ministers [of the WTO] to accord the said assistance. There are no specific Members which can be called upon to provide this assistance and no mechanism of enforcement of this Decision is established. The lack of specific provisions relating to the above limits its ability to be invoked by LDCs.

Lastly, assistance under the TFA will be examined with regards to its non-specific nature. The TFA has already been examined as a progressive Agreement which accords clear and

[523] *US – Steel Plate* (as above) para 7.114. Also see *EC - Bed Linen* (as above) para 6.233.

enforceable S&DT. Assistance in the TFA is geared towards helping Developing Countries implement the provisions of this Agreement. The TFA ties notification of dates on implementation with assistance by providing that category B Developing Countries under Article 16 and LDCs notifying under category C shall include "information on the assistance and support for capacity building that the Member requires in order to implement".[524] This allows Developing Countries to identify areas of technical or financial assistance that are needed to comply with the Agreement. This is a unique approach which allows the Developing Countries and LDCs to address specific institutional, technical or financial needs related to trade facilitation.

LDCs are given preference given their special needs with "targeted" assistance and support to help them build sustainable capacity to implement their commitments.[525] This provision acknowledges that S&DT regarding assistance should be accorded in different levels, with the least of the Developing Countries receiving preference.

The TFA creates a legal and political obligation to Developed Countries to provide technical assistance to LDCs and Developing Countries.[526] Article 21 is dedicated to setting out the rules regarding assistance and support for capacity building. Assistance from Donor Countries is to be provided bilaterally or through an appropriate international organisation on "mutually agreed terms".[527] The reference to provision of assistance through "mutually agreed terms" is also present in the TBT Agreement, and its importance was indicated above. The positive side of this phrase is that it allows Developing Countries to identify specific areas of needs as opposed to receiving S&DT, which is unilaterally structured by Donors and may not be relevant to the receiver. The shortcomings this creates, in the ability to create a de facto reduction of preferential treatment also applies to S&DT, reducing the obligation on the granting Members.

[524] *TFA* (n 24 as above) Article 16.1 (c) & (d).
[525] *TFA* (as above) Article 21.2.
[526] *TFA* (as above) Article 21.
[527] *TFA* (as above) Article 21.1.

The TFA's shortcoming regarding assistance follows the same issues under Uruguay Agreements; the Agreement does not bind or oblige specific Developing Countries to provide assistance. The agreement utilises the phrase "Developing country Members declaring themselves in a position to provide assistance...".[528] The Agreement does not specify or detail rules regarding direct request for assistance by a Developing Country to a Developed Country, or the extent to which a Developing Country would be entitled to assistance. In the controversial times of emerging economies which possess traits of Developed Countries (a topic which will be addressed in the next chapter), the TFA or WTO does not preclude the emerging Members from receiving assistance, at the expense of another Developing Country.

Assistance is a controversial issue, which is linked to historical, colonial, political and socio-economic factors. The limitation in detailed rules may be a deliberate format adopted by the MTS which has continued to flow from the Uruguay Round, into progressive agreements like the TFA. This non-specific or detailed form, prejudices Developing Countries by limiting access to assistance, as indicated under the TBT Agreement (with Article 11 not being used). It creates luke warm rights and obligations, and non-binging provisions which cannot be enforced in their entirety.

3.5 Non-peremptory S&DT provisions drafted in non-obligatory language

Non-peremptory or mandatory S&DT provisions are common under the MTS. This is primarily due to non-committal language and 'best endeavour' clauses which characterise the drafting under WTO Agreements, as explored in the section on vague and unclear S&DT provisions. The WTO Secretariat acknowledged this when describing mandatory provisions in the WTO by stating; "A mandatory provision might …not necessarily be effective."[529] The secretariat further explained that some special and differential treatment provisions which

[528] *TFA* (as above) Article 22.
[529] WTO *Non-mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions* (n 374 above) para 4.

are mandatory in the strict legal sense of the term (i.e., the term "shall" is used), are characterized by a considerable flexibility of the obligations laid down in these provisions.[530]

Some of the non-binding, best-endeavour S&DT provisions are described as 'enabling provisions,' by the WTO secretariat, that confer rights but are not meant to impose obligations.[531] An example of this is Article 1 of the Enabling Clause that states; "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties." This provision 'enables' preferential treatment to Developing Countries with the exclusion of Developed Countries, however, the provisions do not mandate or obligate Developed Countries to accord S&DT. Further, the use of "may," is non-peremptory, meaning S&DT is optional in this particular context.

Non-peremptory or mandatory S&DT provisions drafted in non-committal language identified and examined under this section are the following;

- TBT Agreement 12.4;
- Decision on Measures in Favour of Least-Developed Countries Paragraph 2 (iii);
- ADA Article 15; and
- SPS Agreement Article 9.2, Article 10.4.

3.5.1 Market Access

Non-obligatory flexibilities exist under RoO in the WTO MTS. RoO play a significant role in market-access. RoO are the criteria needed to determine the national source of a product, which is an important factor for the competitiveness of an export product as duties and restrictions in several cases depend upon the source of imports.[532] The local processing requirements are essential for goods to be considered as being of local origin,[533] therefore

[530] WTO *Non-mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions* (as above) para 4.
[531] WTO *Non-mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions* (as above) 5.
[532] WTO website, https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm (accessed on the 11th November 2020).
[533] Naumann (n 75above) 2.

they set the benchmark for which goods qualify for preferential market access under a given preferential Trade Agreement.

Under RoO, which is critical for market access for Developing Countries, the lack of mandatory precise terms regarding preferential rules where LDCs do not have preferential RoO means that the said LDCs and Developing Countries lose out on preferential terms, and on critical market access, which they seek through bilateral agreements. The lack of enforceability and specific terms which Developing Countries may use has been a common theme in this paper, and equally applies to provisions on RoO that aim to assist LDCs in particular with increasing opportunities to trade.

S&DT under RoO also contains non-specific provisions which are unenforceable, which are crafted in non-obligatory language. The Nairobi-decision contains multiple obligations for preference granting countries to "consider" preferential treatment. It was mentioned above, in the context of DSB decided cases, that this does not place a mandatory obligation to accord the said preferential treatment. The granting of preferential provisions regarding RoO, like GSP, is a unilateral decision by the preference-giver. LDCs have called upon preference granting countries to take into account "the level of development, industrial capacity, scarcity of resources, human resources constraints, manufacturing capabilities, and administrative challenges of LDCs" while designing their rules of origin.[534] The current dispensation of RoO however, does not factor these considerations in the WTO law. The criteria are based on challenges experienced by LDCs and measures they believe would address them, which S&DT rules would be best to address. Challenges, for example, were identified in a communication to the WTO Committee on Rules of Origin submitted by Bangladesh, where it was reported that LDCs are not benefitting from particular technical assistance for administering self-certification that may be particularly demanding during the TFA transition phase.[535] It would be envisaged that GSP would be adept to addressing this through human resource and technical capacity assistance accorded to LDCs from

[534] ICTSD website, http://www.ictsd.org/bridges-news/bridges-africa/news/ldc-group-submits-elements-on-rules-of-origin-services-waiver-ahead (accessed 23rd December 2019).
[535] *WTO* Committee on Rules of Origin 17 April 2015 Elements for Discussion on Preferential Rules of Origin for LDCs submissions by Bangladesh, on behalf of the LDC Group, 3.

Developed Countries, which flow from S&DT rules under the GATT 1994. Practically, implementing a criteria which requires the examination of each individual LDCs needs and capacity related shortcomings is a tall task. One which is, however, set by the Members in the Enabling Clause at Article 3(c) which stated that S&DT should address "needs" of Developing Countries. This could be addressed through a notification of needs mechanism, and requirement for granting of preferential treatment, as will be explored under chapter 4 in developing the legal Framework Agreement.

The TBT Agreement contains critical rules for Developing Countries to increase market access. A number of S&DT rules in the said Agreement, however, fall short of according effective preferential treatment due to deficiencies in drafting, as already examined under this section, Article 12.4 is one such provision. The said Article 12.4 of the TBT contains two parts. The first part recognises that Developing Countries, in their particular technological and socio-economic conditions may adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and process. This flexibility is addressed to enable trade in traditional knowledge products by international standards and mutual recognition of indigenous standards.[536] The second part of the provision allows Developing Country Members to adopt TBT measures aimed at preserving indigenous technologies and production methods and processes compatible with their development needs.

The rationale of the rule was elucidated by Biber-Klemm, who explained that the provision enables trade in Traditional Knowledge products between Developing Countries with lower instances of international trade, which fosters South-South trade.[537] The provision, therefore, allows South states to derogate from their technical and international standard commitments to the extent provided under Article 12.4. The deficiency, however, with Article 12.4 is with regards to the legal construction of the clause. The wording is couched in uncertain language that does not clearly accord the Developing Countries clear rights to

[536] *TBT Agreement* (n 406 as above) Article 12.4.
[537] S Biber-Klemm & T Cottier *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (2006) 376.

derogate from the provisions of the TBT Agreement. The provision provides that Developing Countries "should not be expected" to use international standards. There is no clarity on the procedure a Developing Country is to employ in undertaking this exception, e.g. notification to the Committee on TBT. The provision does not clearly accord an exclusionary right. The provision, therefore, lacks enforceability due to its vague drafting.

3.5.2 Flexibility Provision

The first S&DT flexibility provisions to be examined which fails to utilise obligatory language can be found under The Decision on Measures in Favour of Least-Developed Countries, which was adopted during the Uruguay Round. The provision recognises the need to ensure LDCs' effective participation in the world trading system and to take measures to improve their trading opportunities. [538] The Decision is an integral part of GATT 1994, and requires LDCs to comply with the GATT 1994 and other WTO Instruments "to the extent [that it is] consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities".[539]

The provision is a flexibility, and interpretive provisions, stated under Decision on Measures in Favour of Least-Developed Countries is found at Paragraph 2 (iii). The first part of the provision states that "[t]he rules set out in the various agreements and instruments and the transitional provisions in the Uruguay Round should be applied in a flexible and supportive manner for the least-developed countries". The second part of the provision goes on to bind WTO Councils and Committees to consider issues tabled by LDCs. The language utilised is not clearly obligatory, as the provision utilises the word "should" as opposed to "shall." The obligation in this regard is unclear. This issue was addressed in *Korea – Radionuclides*.[540] The question posed was whether Annex C(1)(g) of the SPS agreement poses a positive

[538] World Trade Organization *Decision on Measures in Favour of Least-Developed Countries* (1994) Preamble (*Decision on Measures in Favour of Least-Developed Countries)*.
[539] *Decision on Measures in Favour of Least-Developed Countries* (as above) Paragraph 1.
[540] WTO K*orea – Import Bans, and Testing and Certification Requirements for Radionuclides* 22 February 2018 Panel Report WT/DS495/R (*Korea - Radionuclides*).

obligation, due to its similarly unclear drafting with the use of "should," over "shall." The Panel stated that;

> "As regards its plain meaning, "should" is somewhat of a chameleon in the treaty text and the Appellate Body found in Canada – Aircraft that, depending on the circumstances, should can express either an exhortation or an obligation."[541]

The panel further cited *US – Animals* ,[542] which observed that "the use of 'should' as opposed to 'shall' in any particular provision of [the SPS] Agreement was a deliberate choice. Ultimately, the Panel in *Korea – Radionuclides* concluded that the language of the whole sub-paragraph coupled with Annex C and the SPS Agreement imposes a positive obligation.[543]

The above cases are indicative of the unclear drafting used in S&DT provisions, which compromises the binding nature of the provision. The provision itself however, which requires application of rules in "a flexible and supportive manner", does not have considerable effect, and is utilised for interpretation of WTO Agreements. It further does not form any significant enforceability on Councils and Committees to take further action other than "considering" issues tabled by LDCs. This provision lacks the appropriate mandatory wording that Developing Countries require to secure key rights and flexibilities in the MTS.

The provision attempts to enforce the flexible and supportive application of Agreements to LDCs through relevant Councils and Committees, which are mandated to consider LDC issues "sympathetically.[544] The second part of this Decision could have been crafted or couched in a more purposive manner, placing positive obligations on the said Councils and

[541] *Korea - Radionuclides* (as above) para. 7.428.
[542] United States – *Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina* 2015 Panel Report WT/DS447/R and Add.1 para. 7.403.
[543] *Korea – Radionuclides* (n 540 above) para. 7.433.
[544] *Decision on Measures in Favour of Least-Developed Countries* (n 538 above) para. 2(iii).

Committees. This would bolster the provision and place a stronger obligation which LDCs could use for increased flexibility to adapt to the WTO and increase their share of trade.

This provision was employed when the LDC Group submitted a "duly motivated request" (IP/C/W/583) to the TRIPS Council requesting that LDCs shall not be required to apply the provisions of the Agreement, other than Articles 3, 4 and 5, until they cease to be a least Developed Country Member. The rationale for the extension of the transition period was that it would give LDCs maximum flexibility in determining the level of intellectual property (IP) protection and enforcement that should be in place nationally.

Nepal highlighted that Article 66.1 of the TRIPS Agreement "specifies an obligation to grant extensions" once the TRIPS Council receives a duly motivated request from LDCs.[545] It also referred to paragraph 2(iii) of the Uruguay Round Decision on Measures in Favour of LDCs, which states that "sympathetic consideration shall be given to specific and motivated concerns raised by the Least-Developed Countries in the appropriate Councils and Committees".[546] The Council for Trade-Related Aspects of Intellectual Property Rights considered this and obliged with the Decision of the Council for TRIPS of 11 June 2013 extending provisions of the TRIPS to 2021.[547]

Despite the successful use of the S&DT provision, the wording is not as binding as it should be to be effectively operationalised and used by LDCs to obtain favourable decisions, as it only requires “sympathetic consideration” by Councils and Committees. This is another example of S&DT provisions which assist in interpretation, but that lack specific provisions needed in order to grant Developing Countries adequate preferential treatment. Open phrases such as “sympathetic consideration” could potentially be replaced by specific modalities or rules specifying positive obligations on the said Councils and Committees to

[545] Third World Network website, https://twn.my/title2/wto.info/2013/twninfo130301.htm (accessed 11th November 2020).
[546] *Decision on Measures in Favour of Least-Developed Countries* (n 538 above) para. 2(iii).
[547] WTO *Extension of the Transition Period under Article 66.1 for Least Developed Country Members* 12 June 2013 Decision of the Council for TRIPS 11 June 2013 IP/C/64. Paragraph 1 provides that “Least developed country Members shall not be required to apply the provisions of the Agreement, other than Articles 3, 4 and 5, until 1 July 2021, or until such a date on which they cease to be a least developed country Member, whichever date is earlier”.

grant specific treatment or rights upon satisfying a listed and certain criteria. This would also provide for certainty on the part of LDCs in satisfying specific and motivated concerns. The phrase also falls under vague and unclear provisions, as it is imprecise and ambiguous.

3.5.3 Protective Measures

With regards to S&DT under protective measures, the ADA and SPS Agreement contain non-obligatory preferential treatment. The primary WTO text used, which sets out Members' rights regarding anti-dumping is the Anti-Dumping Agreement. It established key concepts such as the definition of dumping,[548] lays substantive requirements that must be fulfilled in order to impose anti-dumping measures[549] as well as detailed procedural requirements regarding the conduct of antidumping investigations[550] and it also establishes the imposition of anti-dumping measures.[551]

The ADA also provides for S&DT for Developing Countries. It contains non-binding deficient S&DT provisions. Article 15 calls for Members to pay special regards to the "special situation" of Developing Country Members when considering the application of anti-dumping measures under this Agreement. Further, "constructive remedies" provided for by this Agreement are to be "explored" by Members before applying anti-dumping duties where they would affect the essential interests of developing country Members. *EC – Bed Linen* in interpreting the term "explore", stated that, while the concept of "explore" does not imply any particular outcome, the Developed Country authorities must actively undertake the exploration of possibilities with a willingness to reach a positive outcome.[552]

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[548] *ADA* (n 88 above) Article 2.1. Dumping is defined as where a product is "introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

[549] *ADA* (as above) Article 8 and 9. The Article provides for provisional measures in order to lay down duties, Article 5 outlines requirement for initiation of the said duties.

[550] *ADA* (as above) Article 5. The provision deals with investigations, Article 6 provides for Evidence required to conduct an investigation, and with regards for the above.

[551] *ADA* (as above) Article 9. The Article provides for the imposition and collection of Anti-Dumping duties. Article 9.1 places the right to impose the duty where requirements are satisfied with the authorities of the importing Member, and 9.2 provides for the anti-dumping duty to be collected in the "appropriate amounts" on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury.

[552] *EC – Bed Linen* (n 464 above) para. 6.233.

The call to pay regards to the "special situation" of Developing Countries mirrors the proposition made by LDCs regarding GSPs on RoO and Market Access requesting for consideration of factors such as "the level of development, industrial capacity, scarcity of resources…".[553]

The above-mentioned provision is crafted in vague language. The provision places an obligation on Developed Members to consider "special situations" of Developing Countries before imposition of duties, however, it does not establish circumstances or a criterion on which anti-dumping measures are not to be imposed or are to be applied in the particular situation. The obligation of whom "special regard" is to be given to, and obligation to consider this was examined in *US – Steel Plate*. The Panel concluded that Article 15 only requires special regard in respect of the final decision whether to apply a final measure and that such a special regard is to be given to the situation of developing country Members.[554] Further, there is no obligation on Developing Countries to take a particular action after considering the special circumstances and no enforcement measures for Developing Countries on this clause. This renders the first part of Article 15 of the ADA unenforceable. This is further buttressed by the Panel in *US – Steel Plate* which found that "Members cannot be expected to comply with an obligation whose parameters are entirely undefined" and that the provision "imposes no specific or general obligation on Members to undertake any particular action".[555]

The second part of Article 15 of the ADA provides that "[p]ossibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members". The Panel in *EC - Bed Linen* mentioned the examples of "constructive remedies" which has been interpreted as the imposition of a "lesser duty" or a price undertaking.[556] Developed Members, however, are not bound to take the said "constructive remedies" into account.

[553] International Centre for Trade and Sustainable Development website https://ictsd.iisd.org/bridges-news/bridges/news/ldc-group-submits-elements-on-rules-of-origin-services-waiver-ahead-of-wto (accessed on 11th November 2020).
[554] *US – Steel Plate* (n 463 above) para. 7.111.
[555] *US – Steel Plate* (as above) para 7.110.
[556] *EC – Bed Linen* (n 464 above) para. 6.229.

This part of the provision, like the first part, is vaguely constructed and of no legal consequential effect in obliging Developed Countries to take or prevent Members from taking specific action. Firstly, the verb "explore" has also been narrowly interpreted[557] to mean that Developed Members merely need to go through the motions of considering constructive remedies in order to comply with Article 15 of the ADA. This does not place any further obligation in the interest of safeguarding or protecting Developing Countries from anti-dumping measures, which renders the provision inutile.

Non-obligatory language also exists under the SPS Agreement. The SPS Agreement allows countries to set their own standards, however, it requires that regulations should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail.[558] It buttresses the need for the application of the MFN principle. The SPS Agreement encourages Members to harmonise their SPS measures[559] by basing them on international standards developed by international standard-setting bodies.

The primary challenge with S&DT under the SPS Agreement is lack of enforceability of S&DT provisions due to non-committal or non-obligatory language. Article 10 of the SPS Agreement focuses on S&DT. It contains the common clause which obligates Members to take account of the special needs of Developing Country Members, and in particular LDCs, regarding the preparation and application of SPS measures.[560] This is the only mandatory S&DT provision under Article 10 creating an obligation on Members, as it mentions members "shall" take account of special needs. In the WTO Secretariat's review of SDT provisions, this article is classified as a mandatory provision, creating an "obligation of conduct." [561] The obligation of conduct however does not prescribe a particular result. This

[557] *EC – Bed Linen* (as above) para 6.233. Also see *US – Steel Plate* (as 463 above) para 7.114.
[558] *SPS Agreement* (n 90 above) Article 2.3.
[559] *SPS Agreement* (as above) Article 3. Article 3 gives Members three autonomous options. Members may: (1) base their measure on international standards; (2) conform their measure to international standards and thereby benefit from a presumption of consistency with the entire SPS Agreement and the GATT (3) adopt a measure resulting in a higher level of protection than the international standard, provided it is justified by means of a risk assessment. Article 3 was clarified by the Appellate Body in *EC – Hormones*. *European Communities — Measures Concerning Meat and Meat Products (Hormones)* adopted 13 February 1998 (Appellate Body) WT/DS26/AB/R ; WT/DS48/AB/R, (*EC – Hormones*) para. 165.
[560] *SPS Agreement* (as above) Article 10.1.
[561] World Trade Organization *Implementation of Special and Differential Treatment provisions in WTO Agreements and Decisions* (n 351 above).

provision, has little effect as it does not prescribe any obligation of Members to act on the special needs.

Use of mandatory language in S&DT provisions is not sufficient to make them enforceable. In *US – Steel Plate*, the first sentence of Article 15 of the Anti-Dumping Agreement was at issue before the panel, which stated the following:

> "It is recognised that special regard *must* be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement". [562]

Despite the word 'must' in this sentence, the panel held that "Members cannot be expected to comply with an obligation whose parameters are entirely undefined. In our view, the first sentence of Article 15 imposes no specific or general obligation on Members to undertake any particular action".[563] On the same issue, the panel in *EC – Pipe Fittings* found that:

> "[…] even assuming that the first sentence of Article 15 imposes a general obligation on Members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action".[564]

The above cases clearly indicate that in order to enforce S&DT the nature of the obligations must be set out. Applying Article 10.1 of the SPS Agreement discussed above, to the above-mentioned decisions, it is evident that the provision (like many other S&DT provisions) lacks specificity with regards to the steps Developed Countries must implement after consideration is made to Developing Countries' needs. This, therefore, means that the obligation to take Developing Countries' needs into account does not require any specific implementation beyond an enquiry into 'needs' of Developing Countries. This has resulted

[562] Authors Emphasis added. See *US – Steel Plate* (n 463 above). It is recognised that special regard must be given by developed country Members to the special situation of developing country - para 7.110.
[563] *EC – Tube or Pipe Fittings (*n 464 above) para 7.68.
[564] *EC – Tube or Pipe Fittings* (as above).

in Developing Countries expressing concerns that their needs and limitations are in practice rarely ever taken into account in the preparation and application of SPS measures.[565]

Further S&DT can be found under Article 10.4 of the SPS Agreement which provides that Members "should encourage and facilitate the active participation of Developing Country Members in relevant international organisations". The objective of this provision is to facilitate the participation of Developing Countries in an international standard setting. These provisions are closely tied to Article 9 on technical assistance, as it places a financial and technical obligation on Developing Countries to attend numerous committees of the international bodies where harmonised standards are initiated, developed and proposed. Further, scientific data and technical capabilities would have to be developed. Article 10.4 itself, however, is vague and is unclear about any positive rights or obligations on both Developing and Developed Members. It has been described as being couched in "hortatory language and the question arises whether any binding obligations can be derived from its terms".[566] The provision does not impose obligatory language, stating that members "should" encourage active participation, and is unenforceable due to its lack of specificity and vague non-description.

3.5.4 Financial and Technical Assistance

Technical assistance is non-specific and is not crafted in obligatory language, as examined under section 3.4.4. The provisions do not specify or oblige a particular Members to render such assistance, save for mentioning Developed Countries in their generality. An example of the non-obligatory language used can be found under the SPS Agreement. Article 9.2 of the SPS Agreement is also crafted in non-binding form, however unlike Article 9.1, specifies the particular contracting Members which is to render the said assistance. Article 9.2 places the obligation on an "importing Member" in a situation where goods are from a Developing Country. A Developed Member under this provision is obligated to "consider" providing

[565] World Trade Organization *Committee on Sanitary and Phytosanitary Measures Special and Differential Treatment: Note by the Secretariat* 9 May 2000 G/SPS/W/105 para 4.
[566] Prévost (n 73 above) 23.

technical assistance where substantial investments are required for a exporting Developing Country Member to fulfil the SPS requirements.

Article 9(2) is drafted in non-peremptory language, by providing that the importing country is to "consider" providing assistance. It has already been indicated that this provision is common in WTO Agreements, particularly Uruguay Round Agreements, which resulted in non-binding real rights in favour of Developing Countries. This provision would fall into the category of S&DT provisions that use non-peremptory language.

3.6 Complex S&DT provisions which are difficult for Developing Countries to implement

S&DT provisions may be clear and binding, however un-implementable by Developing Countries due to the complexity of the provisions. Developing Countries may opt not to enforce such provisions due to capacity related issues; that the provisions require increased technical capacity or financial resources. This may be a flexibility or extend a transitional time-line prescribed (as most Uruguay Round Agreements contained extensions to existing transitional provisions).

Complex S&DT provisions that are difficult for Developing Countries to implement identified and examined under this section are the following;

- GATT 1994 Article XVIII Sections C and D.

Article XVIII Sections A and B of the GATT 1994 have been examined under the category of vague and unclear provisions.[567] Article XVIII Sections C and D[568] fall under provisions which are complex and difficult for Developing Countries to implement. The provisions also provide S&DT in order to promote the establishment of a particular industry, however, they also fall into the category of S&DT that lacks specificity or detail. A Developing Country

[567] See Chapter 3.3.
[568] *GATT 1994* (n 12 above), Article XVIII:13-21 and XVIII:22-23 respectively.

utilising this provision is to indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties.[569]

The time considerations raised by the Agreement are to be found under Article XVIII:15 and 17 and require notification of measures by Developing Countries which may require consultations with Members which have substantial interest in them, and waiting periods. This is burdensome and financially demanding in the current trade landscape on RTAs, as the proliferation of RTAs would mean a greater number of WTO Members would substantially be affected by the Developing Countries measures, which would require multiple consultations. Further, complexity arises from the limitation to the application of Section C under Article XVIII (20), which provides that Members who use the S&DT under this provision may not deviate from the MFN rule under Article I, rules under Article II on Schedules of Concessions, and Non-discriminatory Administration of Quantitative restrictions under XIII of GATT 1994.

The S&DT provision under Section C of Article XVIII requires numerous pre-conditions that make it complex and consequently difficult for Developing Countries to use. The Sri Lankan delegation stated that "the stringency of the review procedure under Article XVIII nearly destroyed the benefit it sought to confer".[570] This is well summarised by Gunawardne, who argues that "Section C [had] been invoked so rarely that it would be superfluous to explore this exceedingly complex provision at length".[571]

Section D is similar to Section C, save for its application to Developing Members that are not in "early stages of development" and those that cannot "only support low standards of living". No Member has ever invoked the infant industry Article, as reported in 2012.[572] The stringent nature of Section D raises legal uncertainty. Further, this is exacerbated by uncertainty with regards to the question of which category of Developing Country can invoke Section D of Article XVIII.

[569] *GATT 1994* (as above) Article XVIII:14.
[570] *GATT 1994* (as above) Article XVIII: Measures Applied Under Section C, BISD 15S/65.
[571] Gunawardne (n 67 above) 45- 46.
[572] UN Millenium Project, *UN Millenium Development Library: Trade in Development* 219.

Overall, Article XVIII presents very minimal market access opportunities, particularly in support of export products of Developing Countries. UNCTAD identified the inflexibility and practical limitations of Article XVIII. UNCTAD stated that the partial approach of Article XVIII could not secure effective promotion of Developing Countries industrial export sectors.[573] They encapsulated this by providing that "Article XVIII considers solely the implementation of protective measures in relation to imports of goods that a Developing Country decides by establishing or expanding [its own industries], but it does not provide for action to foster exports".[574] This is primarily due to the complex S&DT provisions which are difficult for Developing Countries to implement.

3.7 Conclusion

The MTS contains a limited number of clear and enforceable S&DT provisions. A majority of preferential treatment clauses under WTO Agreements are vague and unclear, non-specific, complex or un-enforceable. It is notable that S&DT provisions in critical areas that Developing Countries require to increase their share of global trade, such as market-access, are highly deficient and do not adequately serve their intended purpose.

The chapter firstly examined clear and binding S&DT provisions. The notable and significant clear and binding preferential provisions were found to exist under Article XXXVI:8 of the GATT 1994, and Article 2 Enabling Clause. Article XXXVI:8 is regarded as the most significant substantive provision of Part IV providing for hard law provisions on non-reciprocity for LDCs regarding commitments. The Enabling Clause provides for preferential market access for Developing Countries (both LDCs and Developing Countries) on a non-reciprocal and non-discriminatory basis. It justifies preferential RTAs in favour of Developing Countries which operate legally within the rules of the MTS in precise and binding language, and also

[573] UNCTAD *Proceedings from the United Nations Conference on Trade and Development* 23 March to 17 June 1964 Vol I, Doc E/CONF. 46/36, 456.
[574] UNCTAD *Proceedings from the United Nations Conference on Trade and Development* (as above).

establishes rules regarding GSPs. The Enabling Clause, however, is not without its shortcomings.

Further clear and binding rules examined were on transitional provisions, which have partially expired. A majority of the provisions were clear and binding, due to the nature of the structure of the provisions, which were to provide for definite time-periods and certain exemptions. New progressive transitional binding S&DT provisions were further incorporated under Article 14 of the TFA. It further prescribed advanced, clear and binding rules on technical and financial assistance. The limitations in the rules, however, were addressed as non-specific on critical issues such as the binding nature of obligations regarding assistance on Developed Countries, and absence of modalities to request for assistance.

Vague and unclear provisions were further examined under this chapter. Frequently, the language of the S&DT provisions merely encourage Developed Countries to help developing countries. Vague S&DT provisions cut across most WTO Agreements, with many prevalent provisions contained under the GATT 1994. Part IV of GATT 1994 exists only as a moral commitment, whose primary significance lays in "its value as an agreed statement of principle".[575] The S&DT provisions were concluded as "never more than a set of 'best endeavour' undertakings with no legal force."[576] It was concluded that Article XVIII provisions provide for flexibility at face value, however, vagueness, over-complex procedures, and lack of enforceability has resulted in un-implementable and ineffective S&DT. This position was also buttressed by Hudec, who states that Part IV has not significantly improved the situation of Developing Countries under the GATT 1994.[577] Empirical data in chapter 2, from WTO statistical review, further supports this position, indicating the stagnation and decline in share of global trade by Developing Countries, particularly LDCs in 2017, and in data from recent years (with the exclusion of Asia).[578] From an examination of Part IV, it is evident that it does not address critical market access issues

[575] U Ewelukwa (n 17 above) 859, citing CARL (n 461 above) 83.
[576] Lichtenbaum (n 462 above)1012.
[577] Hudec (n 69 above) 227.
[578] WTO *World Trade Statistical Review* (n 237 above).

such as trade preference for goods from Developing Countries, elimination of agricultural protectionism of Developed Countries, and technology transfer.[579] This was also apparent in the Doha Round which was centred on Developing Countries and the inadequacies of the GATT 1994 and the MTS.

A majority of vague provisions are also non-binding, and were examined under other categories of non-specific S&DT provisions and non-peremptory S&DT. Vague provisions were also examined under protective measures, particularly under Article 15 of the ADA which prescribed to give 'special regard to the special situation of developing country Members'. It was found that a majority of vague provisions are characterised by open phrases such as to pay 'special consideration' or 'special regard', or to 'further improve', which can be widely construed, and therefore are difficult to interpret and enforce.

S&DT provisions that lack specificity or detail rendering them un-enforceable or un-implementable at [WTO] law are one of the primary challenges under the MTS which cut across all types of S&DT under the MTS. Chapter 2 described the challenges the WTO is faced with, in constructing detailed rules. The WTO is charged with prescribing minimum standards and trade rules that respective Member are to subscribe by, whilst allowing policy space and political freedom to peruse national objectives. The result is open-ended non-specific provisions which are un-enforceable. This is particularly the case with the Enabling Clause, which contains vital S&DT, however the provisions are not specific on the list of countries that should be, or that it contemplates to be preference-granting countries, and on the range of goods which are to be included in GSPs.

The section also examined the *US – Steel Plate* which highlighted the danger of non-specificity of S&DT, by providing that; "Members cannot be expected to comply with an obligation whose parameters are entirely undefined" and that the provision "imposes no specific or general obligation on Members to undertake any particular action".[580] It was further found that technical assistance provisions under Uruguay round Agreements, and

[579] R Wolfrum, PT Stoll & H Hestermeyer 'WTO Trade in Goods' (2011) *Max Planck Commentaries on World Trade Law* 806.
[580] *US – Steel Plate* (n 463 above) para 7.110.

progressive TFA, fail to detail critical rules regarding how Developing Countries may either exercise provisions to request for assistance, enforce the right to assistance or detail the extent to assistance and specific Developed Members obligated to provide the assistance. A considerable number of preferential treatment rules greatly derogate from the Hong Kong Declaration, to provide "precise, effective and operational" S&DT,[581] due to the deliberate open-ended construct of the rules.

Non-peremptory S&DT provisions, which are drafted in obligatory language are common under WTO Agreements, and were also examined in this chapter. A considerable number of the provisions are often constructed in aspirational character, use non-committal language and cannot bind members despite being taken up in a treaty provision.[582] S&DT provisions are further softened by the use of the common reference of the obligation to 'consider' providing S&DT as well as the use of the word 'should' instead of 'shall', which detract from the S&DT's apparently mandatory nature. This was particularly the case under the GATT 1994, and Decision on Measures in Favour of Least-Developed Countries, with the latter addressed in *Korea – Radionuclides*. Vague language is a large contributor to non-mandatory provisions, with provisions on technical assistance requiring Members under the SPS Agreement to "consider" providing assistance.

Lastly, complex S&DT rules which are difficult for Developed Countries to implement were also analysed. A large majority of the provisions emanate from Part IV of the GATT 1994, particularly Article XVIII Sections C and D (exceptions to GATT 1994 rules to promote establishment of a particular industry), which requires numerous pre-conditions that make it complex and consequently difficult for Developing Countries to use.

S&DT provisions under current WTO rules require streamlining and to conform to a defined and predictable form, and to substantively reflect the objectives regarding the MTS, and Developing Countries. The need is apparent from the conflicting drafting styles and diverging constructs that they were crafted in regarding mandatory wording, complexity

[581] *Hong Kong Declaration* (n 369 above) para 35.
[582] Footer (n 243 above) 8.

and non-specific wording which works against the principles developmental objectives. The rules currently reflect the political challenge of balancing Members interest, the need for preferential treatment by Developing Countries, and reservations in according such preferences from Developed Countries. Developing Countries themselves have not fully cooperated in WTO structures to strengthen S&DT provisions in the MTS. A decision was taken at the Bali Ministerial Conference in December 2013 to establish a Monitoring Mechanism on S&DT, undertaken on the basis of written inputs or submissions made by Members, to analyse and review the implementation of S&DT provisions.[583] As of 22 September 2016, no written submissions from Members had been made,[584] which indicates either a lack of technical or financial capacity in pushing the trade and development agenda, or interest from Developing Countries, or deficiencies in the mechanism itself.

S&DT under the MTS require political buy-in from both Developing and Developed Countries to re-construct substantive and structural rules on preferential treatment. This could be through amendment of the S&DT provisions under WTO agreements.[585] This could also be attained by providing for authoritative interpretation on S&DT under the WTO rules.[586] A further approach, may be for Members to enter into a new S&DT Agreement. These approaches will be explored in the next chapter, with the view of attaining objectives Members agreed embodied in the Hong Kong Declaration, of establishing "precise, effective and operational" S&DT.[587]

[583] WTO *Monitoring Mechanism on Special and Differential Treatment* (n 289 above). According to the Decision, the Monitoring Mechanism which operates in Dedicated Sessions of the CTD is to act as a focal point within the WTO.
[584] WTO *Special and Differential Treatment Provisions in WTO Agreements and Decisions* (n 278 above) para 1.6.
[585] WTO Organization *Non-mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions* (n 374 above) 3; Amending S&DT in Agreements would convert non-mandatory provisions into mandatory ones, through amending specific provisions, i.e. replacing the term "should" with the term "shall", while leaving the rest of the provisions unchanged. Article X of the WTO Agreement contains rules on amendment, which require a two thirds majority by Members. The only amendment made to date has been the Protocol *amending* the TRIPS Agreement.
[586] WTO Organization *Non-mandatory Special and Differential Treatment Provisions in WTO Agreements and Decisions* (as above) 3; Article IX:2 of the WTO Agreement, which lays down the WTO rules on authoritative interpretation, specifically states that authoritative interpretation may not be used in a manner that would undermine the amendment provisions of Article X. Only the Ministerial Conference or the General Council have the authority to adopt interpretations of the provisions of a WTO agreement. Decisions to adopt an interpretation must be taken by a three-fourths majority of the Members.
[587] *Hong Kong Declaration* (n 369 above) para 35.

Chapter 4: Establishing a Framework for S&DT under the WTO

This chapter establishes a conceptual framework for S&DT rules under the WTO. The primary objective in developing the framework is to ensure that it subscribes to WTO developmental objectives and trade rules and addresses challenges and shortcomings of S&DT (as identified under chapter 3 of this study). The envisaged framework and model WTO legislation is to be developed for the operation, use, and implementation of S&DT rules.

The chapter, firstly, examines structural approaches [proposed legal arrangement in which WTO trade rules and Agreements exist under the MTS] and considerations regarding improving and redressing S&DT under WTO Trade rules. This is followed by a critical analysis of the potential outcomes as a result of the proposed approaches employed in the chapter. The study then proceeds to adopt a unique approach based on the objectives, challenges and proposed models and details the rationale and justification for the said approach. The envisaged S&DT Framework is then developed, with an explanation of the Articles under each part of the framework. The consolidated S&DT Legal Framework Agreement is annexed to this thesis and titled "Annexure A".

4.1 Proposed Approach by Developing Countries

Developing Countries as well as academics have repeatedly asserted that an S&DT framework would result in a more consistent approach to S&DT.[588] Some approaches proposed by scholars to developing a Framework Agreement on S&DT were examined in the Literature Review in chapter 1 of the study. A number of these approaches have been adopted in the conceptual Legal Framework. Approaches suggested by Developing Countries have not been examined in this study as of yet. Two proposed approaches to a

[588] Kleen & Page (n 111 above) xii. Also see Doha Declaration (n 1 above) para 44. Also see Hoekman (n 87 above).

framework on S&DT by Developing Countries will be examined in the chapter below. These two proposals were raised at two significantly different times.

4.1.1 Doha Round Proposal on S&DT Framework by Developing Countries

The first proposal by Developing Countries was put forward in 2001 during the preparations for the Doha Fourth Session of the Ministerial Conference. Developing Countries called for a framework in September 2001 to elaborate a Framework/umbrella Agreement on S&D treatment.[589] Prior to the Ministerial conference, the Developing Countries submitted a proposal for a framework to the WTO General Council, which consisted of challenges and general issues regarding S&DT experienced under the WTO S&DT construct at that particular time.[590]

The second proposed approach by Developing Countries was contained in a communication to the WTO General Council in early 2019 titled "The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness".[591] This communication was primarily aimed at refuting data and statements made by the US in the communication titled "An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO," which contained assertions regarding *inter-alia* self-declaration and graduation to the General Council in 2019.[592] The contents of the communication from the US will be examined further in this Chapter, however the primary claim by the US is that the system of self-declaration contradicts liberalisation objectives, and doesn't reflect the current levels of trade and development of emerging Developing Countries, particularly China. The Communication further stated that the WTO is silent on graduation.

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[589] *Doha Declaration* (n 1 above) para 44 which stated: "We note the concerns expressed regarding their operation in addressing specific constraints faced by Developing Countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment".

[590] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above). The Countries which tabled the proposal were Cuba, the Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe.

[591] WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above).

[592] World Trade Organization *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* 16 January 2019 Communication from the United States WT/GC/W/757 (WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO)*.

In examining the first proposed approach, Paragraphs 10 to 15 of the proposal for a Framework/umbrella Agreement contain details of the proposed framework by Developing Countries. The objective behind the proposed framework was to ensure that "all the existing S&D provisions in various WTO agreements should be fully operationalised/ implemented".[593] The proposal went on to further qualify this statement by providing that the "implementation should go beyond technicalities and include operationalisation of provisions that presently lack operational modalities".[594] The Developing Countries' proposal and approach, however, failed to detail the construct of the modalities particularly relating to the specifics of which provisions require re-crafting, or the technical details of how the provisions should be amended and the language that should be utilised in ensuring for implementable S&DT. No draft provisions, or envisaged general modalities or clauses that could be applied to most WTO Agreements and in the proposed framework itself to address the deficiencies were put forward. The lack of operational modalities in WTO Agreements was identified as a consistently re-occurring issue in most WTO Agreements in chapter 3 of this study. Development of a framework, which incorporates modalities, ensures preservation of rights through operational rules which allow for the enforcement of S&DT provisions.

The proposal contains general and specific proposals. The first general proposal tabled by the Developing Countries is that the proposal comes with a "medium term" solution to amend WTO Agreements in a way that accords necessary flexibility to pursue appropriate policies and facilitate economic development in the Developing Countries.[595] This approach is effective in addressing implementation of specific provisions, however, may be legally considerably cumbersome, as it would involve amendments to numerous Agreements. The proposal by Developing Countries was, however, silent on the particular areas within which it seeks to incorporate the economic policies of Developing Countries in the individual agreements. The proposal does not detail or list specific provisions that fall short of such opportunity in the various WTO texts, i.e. safeguards and details around the fact that Article

[593] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above) para 12.
[594] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (as above).
[595] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (as above) para 13.

9.2 of the Agreement on Safeguards is insufficient to facilitate domestic interests.[596] Identifying specific provisions, and proposing amendments to the text, would assist in measuring the extent of amendments required under the MTS, which is an important factor in determining the approach to take regarding re-working S&DT rules.

The long term approach the Developing Countries proposed was to establish a framework/umbrella agreement on S&D treatment which "should include provisions reflecting the objectives and principles of S&D treatment for Developing Countries".[597] The details of the proposed principles which should be incorporated in the Agreement on S&DT by the Developing Countries included the following: [598]

- evaluation of the development dimension in all future WTO Agreements, which speak to how these Agreements facilitate attainment of developmental targets;
- evaluation of the implications of any future agreement by Members, particularly with respect to implementation costs in terms of financial, capacity building and technical assistance;
- linkage of transition periods to an objective and social criteria;[599]
- mandatory and legally binding S&DT through the dispute settlement system of the WTO, which includes notification requirements, and the inclusion of commitments in country schedules;
- allowing [do not prohibit] policies in Developing Countries which promote growth and development, particularly where there is no evaluation of whether the Industrial Policy has a demonstrable adverse impact on trade; and
- the application of the concept of Single Undertaking for Developing Countries should not be automatic.

Overall, the proposed framework is largely undeveloped and unrefined. This approach, to provide general proposals regarding S&DT, may have been deliberately undertaken

[596] The provision provides for the right for Developing Countries to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided of eight (8) years.
[597] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above) para 14.
[598] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above) para 15.
[599] Economic criteria proposed includes development level, level of industrial development and human development index. Social criteria include literacy and life expectancy.

considering the context that the proposal was developed under. It was submitted to the General Council a few months prior to the launch of the Doha Round and it therefore may have been proposed in order to introduce general S&DT considerations which were to be tabled at negotiations. The proposal is useful, however, to the extent that it generally provides for approaches at making S&DT more operational, specific, and in line with WTO development objectives. The said proposal, up to date, has not been further developed since its development in 2001. Lack of or the failure to develop or adopt a holistic and development encompassing Agreement by WTO Members States, is one of the factors that has necessitated the development of the main argument of this thesis.

4.1.2 Proposals Regarding S&DT Contained in 2019 Communication to the US

In examining the second proposed approach, it is important to note that the communication from the Developing Countries to the US, was primarily aimed at addressing a number of issues. The first was the deepened divide between Developed and Developing Countries. The second, the contentious issue of self-declaration, and lastly, "reversed S&DT" which was a heading used to describe long-lasting imbalances in the multilateral trading system as well as distortions in the international trade. The Communication contains important assertions and the positions of S&DT from Developing Countries, which may be considered in arguments for the change or reform in structure and substance of S&DT under the current dispensation.

The importance of the communication to the discourse on a framework is twofold. Firstly, it established the role S&DT plays in addressing capacity constraints.[600] Capacity constraints are linked to needs of Developing Countries, as overcoming them is critical for development in the trade dimension.[601] The communication states that S&DT was to ensure that "negotiated outcomes would accommodate differences in levels of economic development as well as the capacity constraint of developing Members". The WTO areas where

[600] WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above).
[601] This is acknowledged in most Uruguay Round Agreements and the *TFA* through S&DT which addresses assistance to enable Developing Countries to implement WTO Agreements.

Developing Countries face capacity challenges, referred to in the communication, include *inter alia*;

- lack of negotiating capacity at human resources level which persisted from the GATT to the WTO;[602] and
- lack of coordinating capacity at institutional level, that is that Multilateral trade negotiations involve governmental agencies of foreign affairs, economy, industry, trade and other agencies of a member, which require overall coordination, speedy response and flexible adaptation.[603]

The above is indicative of the need for a framework that adequately addresses capacity constraints, particularly in negotiations and at implementation and coordination at a national level, as will be justified further in this chapter under the proposed S&DT Framework Agreement. This may be done through adequate flexibilities to implement WTO Agreements, technical and financial assistance, with modalities to ensure specific binding use of the S&DT provisions. This may address the "[…] big asymmetry between the two [Developed and Developing Countries] in formulating multilateral trade rules due to the capacity constraint. The formal "de jure" equality cannot mask the "de facto" inequality in reality".[604]

Secondly, the communication speaks of the issue of eligibility of Developing Countries in the use of S&DT, particularly by advancing factors and economic indicators to determine development levels and trade needs of Developing Members. The question of eligibility is central to the development of the conceptual framework, as it is imperative to determine which Country is entitled to preferential treatment. The graduation topic will be discussed in more detail below.

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[602] WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above) para 3.4 (a). Developed Members have been in a dominant position in the initiation of negotiations, the design of rules, the assertion of rights, and even the "flexible use of rules".

[603] WTO *The Continued Relevance of Special and Differential Treatment* (as above) para 3.4 (b). Developing members usually lack a unified policy across different departments and have difficulties in fully assessing and accurately analysing the impacts of multilateral trade negotiations on the economic system, industrial development, among others, as well as formulating the national trade negotiation strategies and tactics accordingly. Such incapability leads to deficiencies in the leadership, stability and continuity of trade negotiations.

[604] WTO *The Continued Relevance of Special and Differential Treatment* (as above) para 3.5.

The classification of countries and factors that determine such categorisation varies under respective International Organisations. It was expounded in chapter 1 that the WTO, unlike the UN and the World Bank, operates with a self-designation system, where Member-States announce for themselves whether they are 'Developed' or 'Developing' Members, as opposed to a system that classifies Countries on the basis of numerous indices and factors. As the graduation issue under the WTO gained momentum, Developing and Developed Countries have proposed various indicators, criteria, and factors to the argument. Developing Countries, in their communication to the General Council and rebuttal to the US, under pressure to counter the US proposed criteria, also proposed factors and economic indicators to determine development levels.[605] The Developing Countries opined that the US [and other Developed Countries] employ selective economic and trade data, such as Human Development Index, Trade exports, FDI and macroeconomic indicators such as economic production and per capita income. The Developing Countries went on to propose that other considerations should be recognised, which include *inter-alia*:

- Top 10 countries with the Largest Proportion of the World's (MPI) Poor;[606]
- Distribution of Under-nourished Population;[607]
- Subsidies Per Capita to Farmers;[608]
- Farmers Per Hectare;[609]
- Share of Agriculture in Total Employment;[610] and
- Intellectual Property Rights Receipts.[611]

The above list and indices raised by Developing Countries extended beyond the usual trade scope. There are factors such as "Best global Universities"[612] which is far from the trade scope, which were included to support the argument on the superiority of Developing Countries under the MTS. This is with respect to technical capacity in implementing trade

[605] WTO *The Continued Relevance of Special and Differential Treatment* (as above) para 3.4(b).
[606] WTO *The Continued Relevance of Special and Differential Treatment* (as above) p 14.
[607] WTO *The Continued Relevance of Special and Differential Treatment* (as above) p 15.
[608] WTO *The Continued Relevance of Special and Differential Treatment* (as above) p 17.
[609] WTO *The Continued Relevance of Special and Differential Treatment* (as above) p 19.
[610] WTO *The Continued Relevance of Special and Differential Treatment* (as above) p 21.
[611]WTO *The Continued Relevance of Special and Differential Treatment* (as above) p 24.
[612] WTO *The Continued Relevance of Special and Differential Treatment* (as above) p 29.

rules, and trade negotiations , and to highlight deficiencies of Developing Countries in the area. Factors such as these are unconventional and are uncommon indices used in a Developing Country debate. This factor may be justified as WTO Members with a considerably high number of "Best global Universities" would be able to produce necessary human capital capacity in trade and economic related areas, at the benefit of a particular Country. This has been a particular area of weakness for Developing Countries; therefore this factor could be one to consider.

The underlying proposal advanced by the Developing Countries, as deduced from the communication, is that eligibility for S&DT and development levels are to be tied to specific areas and indices which directly relate to particular circumstances of a Developing Country. Essentially, each case must be contextual, and eligibility to S&DT must be related to the circumstances, which should be examined with relevant indices. This is that S&DT should not be restricted by the narrow application of indices currently applied by the international organisations, such as the UNDP Human Development Index (HDI), Total Exports of a Country, and FDI,[613] or restricted to the US' draft decision, which proposes to make S&DT ineligible for;

i. A WTO Member that is a Member of the Organisation for Economic Cooperation and Development (OECD), or a WTO Member that has begun the accession process to the OECD;

ii. A WTO Member that is a member of the Group of 20 (G20);

iii. A WTO Member that is classified as a "high income" country by the World Bank; or

iv. A WTO Member that accounts for no less than 0.5 per cent of global merchandise trade (imports and exports).[614]

The shortcoming with the above-mentioned criteria, according to the Developing Countries, is that they are restrictive, and do not reflect the real divide between Developing and Developed Countries, and that factors should extend beyond the above-mentioned

[613] WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* (n 592 above).
[614] World Trade Organization *Procedures to Strengthen the Negotiating Function of the WTO* 15 February 2019 Draft General Council Decision WT/GC/W/764 (WTO *Procedures to Strengthen the Negotiating Function of the WTO)*.

conventional criteria.[615] They argue that indices should be based on development in the context of a human being, as the WTO recognises in various agreements such as the SCM Agreement under Article 8.2 (b) (iii).[616] This would include *inter-alia* considerations of economic indicators on poverty population, under-nourished population, digital divide, research and development (R&D).[617]

Eligibility of S&DT is a contentious topic, as it could lead to loss in trade preferences. It is a highly political trade conversation and negotiations on data indices and factors for eligibility is polarising, as evidenced through the exchange of communication between the US and Developing Countries, as referenced above. Subsequent to the communication from the US, President Donald Trump took strong measures regarding the issue, threatening to unilaterally deny Developing Countries preferences that the US feel are undeserving.[618] The US further claimed abuse of S&DT WTO rules, which were meant to help "struggling economies". This pressure was primarily aimed at China,[619] however, WTO Members such as Brazil, Singapore, Taiwan and South Korea succumbed to the threats, making announcements to forego developing status at the WTO.[620]

The foregoing political pressure appears to be based on the above-mentioned US approach regarding what it believes should be the applicable categorisation to determine a Members' Status. This "carte-blanche" application of indices, without considering specific context, e.g. food security, is mis-aligned to the WTO rationale behind S&DT. S&DT follows the Doha Mandate - that it must be linked to trade needs.[621] The proposal by Developing Countries to

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[615] WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above) para 2.

[616] *SCM Agreement* (n 392 above) Article 8.2(b)(iii) provides "income per capita", "household income per capita" and "GDP per capita" are mentioned for the purpose of measuring the economic development of a member

[617] WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above) para 2.1 to 2.9.

[618] Law 360 https://www.law360.com/articles/1213561/s-korea-gives-up-preferential-WTO-status-after-us-rebuke?copied=1, (accessed 5 November 2019). In July 2019, President Donald Trump handed down a memorandum in July that directed US Trade Representative Robert Lighthizer to pursue solutions to the problem over the course of 90 days, after which the administration would unilaterally deny developing country preferences to nations that it did not feel were deserving of them.

[619] Law 360 https://www.law360.com/articles/1182563/trump-looks-to-hack-away-china-s-developing-WTO-status?copied=1, (accessed 5 November 2019). President Donald Trump opened a new front in his economic showdown with China on Friday, blasting Beijing and other governments for receiving preferential treatment as "developing" countries at the World Trade Organization and calling for a swift change in policy.

[620] Law 360 (as above).

[621] Doha Declaration (n 1 above) para 2: "We seek to place Developing Countries' needs and interests at the heart of the Work Programme adopted in this Declaration […]" and "positive efforts designed to ensure that Developing Countries, and

the WTO General Council, therefore, as inconclusive and novel as the indices are, is one that has legal basis under WTO law. Specifically, that eligibility for S&DT and development levels is to be tied to specific areas and indices, which directly relate to the particular circumstances of a Developing Country. This position and approach will be considered in formulating the conceptual framework.

4.2 Critical Analysis of Approaches Adopted in the Framework

The Communication between the US and Developing Countries raises a number of crucial issues which need to be resolved in the Legal Framework Agreement. The Framework inherently addresses;

- differentiation between Developing Countries themselves;
- the controversial issue of graduation (briefly examined in the section above); and
- cost and benefits of a framework Agreement for both Developed and Developing WTO Members.

4.2.1 Differentiation under the Framework Agreement

A position on differentiation needs to be adopted before crafting the Legal Framework. The objective and rationale behind S&DT in chapter 2 and interpretation from Agreements and Decisions, offer guidance on the issue of differentiation. The examined provisions (in chapters 2 and 3) revealed that S&DT was envisaged to meet Developing Countries' specific [individual] needs. WTO takes into account needs of individual contracting parties and LDCs, in particular as set out under Article XXVIII bis (3) (a) and (b) of the GATT 1994. Paragraph 44 of the Doha Declaration acknowledges the need to address specific needs of LDCs and Developing Countries. The Enabling Clause examined in section 3.2.1 was also found to contain S&DT on preferential market access for Developing Countries on a non-reciprocal and non-discriminatory basis. A position on this issue was adopted by the Appellate Body in *EC – Tariff preferences*, which held that relevant tariff preferences under GPS schemes may

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especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development".

be "non-discriminatory" when addressed to a particular development, financial or trade need and are made available on the basis of an objective standard to all 'beneficiaries that share that need".[622]

The Legal Framework should clearly cascade the principle of differentiation to WTO Agreements and within its context. Clarity is required on the issue in order to facilitate effective implementation of S&DT provisions, as lack of clarity or ambiguity was identified as one of the reasons Developing Countries fail to utilise S&DT. The Framework shall construct a system where Members are able to identify themselves by their respective needs and interests and provide for differentiation of Developing Countries. It shall also establish rules on mandatory extension of S&DT by Developed Countries to Developing Countries sharing similar needs in order to ensure that identical treatment is available to all similarly situated Members. This is within the envisioned objective under Paragraph 44 of the Doha Declaration of ensuring specific tailored S&DT satisfies "development, financial and trade needs" and in line with the Appellate Body's findings in *EC – Tariff Preferences*.[623]

This position departs from the MFN principle. There would, therefore, be no requirement for a Developed Country to provide S&DT on an MFN basis under the Framework Agreement to a Developing Country which does not possess or have broad interest or needs. MFN therefore cannot solely be relied on as the basis for S&DT, particularly if Developing Countries are not "similarly situated," or do not share the same interest and needs. An example of this is where Botswana utilises a S&DT provision for technical assistance regarding SPS related issues for market access accorded by the United Kingdom. Another Developing Country such as Tanzania or China would not be entitled to seek preferential treatment under the same S&DT provision if it has not identified or notified the particular need. The modalities shall be explored under the Framework in the next chapter. The principle, however, would mean that discrimination would therefore apply between

[622] *EC – Tariff Preferences* (n 19 above) paragraph 165. On interpreting Paragraph 3(c) of the Enabling Clause (n 20 above). Also see World Trade Organization, EC – Tariff Preferences Summary. See https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds246sum_e.pdf (accessed 2 March 2020).
[623] *EC – Tariff Preferences* (as above) para. 165.

Developing Countries and LDCs. There are implications and costs to this approach, which will be examined below.

4.2.2 Graduation in the Framework Agreement

It was established under chapter 2 that the WTO follows a self-designation system, where Members announce for themselves whether they are 'Developed' or 'Developing' Members, and recognises LDCs as those countries which have been designated as such by the UN. It has been argued that "[…] overall, no consistent treatment of the developing country category emerged from the decades of GATT practice".[624] Chapter 2 further showed the drastic diverging sizes of developing economies and disparities in the share of global export and imports through the 2019 World Trade report.[625] The issues of differentiation and graduation are inherently tied to S&DT as Developing Countries derive preferential treatment from their status as such.

Section 4.1.2 further examined how the US recently re-ignited the issue of differentiation aggressively by calling for the rethinking of this practice of "self-designation" arguing not only that it is outdated, but also damaging to the institution overall.[626] The US has asserted that a key structural challenge inherent to traditional S&DT is its dependence on country differentiation. In February 2019, the US even proceeded to submit a proposed General Council Decision that propositions to limit certain WTO Members from being eligible for S&DT in future arrangements.[627] The draft decision proposes to make S&DT ineligible for;

i. A WTO Member that is a Member of the Organization for Economic Cooperation and Development (OECD), or a WTO Member that has begun the accession process to the OECD;

ii. A WTO Member that is a member of the Group of 20 (G20);

iii. A WTO Member that is classified as a "high income" country by the World Bank; or

[624] Rolland (n 57 above).
[625] *World Trade Report 2019* (n 270 above).
[626] WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* (n 592 above).
[627] WTO *Procedures to Strengthen the Negotiating Function of the WTO* (n 614 as above).

iv. A WTO Member that accounts for no less than 0.5 per cent of global merchandise trade (imports and exports).[628]

The implications of this Draft Decision, if implemented, is that it would stretch out to a wide range of WTO members and disqualify Members that include Argentina, China, India and Indonesia and South Africa – Members with vastly different national and regional characteristics. This proposition concludes the US' position on debates by Members of US Congress on whether or not to continue to include emerging market Developing Countries (e.g. India, China) as beneficiaries or to limit the program to LDCs.[629] In the Developing Countries' response, the main argument advanced is that the practice of self-declaration has served to allow developing Members to gradually comply with GATT 1994/WTO disciplines and to integrate themselves in the multilateral trading system with a negotiated degree of policy space.[630] It is further asserted, that the US uses selective Data in its argument against self-declaration.

The graduation rules shall be developed under the Framework Agreement. It is critical to address the graduation argument for two specific reasons.

S&DT was envisaged to be equitable, as demonstrated in the discussion of the historical and contextual development in chapter 2. The said chapter explained that one of the cornerstones of equity is that two persons of unequal rank cannot be treated alike. Differentiation of WTO Members, therefore, is essential to the MTS's mandate of establishing trade rules and frameworks that are fair and equitable, that address inequality, and differentiate between states. The WTO, therefore, cannot ignore the diverging differences between utilising this argument - emerging economies which have equalled or surpassed indices to be established under the Framework Agreement should be re-classified as Developed Countries. Incorporating a Graduation Article, predicated on an objective assessment, would ensure Members are categorised in line with their respective level of development and not entirely based on their self-declared status. This would benefit both

[628] WTO *Procedures to Strengthen the Negotiating Function of the WTO* (as above).
[629] Generalised System of Preferences (GSP): Overview and Issues for Congress, Updated January 8, 2019, Congressional Research Service, see https://fas.org/sgp/crs/misc/RL33663.pdf (accessed on the 27th February 2019)
[630] WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above) Paragraph 5.11.

Developing Countries not categorised as emerging, LDCs, and Developed Countries. The latter would be relieved from granting S&DT to the emerging Members which would have graduated and would potentially share costs associated with S&DT and granting preferences.

Emerging economies would potentially be classified as Developed, which means additional trade preferences to Developing Countries, particularly LDCs, which are in need of increased preferential treatment. This would be on account of increased S&DT obligations which the graduated Members would be obligated to accord to Developing Countries. It would result in increased market access, protective measures and financial and technical assistance in areas specific to Developing Countries. Chapter 6 shall explore this argument and expound on how there is a considerable growth of South-South trade, particularly with emerging economies such as China and African States. This will be explored in the context of SADC Members later in this thesis. S&DT, in such a relationship, may benefit the LDCs and Developing Countries more than preferential treatment from other Developed Countries which they have low trade with.

Secondly, graduation would address and prevent the concern of the US (and what should be all WTO Members' concern) that S&DT provisions "have been 'abused' to allow 'bigger developing countries', with China foremost among them, to wiggle out of obligations and not submit to rules".[631] Graduation rules would be envisaged to prevent emerging economies from abusing S&DT through establishing modalities regarding reviews and criteria to undertake graduation. Modalities would indisputably be a contentious issue, however, they shall be developed in order to establish defined criteria on the issue, as opposed to continuing the current dispensation where certain Members are able to enforce S&DT rights that the WTO Agreements, and the Paragraph 44 of the Doha Declaration, did not envision them to possess.

It is envisaged that the inclusion of the Graduation Article in the Framework would be a motivating reason for Developed Countries to agree to the Framework. It is, however,

[631] R Davies *The Politics of Trade in the Era of Hyperglobilisation - A Southern African Perspective* (2019) 52.

evident that the position would face considerable opposition from emerging economies, particularly China. This has already partially played out in the exchange of communications between the US and China and other Developing Countries cited in this chapter. Graduation would also considerably reduce emerging economies' trade policy and ability to negotiate favourable terms for their economy. The above-notwithstanding, the beneficial impact for Developing Countries (which are not emerging economies), LDCs and Developed Countries, and the contextual and historical spirit of S&DT, outweighs the interests of emerging countries. This, therefore, justifies the inclusion of the graduation chapter in the S&DT Legal Framework Agreement.

One of the critical outcomes from the Framework Agreement is that S&DT, as a form of preferential treatment, will inherently create winners and losers. The primary objective is to ensure that S&DT subscribes to the principles agreed by WTO Members, at paragraph 44 of the Doha Declaration of creating precise, effective and operational rules. A further objective is to ensure that the preferential treatment results in long-term gains primarily for Developing Countries, particularly for LDCs such as Lesotho, and Developing Countries with undiversified economies such as eSwatini which have a low share of global trade. A balance however needs to be sought in enabling them to increase their share of global trade, whilst lifting the burden of reliance on Developed Countries for trade-related aid, preferential treatment and technical support.

The emerging economies however under the Framework Agreement would be likely to be the biggest 'losers' from the said Agreement, if they do not have any notified needs under Article 3, or due to application of the graduation rules. The increase in S&DT obligations of Emerging economies would outweigh any additional obligations Developed Countries have under the Framework, which have their obligations counterbalanced by the reduced use of S&DT on account of the notification and interest clauses which would sift out Developing Countries that do not demonstrate needs. The biggest hurdle therefore would be acceptance of such rules by Members like China, which would be opposed to rules dis-aligned with their trade policy. China has not bowed to pressure from the US to relinquish

S&DT, like Singapore and Brazil, as evident from the communications between Developing Countries and the US in this Chapter, and the Trade war with the US discussed at Chapter 2.

4.2.3 Cost and Benefits of the Framework Agreement

One of the first costs of the approach to be adopted in the Framework Agreement would be that the system would require financial and technical human capital on the part of Developing Countries. This is in relation to notification of needs under the Framework, which would require an understanding of S&DT and trade rules in general and capacitation of relevant technical officers responsible for undertaking an evaluation of trade needs and interest, where this has not been done. Developing Members would be required to understand S&DT provisions and adequately make notifications to be included or grouped into the said category of needs in order to benefit from the Framework Agreement. Section 4.1.2 indicated human-capital and financial constraints in WTO negotiations which leads to low participation in the communication from Developing Countries to the U.S.[632] This would require intervention through financial and technical assistance from Developed Countries to facilitate capacitation and assistance in developing human capital in Developing Countries.

Another critical cost and outcome that may emerge from the Framework Agreement, is that Developing Countries which fail to identify or demonstrate a particular need under the Framework Agreement may be excluded from benefitting from particular S&DT under the Framework Agreement. This is a critical principle under the Framework which allows allocation of preference and assistance to needy Developing Countries, and prevents undeserving Members from taking advantage of S&DT opportunities. The Framework Agreement however needs to safeguard against a deserving Developing Country loosing trade preferences or assistance, even if it has a legitimate or demonstrable need, due to incapacity or inability to report or notify the need. The Legal Framework Agreement should be robust enough to enable those that need preferential treatment to gain from it but not exclude Developing Countries, which are unable to perform reporting or notification

[632] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above)

functions to be excluded from S&DT. Contingency measures should be put into place to ensure Developing Countries do not lose preferential treatment on account of failure or incapacity to identify or demonstrate needs.

The benefits from this approach, however, are envisaged to outweigh the costs for Developing Countries. Firstly, this approach enables Developing Countries to receive preferential treatment in line with areas of interest and suited to their needs. S&DT was always structured to be specific to developmental circumstances. By ensuring S&DT is targeted to address particular trade challenges, coupled with well-structured implementation and enforcement measures in the Framework Agreement, Developing Countries will be able to overcome obstacles to increase their share in global trade. The second benefit is that this approach also encourages Developing Countries to develop comprehensive and directed domestic trade policy, which aligns with S&DT provisions focused on their needs. Developing Members are able to align S&DT provisions with government programmes and interventions for enhanced trade gains. The approach, however, may have negative long term effects if Developing Members develop trade policies specifically based on securing or deriving S&DT preferences, as opposed to their real comparative advantage and sustainable economic policies. Further, this opens up potential dependency on S&DT, as opposed to self-sustaining economic growth. It is therefore imperative that Developing Countries adopt policies that are adept to their long term sustainable development and growth, and utilise S&DT strategically to galvanise their respective development agenda.

There are also costs and benefits of the above approach for Developed Countries. The first cost would be the extension of preferential treatment to all Members who group themselves under a particular need. Clarity of the notification system under new rules may result in more Developing Countries notifying needs and interest, thereby binding Developed Countries to extend trade preferences under 'non-discriminatory' rules to similarly situated or grouped Developing Countries. This, however, could be counter-balanced with the fact that there may be fewer Developing Countries which identify needs

that the existing S&DT that Developed Countries currently offer. The loss, therefore, would be dependent on the nature of S&DT and whether needs have been notified by Developing Countries. This will be further explored in the next section.

Further costs Developed Countries would incur under this approach, would be the technical and financial expenses in rendering technical and financial assistance to Developing Countries. It was indicated above that Developed Countries would be required to develop capacity in understanding S&DT and trade rules in general and in making notifications under the Act regarding needs and interests. This assistance would be required over and above other obligations to render assistance under RTAs and WTO Agreements, such as the TFA.

There are benefits that Developed Countries would derive from the Framework Agreement. The most notable, and important, is that the exclusion of S&DT preferences under the Framework Agreement also addresses the issue of Emerging economies, which seek to 'freeload' S&DT on account of their developing-status. The said Members will be precluded from deriving S&DT under the Agreement where a need is not demonstrated. Developing Countries would have the ability to choose preferences according to their needs, but all Members would have limited discretion in determining eligibility which will be detailed under the Agreement. The CTD would operate as a quasi-adjudicator in making critical determinations over needs. This is an improvement from the current dispensation which extends all benefits to all developing countries regardless of their actual interest in a particular S&DT benefit, and which allows Developed Countries wide discretion in withholding or according preferential treatment.

By grouping needs of Developing Countries, and according S&DT to members who identify or demonstrate needs, this system essentially filters Developing Members, ensuring those which have a general need, receive preferential treatment. The Framework Agreement should be robust enough to ensure preferential treatment is justifiable. The Framework, therefore, would be an attractive proposition to Developed Countries, particularly those that have opposed emerging economies, continuing to derive preferential treatment due to

its status as a Developing Country. The US is one such Country, which has taken a strong opposition to China continuing to derive S&DT despite its share of global trade and development indicators, as examined in the section above.

The proposed approach of developing a new S&DT Framework Agreement, as opposed to the "medium term" solution to amend WTO Agreements would have lesser long-term costs for Developed Countries. Under the "medium term" approach enhanced and mandatory rules would potentially require a higher level of preferential treatment from Developing Countries across a wide scope of goods. The Framework Agreement would, on the other hand, have fewer eligible countries accessing and utilising S&DT in line with identified specific needs. Technical and Financial assistance would also follow, with a larger group of Developing Countries being eligible for assistance, whereas under the Framework the system of demonstrating needs would filter out Countries which do not require assistance from receiving it. Compliance costs under the Framework Agreement for Developing Countries would be significantly higher than the approach of amending Agreements, as the latter approach would not require frequent needs assessments.

4.3 Approach adopted in Proposed Framework

The approach and structural considerations to be employed in developing the conceptual Framework Agreement are directed by the objectives of the Framework itself. The objectives of establishing a framework are formulated at addressing the specific S&DT challenges identified in chapter 3. The objectives are summarised as follows:

- to secure the rights of Developing Countries under WTO law for increased participation and integration in the MTS;
- to facilitate a predictable, enforceable and equitable MTS;
- to ensure a consistent approach to S&DT;
- to secure and solidify preferential conditions for Developing Countries which can be utilised in RTAs, as they are to subscribe to WTO laws;
- to conserve Developing Countries' ability to negotiate;

- to holistically address development-related issues under the WTO. The framework should operate as an interpretative instrument, to harmonise trade and development.

The objectives adopted in the Work Programme on S&DT adopted at the Fourth Session of the Ministerial Conference also guide the approach employed in the Framework, particularly with respect to how S&DT is to be incorporated into the architecture of WTO rules.[633] The Work programme provides that three areas are required for the strengthening of S&DT, namely:

> (a) identifying ways to make existing S&DT provisions be more binding;
> (b) additional measures to make S&DT more effective; and
> (c) incorporating the principles of S&DT into the system and architecture of the WTO.[634]

From the careful examination of the structural challenges in the WTO's development agenda in chapter 2, and shortcomings in numerous diverging agreements as examined in chapter 3, it is evident that S&DT requires an overhaul of its structure and substance. The findings in chapter 3 reveal corresponding challenges with the Doha Work Programme; that a considerable number of S&DT provisions are simply unenforceable or are underutilised due to vagueness or lack of specificity as adopted through a drafting style that lacks implementation. It was explained in section 2.4.3.2 that the reason for open flexible S&DT

[633] *Doha Decision on Implementation-related Issues and Concerns* (n 345 above). Ministers endorsed the Work Programme on Special and Differential Treatment set out in the Decision on Implementation-Related Issues and Concerns and, as per paragraph 12.1, of the Decision directed the Committee on Trade and Development.

[634] *Doha Decision on Implementation-related Issues and Concerns* (as above). The Work Programme provides that the Committee on Trade and Development is to:

a. to identify those S&DT provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting S&DT measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;
b. to examine additional ways in which S&DT provisions can be made more effective, to consider ways, including improved information flows, in which Developing Countries, in particular the LDCs, may be assisted to make best use of S&DT provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and
c. to consider, in the context of the Work Programme adopted at the Fourth Session of the Ministerial Conference, how S&DT may be incorporated into the architecture of WTO rules."

provisions was that this drafting style was deliberately adopted by the WTO. Further, that it was intended to deal with flexibilities arising from trade negotiations and was therefore inherently open. This approach, however, has resulted in unintended consequences, instead leaving space for ambiguity, misinterpretation and failure to utilise important provisions by Developing Countries. The provisions have to be flexible or robust enough for use by a diverging number of Members but must be clear and unambiguous enough to enforce.

From the structure of S&DT under the WTO, it is evident that the Development agenda of the WTO and details of the same are not pronounced as coherently as in other agendas, such as trade liberalisation. Lack of implementation of S&DT provisions, particularly during the Doha Round reflects the unwillingness of Members, particularly a number of Developed Countries, to incorporate substantive S&DT into WTO Agreements.

The structural approach adopted and most effective method of attaining the objectives set-out, is to establish a new framework Agreement on S&DT. This is an approach which has been motivated by Developing Countries, as aforementioned earlier in this chapter[635] [albeit without detailing the provisions Agreement itself and modalities to be employed] and proposed by a number of legal jurists examined under section 1.8.4 of this Thesis. The rationale for this approach is that efficient application of S&DT requires all Member-States to be bound by a central WTO Agreement and essentially, a single set of rules in the WTO which comprises of numerous legal texts. The Framework holistically addresses S&DT shortcomings and challenges in existing (and subsequent WTO law) by establishing general rules which all S&DT provisions in the MTS are to subscribe to, which are to align with the development objective under the WTO.[636] The Framework also details specific rules on pertinent S&DT areas, as will be elucidated under this chapter.

[635] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above).

[636] It was stated in chapter 2 that that one of the primary Development Objectives was stated in the Agreement Establishing the WTO, specifically that "there is need for positive efforts designed to ensure that Developing Countries, and especially the Least-Developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". Further, that the word 'commensurate' in this phrase appears to leave open the possibility that Developing Countries may have different needs according to their levels of development and particular circumstances - Appellate Body Report, *EC – Tariff Preferences* (n 19 above) para 161-162.

The general guiding principles that the Framework employs, is to ensure rules are consistent, predictable, clear and simple for Developing Countries to utilise, across all WTO provisions in the WTO acquis. The Framework Agreement should be able to apply to specific provisions across the plethora of WTO acquis in both soft and hard law. This is, that the Framework should be able to be read together with WTO Decisions, Declarations, Agreements; and the Framework should provide clarify or provide specific rules on S&DT related issues in the said legal instrument. It should be able to clearly establish rights under the WTO MTS, which the current dispensation fails to do. In the same breath, the Framework should establish obligations of both Developing and Developed Countries regarding S&DT and limitations where other WTO objectives take precedence.

A Table of Contents of the proposed Framework Agreement is provided below for reference purposes and to provide direction with regards to the structure. The complete text of the Framework is provided at the end of this chapter. The Table of Contents is as follows:

AGREEMENT ON SPECIAL AND DIFFERENTIAL TREATMENT

Part I: Definitions and Interpretation

Article 1: Definition of Terms

Article 2: Interpretation

Part II – General Rules on Special and Differential Treatment

Article 3: Notification and Implementation of Special and Differential Treatment

Article 4: Enforcement of Special and Differential Treatment

Part III – Specific Rules on Special and Differential Treatment

Article 5: Market Access

Article 6: Protective Measures

Article 7: Flexibility of Commitments

Article 8: Transitional Periods for Developing and Least-Developed Country Members

Article 9: Technical and Financial assistance

Article 10: Sanitary and Phytosanitary Measures and Technical Barriers to Trade

Part IV - Function of the Committee on Trade and Development

Article 11: Function of the Committee on Trade and Development

Part V – Miscellaneous

Article 12: Graduation

Article 13: Monitoring Mechanism

Part VI - Dispute Settlement

Article 14: Dispute Settlement

Annex 1: Broad-based Recognition of a Particular Need

The text from each Part of the Framework Agreement is quoted at the beginning of each Sub-section of this thesis, for ease of reading. The rationale, examination and explanation of the substantive Parts of the Framework Agreement are then provided for in the relevant sub-sections. Multiple approaches were adopted in formulating the Framework. The said approaches, together with the structure and justification, are detailed below in the subsequent sections.

4.3.1 The Preamble

"Preamble

Members,

Recalling the Agreement Establishing the WTO, that there is need for positive efforts designed to ensure that Developing Countries, and especially the Least-Developed

among them, secure a share in the growth in international trade commensurate with the needs of their economic development;[637]

Recognising the applicability of the basic principles of GATT 1994,[638] *and reaffirming Members' commitment to substantial reduction of tariffs and other barriers to trade;*[639]

Recalling Paragraph 3(c) of the Enabling Clause, that special and differential treatment;[640]

> *"…shall in the case of such treatment accorded by developed contracting parties to Developing Countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of Developing Countries";*[641]

Reaffirming the principles contained in paragraph 44 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1), in the Decision adopted by the General Council on 1 August 2004, and at paragraph 35 of the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC) to strengthen special and differential treatment provisions and make them more precise, effective and operational;

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[637] The word 'commensurate' in this phrase appears to leave open the possibility that Developing Countries may have different needs according to their levels of development and particular circumstances. See Appellate Body Report, *EC – Tariff Preferences* (n 19 above) paras 161-162.

[638] Adapted language from the Preamble of Amended TRIPS Agreement (n 14 above). World Trade Organization *Amendment of the TRIPS Agreement* Decision of the 6 December 2015 WT/L/641 The significance of the provision in the preamble is to establish that all WTO Agreements under the WTO Agreement are to subscribe to basic principles under the GATT, particularly MFN and National Treatment principles, and that divergence from rules (particularly S&DT) is permitted through defined exceptions or written rules.

[639] Provision adopted from Preamble of *GATT 1994* (n 12 above).

[640] Paragraph 3 of the *Enabling Clause* (n 18 above) lays the parameters of S&DT. The Panel well acknowledges the critical importance of the policy objectives pursued by the Enabling Clause; Panel Report, *EC – Tariff Preferences* (n 19 above) para 7.52. The Enabling Clause reflects a great effort on the part of both developing and developed countries to rebalance and improve trade benefits for Developing Countries through a carefully negotiated agreement that permits certain types of special and more favourable treatment.

[641] The conceptual Framework centralises "needs" of Developing Countries and is structured to ensure S&DT is directly linked to broad based needs in Annex 1 of the conceptual Agreement. In Appellate Body Report, *EC – Tariff Preferences* (n 19 above) paragraph 162, the Appellate Body decided that "[…] we read paragraph 3(c) as authorising preference-granting countries to 'respond positively' to 'needs' that are not necessarily common or shared by all Developing Countries. Responding to the 'needs of Developing Countries' may thus entail treating different developing-country beneficiaries differently".

Desiring to clarify and improve relevant aspects of Articles XVIII, XXVIII bis, XXXVI:8 *of the GATT 1994 regarding Trade and Development relating to Developing Countries and Least-Developed Countries;*

Desiring to interpret Special and Differential Treatment rules and establish operational modalities for improved implementation of existing and future Agreements and WTO rules;[642]

Desiring to establish a monitoring mechanism on S&DT to improve the application of Special and Differential Treatment;[643]

Hereby agree as follows:"

The Framework Agreement commences with the Preamble, as is customary in all WTO agreements. A preamble under WTO law (and international law) is used as an important source of interpretation of intentions of negotiators and Members,[644] and has been used to provide direction in DSU cases, such as in *US – Shrimp.*[645] The preamble, therefore, should be crafted in a way that speaks to the context within which S&DT applies in the MTS and should lay out the Development objective and other WTO objectives that are to be balanced alongside this objective. The context, or "spirit" and "tone" of the S&DT is established through the Preamble, with a reader to derive the general intention on the Agreement. The approach employed in developing the Framework is to holistically address issues regarding S&DT, which include redressing challenges identified under chapter 3. The preamble, therefore, should speak to this approach.

The preamble in the Framework Agreement, is segmented into three parts:

[642] This general provision in the preamble will be applicable to provisions aimed at increasing trade opportunities through market access, provisions requiring WTO Members to protect the interest of Developing Countries (protective measures), provisions on flexibility of commitments, provisions that allowing longer transitional periods to Developing Countries and provisions on technical and financial assistance, which will be further expounded in the Conceptual Framework.
[643] The above conceptual preamble provides a general objective of the Framework Agreement and provides necessary context of the details that will be canvassed in the said Agreement.
[644] United Nations *Vienna Convention on the Law of Treaties* 23 May 1969; Article 31(1) of the Convention provides for the general rules on interpretation, and Article 31(2) prescribes that a preamble is included as part of interpretive text.
[645] *US – Shrimp* (n 398 above) paras 152, 153 and 155. It was provided that "[a]s this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994".

(i) the WTO's multiple policy objectives;

(ii) specific objectives of S&DT in the WTO; and

(iii) specific aspirations of the Framework Agreement.

WTO's Multiple Policy Objectives

The first part, which lays the "multiple policy objectives" of the WTO[646] establishes three general WTO objectives under the MTS, which closely relate to S&DT. The objectives are derived from various WTO texts which include objectives from the Preamble of the GATT 1994, the WTO Agreement and TRIPS. The Developmental objective is included as the first WTO objective, specifically the need for "positive efforts designed to ensure that Developing Countries, and especially the Least-Developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".[647] The inclusion of this objective as the first objective is notable, as it is to establish the primary general objective regarding the purpose and substance of the Framework Agreement. This objective was established in chapter 2 as cornerstone of S&DT. The inclusion of the clause in the Preamble affirms S&DT as a legal principle under the WTO, and its role in the MTS. It also operates as a pre-cursor to specific S&DT rules that follow the objective throughout the Framework.

The second objective recognises the applicability of the basic principles of the GATT 1994. This speaks to the tariff liberalisation objective, the text states that Members recognise "[…] the applicability of the basic principles of GATT 1994". The provision uses similar wording to that adopted in the TRIPS Agreement. The objective is notably included as the second objective as it is not the primary focus of the Agreement. It is a necessary inclusion as it is to rationalise that the provisions under the Framework Agreement are exceptions to the basic WTO rules, however, they do not negate the said rules. The inclusion of this objective in the Preamble is an acknowledgement of the application of the MFN principle at Article I and

[646] Panel Report, *EC – Tariff Preferences* (n 19 above) para. 7.52. The paragraph provided that in interpreting the WTO Agreement, the Preamble contains multiple policy objectives and all of these objectives are important.
[647] Derived from the preamble of the *WTO Agreement* (n 42 above).

national treatment at Article III of the GATT 1994 as well as various provisions on reciprocity under the GATT 1994. It is important to include, as examined in chapter 1 and 2, S&DT derogates from the GATT 1994 at length. This general rule is included to affirm the WTO's core rules, whilst acknowledging that derogation under the Framework will be specific and in accordance with the Framework Agreement.

Lastly, the Preamble includes a provision reaffirming Members' commitment to substantial reduction of tariffs and other barriers to trade.[648] The balance between WTO developmental and trade liberalisation objectives in the WTO has been set-out in the Panel Report in *India – Quantitative Restrictions*. The Preamble was used to interpret balance, which held that "[…] WTO rules promote trade liberalisation, but recognise the need for specific exceptions from the general rules to address special concerns, including those of Developing Countries".[649] The case involved the US as a complainant regarding India's import restrictions, which India claimed were maintained to protect its balance-of-payments situation under GATT 1994 Art. XVIII.[650] One of India's arguments was that the Preamble of the 1979 Declaration on Measures Taken for Balance-of-Payments Purposes, which recognised that LDCs "[…] must take into account their individual development, financial and trade situation when implementing restrictive trade measures taken for balance-of-payments purposes".

Ultimately, the Panel ruled that the measures taken by India were inconsistent with their WTO obligations.[651] The panel, however, in its suggestions for implementation, summated how the preamble may play a vital role in balancing liberalisation and S&DT under the MTS. The Panel stated that:

> "At the outset, we recall that the Preamble to the WTO Agreement recognises both (i) the desirability of expanding international trade in goods and services and (ii) the need for positive efforts designed to ensure that Developing Countries secure a share in

[648] Provision adopted from Preamble of *GATT 1994* (n 12 above).
[649] *India – Quantitative Restrictions* (n 274 above) para. 7.2.
[650] GATT 1994 (n 12 above) Art. XVIII. Import licensing system, imports canalisation through government agencies and actual user requirement for import licences.
[651] *India – Quantitative Restrictions* (n 274 above).

international trade commensurate with the needs of their economic development. In implementing these goals, WTO rules promote trade liberalisation, but recognise the need for specific exceptions from the general rules to address special concerns, including those of Developing Countries".[652]

This case not only highlights the use of the preamble in a development context, but also establishes the importance of establishing multiple policy objectives in a preamble, as they co-exist in the MTS, S&DT being the exception. The preambular text of the Framework Agreement, therefore, could be used in interpreting a development-related issue by the DSB. It is, therefore, imperative to include fundamental objectives that should be read with the development related ones. This objective of trade liberalisation is the bedrock of the MTS, and S&DT exists as an exception to this rule, hence the need for its inclusion.

Specific objectives of S&DT in the WTO

The second part of the Preamble of the conceptual Framework establishes the specific objectives of S&DT itself. This part draws from paragraph 3(c) of the Enabling Clause which establishes a core element in the structure of S&DT, particularly that it should "respond positively to the development, financial and trade needs of Developing Countries". Further, the Preamble draws from paragraph 44 of the Doha Ministerial Declaration and paragraph 35 of the Hong Kong Ministerial Declaration that S&DT must be more precise, effective and operational. These two principles enshrined set the composition of what S&DT in the rest of the Agreement is to subscribe to.

Specific Aspirations of the Framework Agreement

The last part of the Preamble establishes specific aspirations that the Agreement is to attain. One of the first aspirations is to improve relevant aspects of Articles XVIII, XXVIIIbis, and XXXVI:8 of the GATT 1994 regarding Trade and Development. This flows from a recognition,

[652] *India – Quantitative Restrictions* (as above) para 7.2.

as identified in chapter 3, of the inadequacies of the GATT 1994 in attaining meaningful trade preferences and S&DT specific to Developing Countries. Articles XVIII, XXVIIIbis, XXXVI:8 were examined at length, and it was concluded that the provisions fail to meet the development-objective under the WTO. The second aspiration that the Agreement seeks to fulfil, is to "[…] interpret Special and Differential Treatment rules and establish operational modalities for improved implementation of existing and future Agreements and WTO rules".[653] The need for clear, specific S&DT has been reiterated and justified in this thesis, hence the inclusion in the Preamble. This need will be further justified in the section below.

The lack of operational modalities in the MTS and general "best-effort" provisions were identified as a particular challenge in WTO Agreements. The need for operational modalities expressed in the preamble is applicable to provisions aimed at increasing trade opportunities through market access, provisions requiring WTO Members to protect the interests of Developing Countries (protective measures), provisions on flexibility of commitments, provisions that allow longer transitional periods to Developing Countries, and provisions on technical and financial assistance. Modalities have subsequently been established to ensure simplified and cost-effective (as far as possible) processes which preference seeking Developing Countries can undertake to apply, which will be further explained in the Framework below.

Lastly, the Preamble sets the aspiration of creating a monitoring mechanism on S&DT to improve the application of Special and Differential Treatment. This function was allocated to the CTD by the General Council in July 2002 but it has failed to carry-out its mandate.[654] The Preamble recalls this need and importance in ensuring S&DT is enhanced and improved through the mechanism to ensure substantive and relevant benefits can be derived from S&DT under the MTS.

[653] This general provision in the preamble will be applicable to provisions aimed at increasing trade opportunities through market access, provisions requiring WTO Members to protect the interest of Developing Countries (protective measures), provisions on flexibility of commitments, provisions that allowing longer transitional periods to Developing Countries; and provisions on technical and financial assistance, which will be further expounded in the Conceptual Framework.
[654] WTO website on the monitoring mechanism, https://www.WTO.org/english/theWTO_e/minist_e/mc9_e/brief_monit_mecha_e.htm (accessed 10 October 2019).

4.3.2 Part I: Definitions and Interpretation

"Part I: Definitions and Interpretation

Article 1: Definition of Terms

In this Agreement and WTO Agreements, unless the context otherwise requires:

"commensurate" in respect of the needs of economic development and other WTO law means different needs of Developing Countries and Least Developing Countries according to their levels of development and particular circumstances.[655]

"Graduation" means a change in classification of a Member from Least-Developed Country to a Developing Country, or from a Developing Country to a Developed Country, in accordance with Article 12 of this Agreement.[656]

"needs" of Developing Countries and Least-Developed Countries means development, financial and trade needs,[657] *established by broad-based recognition of a particular need in accordance with the WTO Agreement or in multilateral instruments adopted by international organisations,*[658] *as set out in Annex 1 of this Agreement.*[659]

"'positive efforts" under WTO law means specific exceptions from the general rules to address special concerns[660] *which are to enhance the 'economic development' of developing-country Members and Least Developing Countries.*[661]

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[655] *EC-Tariff Preferences* (n 19 above) para 161.
[656] *EC-Tariff Preferences* (as above) para 161.
[657] *EC-Tariff Preferences* (as above) para 163.
[658] *EC-Tariff Preferences* (as above) para 163. Also see WTO analytical index on Article I of the GATT https://www.WTO.org/english/res_e/publications_e/ai17_e/gatt1994_art1_jur.pdf (accessed 2 November 2019).
[659] The objective is to define "developmental, financial and trade needs". The provision offers interpretation on the concept which is used across the Agreement in order to implement measures, particularly Article 3.1.
[660] *EC-Tariff Preferences* (n 19 above) para. 7.2. Also see the WTO interpretive note at https://www.WTO.org/english/res_e/publications_e/ai17_e/WTO_agree_preamble_jur.pdf (accessed 17 October 2019).
[661] *EC-Tariff Preferences* (as above) para 92. The paragraph provides that ""[T]he Enabling Clause is among the 'positive efforts' called for in the Preamble to the WTO Agreement to be taken by developed-country Members to enhance the 'economic development' of developing-country Members".

"targeted assistance" means financial or technical trade-related programmes to support Developing Countries and Least Developed Countries to build trade capacity in a particular area, or address specified trade related constraints.[662]

Article 2: Interpretation

2.1 Members obligated to 'consider' any measures or action under Special and Differential Treatment provisions in any WTO Agreement, shall:

(a) accord special regard to the special situation of a Developing country or Least-Developed Country;[663] *and*

(b) undertake active measures to accord the Developing Country member or Least-Developed Country with special and differential treatment,

unless the obligated Member is unable to render such preferential treatment or is opposed to rendering the treatment, [664] *in which case the obligated Member shall file a notification of opposition with the Committee on Trade and Development ("CTD") under article 3.10 of this Agreement.*[665]

2.2 Members obligated to 'explore' any measures for purposes of according another Member Special and Differential Treatment under any WTO Agreement, shall undertake a fact finding process where constructive measures or remedies are to be actively applied by a developed or Developing Country member where available.[666]

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[662] Language partially adopted from WTO website on aid for trade and on technical assistance respectively. See WTO website on Aid for Trade https://www.WTO.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm and https://www.WTO.org/english/tratop_e/devel_e/teccop_e/tct_e.htm (accessed 18 October 2019).

[663] *EC – Tube or Pipe Fittings* (n 464 above) Panel Report.

[664] The exemption regarding inability addresses instances where a preference granting Member alleges inability due to technical and financial obligation.

[665] Article 3.10 provides that the notification of opposition shall contain; a reason(s) for opposition of the Special and Differential Treatment; details of potential prejudice, if any; an economic and social report, detailing potential implications of the preferential treatment on the opposing Member; details and evidence of inability to render Special and Differential Treatment, if so claimed; and any other documents in support of (a) to (d) above.

[666] The verb "explore" has also been narrowly interpreted to the extent that Developed Members merely need to go through the motions of considering constructive remedies in order to comply with Article 1. *US – Steel Plate* (n 463 above) 7.114, and Panel Report, *EC – Bed Linen* (n 464 above) para 6.233.

2.3 Where special and differential treatment provisions provide that a Member "must" and "shall" undertake any action, the Member shall be obligated to accord special differential treatment in accordance with the needs of a particular Developing Country member or Least-Developed Country, in accordance with Article 3.2 of this Agreement.[667]"

A considerable number of S&DT provisions are simply unenforceable or are underutilised due to vagueness or lack of specificity.[668] This is partially due to multiple vague terms wherein 'best-endeavour clauses' are contained. The issue of hortatory language was also examined under section 3.3 on vague provisions, and section 1.8.5, which raised the question of whether any binding obligations can be derived from its terms.[669] It was notably established that the drafting style adopted by the WTO structures Agreements to operate as frameworks for action. Further, that the Agreements contain a [deliberate] degree of flexibility. Agreements may not necessarily state exact instructions for actions but establish a spectrum within which acts are permitted.[670] This construct follows in the creation of S&DT rules under the current dispensation and as concluded in the end of chapter 3 – this was identified as a reason for challenges with interpreting rules on preferential treatment across numerous Agreements.

The DSB has been called upon to resolve disputes involving S&DT provisions, or related issues, such as *EC-Tariff preferences*. Chapter 3.1 further established the essential role that the DSU plays in the interpretation of WTO law, in this context S&DT, as it clarifies "[…] the provisions of the WTO Agreement in accordance with customary rules of interpretation of public international law".[671] Use of the DSU for Developing Countries, particularly LDCs, has been a challenge, as cost constraints and technical incapacity Developing Counties face in referring matters to DSU have been factors associated with low participation as examined

[667] This provision ties S&DT to a need of a specific Member, which is linked to the WTO objective of ensuring S&DT meets the needs of a Developing Country.
[668] Chapter 3.7 of this thesis, Conclusion of Chapter after examining the shortcomings of S&DT.
[669] Prévost (n 73 above) 23.
[670] A Alavi 'Strengthening Development in the WTO' Conference paper, *A Theoretical View with Practical Implications* http://siteresources.worldbank.org/INTRAD/Resources/AAlavi.pdf (accessed 12 December 2019).
[671] *DSU Agreement* (n 3 above) Article 3.2.

under Chapter 3.1. The DSB cannot be an interpretative solution which resolves and clarifies S&DT related issues due to the above-mentioned technical and financial challenges indicated. The need, however, for a simpler, cost-effective interpretation on cross-cutting S&DT issues therefore arises.

Part I, therefore, is predicated on clarifying and resolving the issues as identified above through definitions of key concepts and interpretation of existing phrases or words under the current MTS, incidental or related to S&DT. Article 1 includes key definitions on cross-cutting terms under the WTO, particularly on S&DT related terms. This includes provisions which interpret the word "commensurate" as used in the Preamble of the WTO Agreement. As rudimentary as the word may appear to be at face value, it is important to define, as it established the extent to which Developing Countries may be granted preferential treatment. The Article on definitions further establishes definitions on fundamental, yet undefined words and principles such as "targeted assistance" and "needs" in the context of Developing Countries, and "positive-efforts" as stated in the preamble of the WTO Agreement. These are concepts which are consistently used in multiple WTO Agreements and operate as the elemental principles behind S&DT rules. They have been defined above, with references in the footnotes of the text of the Framework Agreement.

Article 2 is the interpretative provision, which includes clarification on central S&DT phrases, which provide clarity on *inter-alia:*

- requirements where Members are prescribed to 'consider developmental needs';[672]
- an obligation on Members to 'explore' remedies;[673] and
- the peremptory nature to undertake any action on S&DT in accordance with a Developing Countries' needs.

The article clarifies the concept of S&DT needs by linking the said needs to a notification process under Article 3.1, and more importantly Annex 1, which establishes a broad category of needs. This approach was adopted in Appellate Body Report, *EC–Preferences*, which requires needs to be assessed based on an objective standard "as set out in the WTO

[672] *SCM* Agreement (n 392 above) Article 27.14 and 27.2. Also see Article 9.1 of the WTO *SPS Agreement* (as above).
[673] *ADA* (n 88 above). Article 15 ADA utilises the phrase of "exploring".

Agreement or in multilateral instruments adopted by international organisations".[674] This will allow Members to better identify and define needs. This is consistent with the approach taken by Stevens who proceeds to state that "there must be some way to identify broad groups of countries that share sufficiently similar characteristics to warrant the uniformity of treatment among themselves but differential treatment compared with others".[675] This is to ensure S&DT remains as closely relatable and applicable to the group as possible.

The objective of Article 2 is to ensure consistency in application of S&DT and clarity to WTO rules through providing for a prescribing definition and interpretation of key terms commonly used in S&DT through the WTO acquis in order to increase use and simplify S&DT.

4.3.3 Part II – General Rules on Special and Differential Treatment

"Part II – General Rules on Special and Differential Treatment

Article 3: Notification and Implementation of Special and Differential Treatment

3.1 Special and Differential treatment in all WTO Agreements shall be designed, or modified, to respond positively to specific development, financial and trade needs of Developing Countries and Least-Developed Country Members,[676] as identified through notification under Article 3.2.[677]

[674] *EC-Tariff Preferences* (n 19 above) 163.
[675] Stevens (n 120 above) 6.
[676] This provision established the general rule regarding implementation and use of S&DT.
[677] The rationale of is to ensure that where S&DT provisions in Agreements are provided for and it is mandated that they address the Development Objective as set out in the Agreement establishing the WTO. Further, a second objective is to tie obligations under Agreements to S&DT. The needs in this sub-regulation are restricted to development, financial and trade as per the *EC - Tariff Preferences* case (n 19 above). The rationale for this approach is elucidated at Article 3.2. The provisions is also deliberately general to ensure application to all WTO Agreements.
The criteria of needs is refined at Article 3.2, based on a broad-based category, in line with Appellate Body Report, *EC–Preferences* (n 19 above) 163.

3.2 All Developing Countries and Least-Developed Country Members shall notify the CTD of specific development, financial and trade needs every six years,[678] or upon any change in national trade policy, and at the beginning of every trade negotiation if there is any change in national trade policy, by lodging a notification containing:

(a) a general summary of the description of the need as set out at Annex 1 of this Agreement;

(b) a detailed description of the specific need;

(c) a trade or economic report highlighting development related concerns, containing facts and data justifying specific needs;

(d) the extent of assistance, support or flexibility required;

(e) any supporting documents to justify the above, and

the CTD shall immediately publish the lodged report at Article 3.2, which shall be accessible by all Members.[679]

3.3 A Member shall notify the CTD of specific Special and Differential Treatment, which it grants, or seeks to utilise, by lodging a report under Article 3.2, at least three months prior to:

(a) entering into a Preferential Trade Agreement, Free Trade Agreement or Regional Trade Agreement;

(b) receiving preferential market access;

(c) applying any protective measure;

(d) undertaking any flexibility on commitments to any WTO rule;

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[678] The reporting function may potentially present challenges to Developing Countries, however the strain is off-set through a provisions which prescribe for Technical and Financial assistance is provided at Article 9 of the Framework Agreement to assist with reporting. Further, this may establish position of Developing Countries at before a negotiating round. This may facilitate for the improved integration of the Developing Countries in future MTS Agreements, with S&DT formulated to meet their needs.

[679] This approach is to holistically and individually address needs of Developing Countries and LDC's, including SVE's. It is also consistent with Paragraph 35 of Doha Declaration (n 1 above), where Members agreed to examine issues relating to the trade of small economies and identify issues for the fuller integration of small, vulnerable economies into the multilateral trading system, however agreed not to create a sub-category of WTO Members. By establishing frequent notification/reporting, this allows special needs of Developed Countries and LDC's to be recognised and disseminated, so that Members can enter into bilateral and RTA's with the aim of addressing the development element of trade and addressing domestic policy issues of Developing Countries.

(e) receiving any technical or financial assistance;

(f) applying any domestic policy which derogates from any WTO rules; and

(g) seeking any other Special and Differential Treatment provision under a WTO Agreement,[680]

with the exception of an LDC which may lodge a report under Article 3.2 any time before entering into any arrangement under this Article.[681]

3.4 The application of Article 3.3 shall not prejudge the substance and the timing of the notification required under Article XXIV of the GATT 1994, Article V of the GATS or the Enabling Clause, or Paragraph 1 of the Transparency Mechanism for Regional Trade Agreements, nor affect Members' rights and obligations under WTO Agreements in any way.[682]

3.5 The report in Article 3.3 shall contain the following details:

(a) a detailed description of the specific development, financial and trade need notified under Article 3.2;

(b) a trade or economic report highlighting development related concerns, containing facts and data justifying specific needs;

(c) supporting documents;

(d) a specific proposed action plan, detailing the extent of preferential treatment to be accorded, and the time-periods proposed for granting of Special and Differential Treatment;

(e) details of potential prejudice which any other Member may be subjected to.

3.6 The CTD shall immediately upon receipt publish the lodged report under Article 3.3, which shall be made accessible by all Members at least within a week of receipt.[683]

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[680] A reporting mechanism is established to provide for transparency of use of S&DT and also doubles-up as an important method of reporting to the CTD for purposes of reviewing the use of S&DT under the monitoring mechanism at Article 13.

[681] This rule is established to accord LDCs the necessary flexibility to enable LDCs which are unable to notify particular needs as frequently as they should, not to be excluded from S&DT on account of inability to perform reporting or notification functions. Contingency measures should be put into place to ensure Developing Countries do not lose preferential treatment on account of failure or incapacity to identify or demonstrate needs.

[682] This provision is adapted from Paragraph 1 of the Transparency Mechanism for Regional Trade Agreements;
World Trade Organization *Transparency Mechanism for Regional Trade Agreements* Decision of 14 December 2006 WT/L/671. The incorporation into this text is structured to ensure rights under WTO Agreements, and timing provisions remain as applicable under existing WTO Agreement, where they exist.

[683] *Agreement on Safeguards* (n 21 above) Language derived from Article 12.6.

3.7 The notifying Member may enter into or undertake any arrangement listed at Article 3.3(a) to (g), if no request for consultation has been lodged by another Member within one month from the date of publication of the lodging of the report under Article 3.3, and nothing prevents a Member from entering into an arrangement listed at Article 3.3(a) to (f) sooner than one month if provided for under another WTO Agreement.[684]

3.8 A Member opposed to the proposed action by a Developing Country or Least-Developed Country under Article 3.3 may request for consultation within one month from the date of publication of the report under Article 3.4, to clarify the facts of the situation and to arrive at a mutually agreed solution.[685]

3.9 The opposing Member must provide the reporting Developing Country or Least-Developed Country Member with a statement detailing:

(a) their legal reason(s) for opposition of the arrangement;

(b) economic and social reports, containing facts and data justifying the opposition to the specific arrangement, in relation to the needs; and

(c) any supplementary documents or evidence supporting their opposition.

3.10 Upon failure to reach a mutually agreed solution within one month of receipt of a statement under Article 3.9, or upon refusal or inability to render Special and Differential Treatment, the Member opposed to the proposed action by a Developing Country or Least-Developed Country under Article 3.3 may lodge a notification of opposition to the CTD within five days, detailing:

(a) reason(s) for opposition of the Special and Differential Treatment;

(b) details of potential prejudice, if any;

[684] This provides for automatic use of S&DT in the absence of request for consultation by another Member. This doesn't prevent a member from immediate use of a provision in the case of emergency where covered under another WTO Agreement.

[685] Derived from Article 4.3 of *SCM Agreement* (n 392 above).

(c) an economic and social report, detailing potential implications of the preferential treatment on the opposing Member;

(d) details and evidence of inability to render Special and Differential Treatment, if so claimed;

(e) any other documents in support of (a) to (d) above,

failing which, the preference right holder may enter into or undertake any arrangement listed at Article 3.3(a) to (f).[686]

3.11 Upon receipt of the notification of opposition by a WTO Member under Article 3.10, the CTD through its Review Panel composed under Article 11.4 shall analyse the documents lodged by both Members, and the CTD shall:

(a) undertake an objective examination of[687]

(i) the proposed justification for preferential treatment;

(ii) the developmental, financial and trade need; and

(iii) the measure or arrangement preferential treatment, together with the action plan of the arrangement or measure,

(b) balance developmental needs of the notifying Member, which shall be given particular preference, with the prejudice to be suffered of an opposing Member, whilst considering incidental factors which may include economic, social, historical and geographical considerations;[688]

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[686] This provision seeks to avails an opposing Members with the opportunity to challenge the reporting of a Developing Country or Member. The CTD is used a quasi-judicial body to make a determination on the matter, which then get escalated to the DSB.

[687] Rationale from Appellate Body Report, *EC – Tariff Preferences* (n 19 above) which provided for an objective test; however, it did not specify the considerations. The objective test under this sub-article balances developmental needs of the notifying Country (which shall be given particular preference by the CTD) and may consider other economic, social, historical and geographical considerations to truly consider the contextual application of the measure, before taking a decision on its validity/invalidity.

[688] The objective of this process is not purely a legal one, as is the primary mandate of the DSU (n 3 above) in disputes. This extends considerations beyond the financial, trade and development needs. This provision is meant to balance WTO objectives of trade liberation, with the exemption that S&DT grants, as reflected in the Preamble. The balance regarding this function may require further economic and development-based research, however, a starting point may be in aligning the WTO development mandate, which seeks derogation from WTO rules to better integrate Developing Countries in the MTS.

(c) where possible, propose a remedial payment, or action to redress, while approving the action at paragraph 3.3;

(d) make a determination and approve the action at paragraph 3.3(a) to (f), or disapprove the action; and

(e) publish a report containing details which include (a) to (d), which shall be accessible by all Members within three months of receipt of the notification of opposition.[689]

3.12 If any Member is opposed to the CTD decision at Article 3.11, they may refer the matter to the Dispute Settlement Body ("DSB") within thirty days of the decision, for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.[690]

3.13 A Developing Country Member experiencing difficulties in notifying needs under Article 3.2 or in lodging a report under Article 3.3 shall not be excluded from receiving preferences under this Agreement if they have notified the CTD of such difficulties before expiry of the notification timelines, and provide evidence of:

(a) capacity related challenges; or

(b) lack or failure to receive technical or financial assistance, and

the Developing Country may enter into an arrangement under this Agreement by notifying under Article 3.2 and submitting a report under Article 3.3 before such arrangement is entered into.

The general rules on S&DT, as set out in Part II, contain critical operational rules and modalities on how S&DT is to be undertaken and rights and obligations of Members

[689] This determination is meant to address a wide range of developmental issues and needs which are covered under Article 3.2, whilst balancing the legal rights of Developed Countries to a fair MTS.
[690] Derived from Article 4.4 of *SCM Agreement* (n 392 above).

regarding same. The two Articles under this Part detail rules on two key objectives that the framework seeks to deliver on, namely implementation and enforcement of S&DT. This is in line with the Doha Work Programme on S&DT regarding strengthening S&DT through "additional measures to make S&DT more effective" as the focus in implementation is to ensure operational, effective and simplified use of S&DT.

Development-related measures are undertaken by Developing Countries in accordance with their subjective needs. This approach was loosely adopted from Lu, Keck and Low[691] as examined in the previous section, who emphasised a focus of S&DT to be linked to a Member's ability to demonstrate a subjective need and undertake a particular measure. Enforcement and implementation are the cornerstone of S&DT, and Hoekman noted that lack of enforcement prevents the WTO Agreements from being self-enforcing.[692] These two Articles, under Part II, formulate the fundamental rules which all S&DT is to subscribe to, which was found to be one of the most deficient areas under the current dispensation in chapter 3. It was found that WTO texts lack specific terms and enforcement measures and penalties, which places heavy reliance on the adjudicating DSU for enforcement, which is undesirable considering the capacity constraints Developing Countries currently face.[693]

Part II establishes modalities for the implementation of S&DT, primarily through a notification procedure and enforcement through the CTD. The author proposes that the CTD's development function be extended to the critical role of making determinations on legality of S&DT measures and consequently enforcing the provisions. The rationale is for the said CTD to clarify S&DT issues and for faster determination of developmental issues, prior to matters being referred to the DSU. The ineffectiveness of the CTD has been well documented in this study. This has been partially due to the lack of participation from Developing Countries, particularly in establishing modalities for the Monitoring mechanism.[694] This may have attributed to lack of political will and deficiencies in financial

[691] Keck & Low (n 460 above).
[692] Hoekman (n 263 above).
[693] Technical and financial. This point was also raised in the previous section on interpretation and definitions.
[694] World Trade Organization *Committee on Trade and Development* 5 July 2018 Meeting WT/COMTD/MMSDT/M/9; Paragraph 3As indicates that no written submissions from Members had been made. Further, while the creation of the

and technical capacity of Developing Countries in participating in the CTD. The above-notwithstanding, it is envisaged that by making implementation rules simpler, less burdensome and offering necessary technical and financial assistance under Article 9 of the Framework Agreement, that the CTD will have increased participation from Developing Countries to enable it to effectively and successfully carry out its services. Further, by establishing rules on the structure and composition of the CTD, and functions of the foregoing, this will facilitate a capacitated CTD to effectively carry out its mandate.

Notification of Needs by Developing Countries & LDCs

The first two provisions of Article 3 provide for the notification of S&DT. Article 3.1 firstly establishes the general principle for all S&DT under the MTS, current and future. It prescribes that all S&DT shall be "designed or modified" to respond positively to specific development, financial and trade needs of Developing Countries & LDCs. This provision is structured to be general and applies specifically to Agreements that contain S&DT, deliberately excluding provisions in Agreements that are not development related. It binds Members to ensure that when negotiating future Agreements, Members develop S&DT that is robust enough to be adapted to Developing Countries' needs. And further, that if existing S&DT provisions in the MTS do not ascribe to this standard, as read with this Framework Agreement, they be "modified" or amended.[695] This would require the up-hill task of a decision at a Ministerial meeting.

Article 3.2 is the heart of the Framework Agreement on S&DT. It prescribes rules for the notification of development needs. The needs under the Framework Agreement serve a dual function; they are utilised to justify access to or undertake a specific measure, and they simultaneously operate as a pre-requisite for eligibility to access a particular S&DT

Monitoring Mechanism was envisaged in the decision taken by the General Council in July 2002, it had taken 11 years for Members to agree to the establishment of the Mechanism.

[695] The Framework attempts to encapsulate all S&DT related issues to prevent further amendment to existing rules. The Framework itself attempts to define, apply positive interpretation and specific provisions to operationalise S&DT in existing Agreements, including specific provisions which allude to specific S&DT in Agreements, which include inter-alia AoA, SPS Agreement, and GATT, However, S&DT rules that even after application of the Framework Agreement that are not structure to meet this standard, are to be amended.

provision. The provision requires all Developing Countries to notify the CTD of specific development, financial and trade needs;

a) every six years;
b) upon change in national trade policy; and
c) at the beginning of every trade negotiation upon change in national trade policy.

Developing Countries' needs and interests are to be adequately updated and notified to ensure they receive relevant and meaningful S&DT. This period is also motivated by UNCTAD's Trade Policy Framework for Developing Countries, and the WTO Trade Policy Review Mechanism,[696] which prescribes that Trade Policy review should be conducted every two, four, or six years, based on the country's share of world trade.[697] The WTO established review cycles to enhance transparency and adherence of trade rules. The review period is to coincide with third party reporting obligations, however, the update to the CTD before trade negotiations (if there are any changes to policy) has particular benefits for Developing Countries, and meaningful negotiations that benefit their respective Countries.

This approach of reporting specific S&DT needs, plays three critical roles. Firstly, it enables Developing Countries the ability to develop and self-define needs and much needed policy space in the MTS. The economic and social report and other introspective undertakings that establish trade, financial and developmental aspects allow a Developing Country to identify key areas they may seek exemption or derogation from WTO rules. This approach is consistent with Prowse's approach examined in section 1.8.4, as it helps formulate appropriate trade positions as well as to place trade reform in the context of the country's overall development strategy that will promote a supply response and facilitate pro-poor growth.[698] Through the identification of needs, the Framework also appropriately addresses capacity constraints, a major challenge which Developing Countries raised in the Communication to the General Council justifying the need for stronger S&DT.[699] Capacity

[696] WTO Amendment of the World Trade Policy Review Mechanism 2017 WT/L/1014.
[697] UNCTAD's Trade Policy Framework for Developing Countries: A Manual for Best Practices, see https://unctad.org/en/PublicationsLibrary/ditctncd2017d5_en.pdf (accessed 24 December 2019).
[698] Prowse (n 118 above).
[699] WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above).

constraints are addressed through the mandatory requirement to consider and accord Developing Countries S&DT in accordance to the lodged needs in Article 3.2 and at implementation and coordination of programmes through financial and technical assistance, at a national level based on notified needs.

Secondly, this approach of notification of development, financial and trade needs once every six years also allows a Member to submit information which the CTD utilises in improving preferential treatment, in the Monitoring Mechanism, and in its Annual Report under Article 13. The ineffectiveness of the Mechanism has already been well documented under Article 3. The submission by Members will enable the CTD to detail frequent reporting and to implement and facilitate improved S&DT, as will be established in the examination of the function of the CTD in Part V.

Thirdly, this may establish the position of Developing Countries before a negotiating round. This may facilitate the improved integration of Developing Countries in future MTS Agreements, with S&DT formulated to meet their needs. This approach justifies, and to a certain extent, 'legitimises' Developing Countries' needs. This may also allow preference-granting Members to sufficiently appreciate the nature and validity of the needs in order to accord preferential treatment or flexibilities under future Agreements or RTAs. The reason for placing the obligation of reporting to the Developing Country, is to ensure trade policy is developed by a Developing Country adapted to its own unique considerations, which allows the Member to adequately negotiate its interests in alignment to its greater developmental needs. This shift in burden also has advantages for Developed Countries, which were identified earlier in this Chapter. Whilst Developed Countries would have limited discretion in the process, the outcome would be less preferences and assistance granted across a wide scope of goods and Developing Members. This would be more cost efficient, and enable Developed Countries to dedicate more resources to Members who have demonstrated needs specific to particular areas.

Notification of needs is done by lodging documentation to the CTD which includes*, inter-alia*, a general description of the need as set out at Annex 1 of this Agreement and specific need, economic and social reports containing facts, and data justifying specific needs as well as the extent of assistance, support or flexibility required. The reporting frequency may appear to be burdensome, however, Technical and Financial assistance is provided for in Article 3.6(b) and Article 9.4 of the Framework Agreement and may be utilised by a Developing Country to request assistance with the reporting function through notification to the CTD. Article 9.5 of the Framework Agreement further provides for a fund, facilitated by the CTD, which operates as a custodian, where Developed Countries contribute to Developing Counties and LDCs for initiatives such as this as well as offering technical assistance. The modalities of this technical and financial assistance will be examined further on in this chapter.

The Framework allocates responsibility of reporting under this provision to a representative from a Developing Country who sits on the Monitoring Mechanism sub-committee established in Article 13. The criteria for selection of the representative at Article 13.2 is that the representative shall be a "[…] *well-qualified governmental and/or non-governmental individual."* It is imperative that this person is selected by a Developing Member, and that the said Developing Member has wide discretion in selecting a representative and that the representative is an individual who will be well versed in national trade policies, and who can seek to make trade-gains through S&DT under the notification process of Article 3.2. It is also envisaged that technical experts will operate closely and in-tandem with the said representative and other government trade officials to ensure notification of needs is properly strategically aligned to trade policy and needs at a domestic level.

Where a Developing Country doesn't submit a Report under Article 3.2, this will not invalidate the Member's claim to S&DT prescribed under any WTO Agreement or Decision. Failure to submit a report, however, will preclude a Developing Country from enforcing S&DT and utilising implementation provisions where a need is not demonstrated. There are, however, exceptions to this rule where a Developing Country or LDC can access preferential

treatment where they experience difficulties in capacity or failure to access technical or financial assistance in notification and reporting under Articles 3.2 and 3.3. They would still be required to submit notification of needs and lodge a report, albeit they may do so late, before an arrangement is entered into, as provided for under Articles 3.3 and 3.13. The S&DT Legal Framework contains considerable improvements on implementation modalities and enforcement, at Article 4, which require needs to be demonstrated. Further, improved S&DT includes provisions on *inter-alia* market-access and technical and financial assistance, where developed countries are obligated to accord preferential treatment based on listed needs under Article 3.2. The rationale of S&DT at chapter 2 and interpretation from Agreements and Decisions, revealed that S&DT was envisaged to meet specific Developing Countries' needs. The Legal Framework, to this extent, is structured to facilitate access, implementation and enforcement of S&DT to Members who share a general need, as identified under Annex 1 and would therefore be entitled to S&DT in relation to that need. This is buttressed by the E*C – Tariff preferences* case which provided that the relevant tariff preferences respond positively to a particular development, financial or trade need and are made available on the basis of an objective standard to all "beneficiaries that share that need".[700] The Framework established objective standards through Annex 1 and Members notifying needs under the said respective categories will be beneficiaries of the S&DT.

There is no requirement for a Developed Country to provide S&DT on an MFN basis under this Agreement, which is consistent with the Appellate Body's interpretation regarding GSP in the *EC – Tariff Preferences* case.[701] This means that Preferential treatment under the Framework would be directed to Members which demonstrate specific development needs, to the exclusion of Developing Countries which may not notify a need under Article 3.2.[702] It is pivotal to note, however, that LDCs may be permitted to notify needs at any time prior to entering into a S&DT related arrangement in order to prevent the said economically sensitive states from losing preferences under the Framework Agreement if they fail or are

[700] World Trade Organization, *EC – Tariff Preferences* (n 19 above) See https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds246sum_e.pdf (accessed 2 March 2020).
[701] *EC – Tariff Preferences* (as above), paragraph 187-188.
[702] *EC – Tariff Preferences* (as above) paragraph 152. The provision provides that "[…] In contrast, the Enabling Clause is a form of Special and Differential Treatment for developing countries, which seeks the opposite result: to create unequal competitive opportunities in order to respond to the special needs of developing countries".

unable to lodge needs under Article 3.2. This is a balance included to ensure the Framework is robust enough to accommodate the challenges LDCs face. The said Members, however, are not excluded from the requirement to notify. Further, it was stated above in this section that LDCs and Developing Countries which struggle with notification or justifying needs, are entitled to assistance through Technical and Financial assistance provided to Developing Countries to assist them in this particular area – as set out Article 3.6(b) and Article 9.4 of the Framework Agreement in order to ensure they derive preferential treatment.

The exclusion of S&DT preferences under the Framework Agreement also addresses the issue of emerging economies which seeks to 'freeload' S&DT on account of their developing-status, which will be precluded from deriving S&DT under the Agreement where a need is not demonstrated. Under the Framework, a need may also be challenged under Article 3.7 to ensure preferential treatment is justified and demonstrated. The Framework, therefore, would be an attractive proposition to Developing Countries, particularly those that have opposed emerging economies, like China, continuing to derive preferential treatment due to its status as a Developing Country. This particular issue will be further examined in chapter 6.

Implementation of S&DT

A recurring theme in this thesis has been the inability of Developing Countries to implement S&DT under the current dispensation. This is due to a number of reasons, as was identified under chapter 3, after conducting a detailed examination of S&DT rules. The primary challenges that emerged regarding implementation of rules was vagueness of provisions, onerous and complex procedures, and lack of or non-specificity of modalities regarding the rules.

The implementation chapter seeks to resolve this challenge by establishing simplified, cross-cutting modalities for use of application of S&DT which apply to all WTO Agreements. The rules on implementation build on the notification of a developmental, trade or financial

need established above. The first process under implementation rules is the requirement of a Developed Country which seeks to grant, or Developing Country which seeks to utilise, S&DT or an S&DT-related measure, which include inter-alia; entering into a Preferential Trade Agreement, Free Trade Agreement or Regional Trade Agreement, or receiving preferential market access or applying any protective measure. RTAs would continue to exist as they do under the current dispensation,[703] with additional notification requirements under the Framework Agreement. The rationale of the rule is for the CTD to ensure S&DT under the RTA subscribes with the Framework Agreement and other S&DT under the MTS. The Framework Agreement, therefore would not affect Developed and Developing Countries' decisions to opt for Agreement under the MTS as opposed to RTA's and vice-versa.

The report is expected to contain a detailed description of the specific development, financial and trade need notified under Article 3.2, as provided above. It should be accompanied by a specific proposed action plan, detailing the extent of preferential treatment to be accorded, and the time-periods proposed for the granting of S&DT; and details of potential prejudice which any other Member may be subjected to. This is to enable measureable preferential treatment linked with the specified need. This report is to be published by the CTD, so that all affected Members may be notified.

The arrangement or measure may be entered into or undertaken if no request for consultation is lodged by another Member, which has to be done within one month from the date of publication of the lodging of the report under Article 3.3. The statement should detail legal reason(s) for opposition of the arrangement, which should be accompanied by economic and social reports, containing facts and data justifying the opposition to the

[703] A WTO Member seeking to enter into a regional trade agreement (RTA) through which it grants more favourable conditions than for trade with other WTO Members, departs from the guiding principle of non-discrimination defined in the GATT and would notify under;
-Paragraphs 4 to 10 of Article XXIV of *GATT 1994* (n 12 above) (as clarified in the Understanding on the Interpretation of Article XXIV of the *GATT 1994*) provide for the formation and operation of customs unions and free-trade areas covering trade in goods, and interim agreements leading to one or the other; or
-Paragraph 2(c) of the *Enabling Clause* (n 18 above), for preferential trade arrangements in trade in goods amongst developing country Members;

specific arrangement, in relation to the needs. The parties are then given an opportunity to resolve the issue within one month, failing which the opposing Member may launch a notification of opposition to the CTD.

The CTD, upon receiving a notification of opposition, is tasked with undertaking a quasi-judicial function of examining the proposed justification for preferential treatment and the developmental, financial and trade needs, together with the action plan of the arrangement or measure and extent of preferential treatment. The CTD further assesses the prejudice to be suffered of an opposing Country, with economic, social, historical, geographical and all incidental factors. It may then propose a remedial payment or action to redress the measure or arrangement, while approving the action at paragraph 3.3. Finally, the CTD may alternatively make a determination and approve or disapprove the measure or arrangement.

Should any of the parties be opposed to the CTD's decision under Article 3.9, they may refer the matter to the DSB within thirty days of the decision, for the immediate establishment of a panel. This will accord the parties the right to access the DSU for final resolution. Despite the challenges facing the DSB, it forms an integral and important enforcement function, as will be examined further on in this Chapter.

The above-mentioned approach has similar elements to Hoekman's "circuit-breaker" approach.[704] Hoekman has proposed a test or a "formal circuit-breaker" mechanism that would make recourse to panels under the DSU conditional on a prior process of consultation mediated by an independent body that does not solely focus on legal issues but on the likely net benefits of (non-)implementation and the magnitude of any negative spill-overs associated with the use of policies that are subject to WTO disciplines. The proposed approach under the Framework does the same. The CTD's examination goes beyond legal considerations and considers issues such as spill-overs and developmental factors which include economic, social, historical, geographical and all incidental factors to attempt to

[704] Hoekman (n 87 above).

resolve disputes or issues regarding application of S&DT, even before measures or arrangements are taken. The CTD in operating as an independent body in this function is not to make purely legal determinations, but rather to balance development factors with those of prejudice or spill-overs from measures in relation to S&DT. The balance regarding this function may require further economic and development-based research, however, a starting point may be in aligning the WTO development mandate, which seeks derogation from WTO rules to better integrate Developing Countries in the MTS.

It is envisaged that this approach will result in increased use by Developing Countries of S&DT, as the provisions are far less onerous than most provisions under the current WTO dispensation. It is envisaged that all urgent S&DT measures which are prescribed under a WTO Agreement and which have shorter or no notification periods may continue to apply. However, it is anticipated from the simplification and streamlining of the process under Article 3, that implementation of S&DT will be greatly enhanced from this Article. This will enable Developing Countries to effectively utilise and enforce rights or undertake measures.

Enforcement of Special and Differential Treatment

"***Article 4: Enforcement of Special and Differential Treatment***[705]

4.1 Whenever a Member has reason to believe that another Member:

(a) refuses or fails to accord such Member with special and differential treatment;
(b) fails to consider any development, financial and trade need it has lodged with the CTD under Article 3.2;

[705] This rule is focused on enforcement of S&DT rights as opposed to Article 3, which sought to formulate rules for implementation and notification of S&DT. The rationale of this rule is to avail a simplified, efficient, and considerably detailed provisions for enforcement of Special and Differential Treatment for Developing Countries and LDC's. The rule, conversely, allows Developed Counties the ability to take action against a Developing Countries and LDC which improperly imposes S&DT.-

(c) has caused, or will cause potential prejudice through the imposition of a special and differential treatment which is not notified under this Agreement or any other WTO Agreement; or

(d) violates any special and differential treatment provision under any WTO Agreement,

such Member may request consultations with such other Member in order to clarify the facts of the situation and to arrive at a mutually agreed solution.[706]

4.2 A request for consultations under Article 4.1 shall include a statement of available evidence from all parties with regard to the existence and nature of the request for consultation, and defence, and

(a) a Member may request for an extension of consultations for a period up to 90 (ninety) days; and

(b) the other Member may accord or reject the request for extension of consultations.

4.3 If no mutually agreed solution has been reached within 30 days of consultations, any Member party to such consultations may refer the matter to the CTD through its Review Panel composed under Article 11.4, where both Members are to lodge with the CTD*:*

(a) a statement based on a WTO provisions;

(b) an economic and social report, detailing potential implications of the preferential treatment on the opposing Member; and

(c) any other document or evidence in support of (a) and (b).[707]

[706] Derived from Article 4.3 of *SCM Agreement* (n 392 above).

[707] The provision attempts to widen the evidence-based requirements to address the developmental of WTO law, as the confines of disputes under this particular section are premised on S&DT. Exact Provisions such as these, which require a specific obligation regarding evidence are important for the enforcement of S&DT, as it was explained in chapter 3 of this study - that S&DT under the MTS contains multiple soft law provisions which are difficult to enforce due to vagueness and imprecision in provisions. WTO law has been characterised as constructive ambiguity.

4.4 Upon receipt of the notification of referral under Article 4.3, the CTD shall analyse the documents lodged by Members, and the CTD shall:

(a) undertake an objective examination of[708]

(i) the proposed justification for preferential treatment;

(ii) the developmental, financial and trade need; and

(iii) the measure or arrangement preferential treatment, together with the action plan of the arrangement or measure,

(b) balance developmental needs of the notifying Member, which shall be given particular preference, with the prejudice to be suffered of an opposing Member, whilst considering incidental factors which may include economic, social, historical and geographical considerations;[709]

(c) make a determination on whether a Member is entitled to preferential treatment, or has infringed a right to special and differential treatment, or whether the Member has refused or fails to accord the right holder with preferential treatment;

(d) make a determination on any other rights regarding special and differential treatment; and

(e) publish a report which includes details in (a) to (d), which shall be accessible by all Members within three months of receipt of the notification of opposition.

[708] Rationale from *EC – Preferences* (n 6 above) which provided for an objective test; however, it did not specify the considerations. The objective test under this section balances developmental needs of the notifying Country (which shall be given particular preference by the CTD) and may consider other economic, social, historical and geographical considerations to truly consider the contextual application of the measure, before taking a decision on its validity/invalidity.

[709] The objective of this process is not purely a legal one, as is the primary mandate of the DSU (n 3 above) in disputes. This extends considerations beyond the financial, trade and development needs. This provision is meant to balance WTO objectives of trade liberation, with the exemption that S&DT grants as reflected in the Preamble. The balance regarding this function may require further economic and development-based research. However, a starting point may be in aligning the WTO development mandate, which seeks derogation from WTO rules to better integrate Developing Countries in the MTS.

4.5 A Member shall be obligated to abide by the decision made by the CTD under Article 4.4, subject to a decision made by the DSB.[710]

4.6 If any party is opposed to the CTD decision under Article 4.4, it may refer the matter to the DSB within 30 days of the decision, for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.[711]

4.7 A Member obligated to undertake a measure or any action, in accordance with a decision of the CTD under this Article shall notify the complaining Member and the CTD within ninety (90) days of the decision, and at the end of the period prescribed in the decision

(a) of any measure or action it has taken to comply with the decision; and

(b) of its request to end the application of appropriate measures by the complaining Member, in accordance with the CTD's decision.

4.8 A Member party to proceedings under this Article, which is dissatisfied with action undertaken under Article 4.7, may within thirty (30) days of the date of notification of the said Article, request in writing to the CTD for a decision on compliance, and if the CTD rules that any measure or action taken to comply

(a) is not in conformity with the provisions of this Agreement or its decision, the CTD shall determine whether the complaining Member may continue to apply appropriate measures, or whether any specific action or measure shall be undertaken;

(b) is in conformity with the provisions of this Agreement or its decision, the appropriate measures or action shall be terminated, and

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[710] It is envisaged that a decision by the CTD will offer an opportunity to efficiently and judiciously address contentions issues surrounding S&DT. This will allow general dispute resolution on S&DT matters and ensure S&DT under a plethora of rules of the WTO are enforceable. It was examined in chapter 3 that provisions currently contain limited enforceable S&DT and mainly speak of the intentions and spirit of relations regarding Developing and Developed Countries. The GATT 1994 (n 12 above) is an example of the above. Article XXXVI:1 makes repeated mention of recognition and recollection of LDC's needs to attain development objectives, the standard of living between developed and Developing Countries. Article XXXVI:2 and XXXVI:3 are also unenforceable, they speak to need for a rapid and sustained expansion of the export earnings of the LDC's and the need for positive efforts. Article XXXVI:4 to 7 speak on collaboration between contracting parties, need for market access by LDC's.

[711] Derived from Article 4.4 of *SCM Agreement* (n 392 above).

the CTD may make any ruling with regards to financial compensation based on impact on the economy of a Member which is party to the proceedings caused by non-compliance of a decision.

It was well summated in the Developing Countries' communication to the General Council that "[m]ost of the current S&DT provisions are "best endeavour" clauses, lack precision, effectiveness, operationality and enforceability".[712] Enforcement is pivotal to the preservation of rights. Under the current dispensation most S&DT provisions would have to be enforced after determination by WTO DSB.[713] This presents a challenge for Developing Countries which experience hurdles in using the DSU[714] and have a record of low participation. Challenges identified include *inter-alia* Developing Countries' fear of reprisal due to the initiation of disputes (such as suspension of foreign aid), lack of technical capacity with regards to trade lawyers to litigate and staffers who participate on complex issues such as health and safety standards, and lack of policy development and bureaucrats and politicians who can make decisions on the above.[715] Lack of Financial capacity is also a challenge, as disputes require considerable resources. Further, when weighing the gains from initiating a dispute [if the DSB successfully rules in favour of the Developing Country] with the financial costs, Developing Countries may make an assessment that there is little to no benefit in perusing the said dispute, and that it may be a risk not worth taking. This, therefore, necessitates for alternative means to enforcing S&DT provisions.

The previously examined Article 3 on implementation of S&DT has a dual function. Firstly, it establishes a mechanism and modalities for implementing S&DT. And secondly, it enforces rights specifically regarding S&DT measures and arrangements, through determinations

[712] WTO *Proposal for a Framework Agreement on Special and Differential Treatment* (n 13 above).
[713] *DSU* (n 3 above). Article 3 of the DSU provides that "[t]he Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".
[714] B Hoekman & P Mavroidis 'WTO Dispute Settlement, Transparency, and surveillance' (2000) 23(4) *World Economy* 527-542.
[715] E Otor 'The World Trade Organization (WTO) Dispute Settlement Mechanism in Developing Countries' (2015) 5(1) *International Journal of Advanced Legal Studies and Governance* 8.

made by the CTD. Article 4 of the Framework establishes further modalities for the enforcement of S&DT in WTO Agreements and under the Framework itself. The provision establishes a procedure which commences with a request for consultation by a Member which has reason to believe that another Member

- refuses or fails to accord such S&DT, or consider development, financial and trade needs lodged under Article 3.2;
- has caused, or will cause, potential prejudice through the imposition of an S&DT which is not notified under this Agreement or any other WTO Agreement; or
- violates any S&DT provision under any WTO Agreement.

The parties are accorded thirty (30) days to resolve the consultation and the matter is taken to the CTD which may make a determination on rights regarding S&DT or related measures. This timeframe is aligned with the timeline provided in WTO Agreements, such as Article 4.4 of the SCM Agreement. A Member, however, can request the other Member to extend consultations by up to a further ninety (90) days. The Framework Agreement contains a provision that a Member shall be obligated to abide by the decision made by the CTD, subject to a decision made by the DSB. An appeal provision is also provided in the Framework. Lastly, the Article contains detailed rules on review of measures, compliance with decisions of the CTD, and remedies prescribed in the event of non-compliance. This includes financial compensation based on the impact on the economy of the complainant. These rules would significantly increase compliance with decisions for increased security of S&DT rights, particularly pertaining to Members which fail to subscribe with decisions involving S&DT.

The rationale of this rule is to avail a simplified, efficient, and considerably detailed provisions for enforcement of S&DT for Developing Countries and LDCs. The rule, conversely, also allows Developed Counties the ability to take action against Developing Countries and LDCs which improperly imposes S&DT. An example of this is where a Developing Country undertakes a protective measure on imports from a Developed Country,

such as countervailing duties to protecting an infant industry such as processed fruits, under a report notified at Article 3.3, and then the Developing Country extends the tariffs to other products which are not related or incidental to the industry, and not in line with the report. The process is a significantly simpler than enforcement of rights under the DSU, which Developing Countries have not been able to successfully utilise. The enforcement rule aims to facilitate resolution through consultation first, through a relatively short prescribed time to attempt to expeditiously and amicably reach resolution. The provision is accessible to all Members and ensures determinations by the CTD are not restricted to legal arguments but are similar to the Article on implementation that requires the CTD to consider development orientated factors. This is to ensure that the development mandate established under the Preamble of the Framework Agreement is met, namely, of facilitating a growth in share of global trade through enforceable exceptions under the WTO Agreements.

4.3.4 Part III – Specific Rules on Special and Differential Treatment

One of the three areas that are required for strengthened S&DT as provided by the Doha Work Programme on S&DT, is the incorporation of "[…] principles of S&DT into the system and architecture of the WTO".[716] This process involves the identification of S&DT provisions that are already mandatory in nature and those that are non-binding in character to consider the legal and practical implications for developed and developing Members of converting S&DT measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002.[717] The work-plan above has not been effected as provided above, and S&DT to date remains relatively unchanged (with the exception of the new TFA which provided for more progressive S&DT only in relation to Trade Facilitation). This deficiency therefore necessitates for amendments to existing rules, or alternatively, a Framework that addresses specific rules by making them precise, obligatory and simplified, and relevant to Developing Countries' needs. This is the focus and purpose of

[716] *Doha Decision on Implementation-Related Decisions and Concerns* (n 345) para. 12.1(iii).
[717] *Doha Decision on Implementation-Related Decisions and Concerns* (as above) para. 12.1(iii).

this Part in the Framework Agreement which concentrates on specific rules on S&DT in existing WTO Agreements.

Part III of the Framework introduces detailed and specific provisions, which are applicable to existing WTO rules, under the following broad areas of preferential treatment identified from WTO Agreements, namely; Market Access, Protective Measures, Flexibility of Commitments, Transitional Periods for Developing and Least-Developed Country Members, Technical and Financial assistance, Sanitary and Phytosanitary Measures, and Technical Barriers to Trade.

Chapter 1 of this study and section 3.1 detailed how WTO law comprises of both soft-law and hard law provisions. Further, that soft law norms play a role in reconciling some of the antinomies or paradoxes in WTO law. [718] It aids in interpreting and reaffirming diverging positions through previously agreed principles. There are numerous forms of soft-law in the WTO context, which include decisions in the form of recommendations taken by Members in one of the councils or committees, guidelines, reports, statements, programmes of action and Declarations.[719] These have been considered under this Part and incorporated in areas of S&DT which are vague, unenforceable, or where S&DT under Agreements is not specific to Developing Countries and may have been redressed by soft-law. Part III of the Framework Agreement examines areas of S&DT in order to ensure such rules are operational, simple to use, and facilitate preferential treatment specific to Developing Countries development needs.

The primary information utilised in identifying which provisions to provide rules for in the Framework, was chapter 3, as the chapter examined and identified challenges and deficiencies in the application of S&DT in relation to Developing Countries. Part III attempts to redress the identified challenges which include unclear drafting, lack of mandatory phrasing or complex procedures. As stated earlier in this chapter, the Framework seeks to build on existing WTO law, stay within the boundaries of existing WTO law, and attempts

[718] Pauwelyn (n 367 above).
[719] Footer (n 243 above) 9.

not to amend S&DT rules which attain the development objective. The Framework Agreement, however, may derogate from existing Agreements in applying other WTO decisions or in simplifying and clarifying S&DT to ensure it is implementable, enforceable and relevant to a Developing Country's needs. This is the case under Part III.

The provisions in this Part are technical and detailed in nature. To avoid duplicity in examining the provisions, footnotes have been included in Part III on specific rules in the conceptual Framework explaining the rationale of most clauses, and a brief summation of the structure and objectives is provided at the end of each Article.

Part III – Specific Rules on Special and Differential Treatment

Article 5: Market access

5.1 Members are to enter into negotiations to reduce or eliminate

(a) tariffs;

(b) tariff peaks;

(c) high tariffs;

(d) tariff escalation; and

(e) non-tariff barriers,

particularly on products of export interest to Developing Countries and Least-Developed Countries.[720]

[720] *Doha Declaration* (n 1 above) para 16.
Further, it was indicated in chapter 3 that despite GSP and preferential North-South PTA's entered into, a lot of products of interest to Developing Countries are still subject to high tariffs." JD Haveman and HJ Shatz in their study on Developed Country trade barriers concluded that;

"The European Union, the economy implementing the most significant set of preferences, offers the best terms for goods that developing nations are able to export. Japan also offers preferences that the Least-Developed countries use. The United States, in contrast, still maintains high tariffs on many of the products that developing economies are most able to export".

See J D Haveman & H J Shatz 'Developed Country Trade Barriers and the Least-Developed Countries: The Current Situation' (2004) 19(2) *Journal of Economic Integration* 252.

5.2 Negotiations under Article 5.1 shall take fully into account the special needs and interests of Developing Country Members and Least-Developed Country Members, including through less than full reciprocity in reduction commitments, and:

(a) Developed Members, and Developing Country Members in a position to do so, shall provide duty-free and quota-free market access for products originating from Least-Developed Countries;[721]

(b) Developing Countries and Least-Developed Countries which have notified the CTD of a particular need, and sensitive products, as notified under Article 3.2 may use tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes;[722]*and*

(c) all other relevant circumstances, including the fiscal, developmental, strategic and other needs of the contracting parties concerned, particularly Developing Countries as notified under Article 3.2.[723]

5.3 Developing Country and Least-Developed Countries may submit a list of goods of interest once every six years, or upon change in national policy regarding goods of interest, to the CTD, simultaneously when submitting their needs under Article 3.2, and Developed country Members, in implementing their commitments on market access shall:

(a) take fully into account the particular needs and conditions of Developing Country Members; and

[721] WTO *Decision of the Doha Work Programme adopted by the General Council* (n 369 above) para 45. Further, the Nairobi Package, Members agreed on a decision that calls for cotton from LDCs to be given duty-free and quota-free access to the markets of developed countries and to those of Developing Countries declaring that they are able to do so from 1 January 2016. The Doha Work Programme, however, provided for all products to be given DFQF access.

[722] WTO Decision of the Doha Work Programme adopted by the General Council (as above) para 45. The provision provides that "[t]he 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".

[723] Wording adopted from Article XXVIII bis (3) (c) of GATT 1994 (n 12 above).

(b) provide a greater improvement of opportunities and terms of access through reduced tariffs and non-tariff barriers for products of particular interest to these Members.[724]

5.4 Tariff reductions by Members will be made through a tiered formula that takes into account their different tariff structures of Developed, Developing and Least-Developed Country Members, and:

(a) Tariff reductions will be made from bound rates;
(b) Each Member, other than Least-Developed Countries, will make a contribution to tariff reduction;
(c) Special and Differential Treatment provisions for Developing Members will be an integral part of all elements;
(d) There shall be deeper cuts in higher tariffs, with flexibilities for sensitive products notified by Developing Countries at Article 3.2,

and there shall be substantial improvements in market access for all products.[725]

5.5 All Developing Countries or Least-Developed Countries which notify the CTD of a need under Article 3.2 shall be entitled to special and differential treatment under Article XVIII (A) (B) (c) and (d) of the GATT 1994, [726] *and shall be entitled to disregard rules on notification therein, provided:*

[724] Chapter 3 of this thesis identified a weakness in Article XVIII of the GATT, as presenting very minimal market access opportunities, particularly in support of export products of Developing Countries. This provision seeks to ensure improved market access, in particular in industries of interest to Developing Countries.
[725] The provision which speaks of "substantial improvements in market access for all products" ties in the overriding mandate of the WTO, of reduction of global tariffs.
[726] Adapted from Article XVIII of the GATT (n 26 above). This particular rule seeks to clarify and extend Article XVIII, particularly 4(a) of the GATT to apply to Developing Countries and LDC's, as currently it only applies to Countries which "support low standards of living and is in the early stages of development" This provision was examined in chapter 3, and it was noted that there is a disconnect in nomenclature under the current trade dispensation, which traditionally defines two categories of Developing Countries; namely LDC's and Developing Countries.

(a) the Developing Country or Least-Developed Countries notifies the CTD under Article 3.3 of this Agreement of a specific measure, or modification or withdraw concessions under the appropriate Schedule under the GATT 1994; and

(b) that the member shall inform any Member that has substantial interest therein at the time of notifying the CTD, and

any Member which has substantial interest therein may seek recourse under Article 3.6.[727]

5.6 A Developing Member and Least-Developed Member may enforce its rights under Article 4 by requesting for consultations, and lodging the matter with the CTD, where a preference-granting Member:

(a) fails to consider any development, financial and trade need lodged with the CTD under Article 3.2 during negotiations under Article 5.1; [728] *or*

(b) fails to reduce or eliminate tariffs and non-tariff barriers particularly on products of export interest to Developing Countries and Least-Developed Members in accordance with Article 5.1.

5.7 The CTD may conduct studies and avail reports to Members regarding Least-Developed Countries and their needs, and the reports shall be considered in negotiations under Article 5.1.[729]

5.8 Developed Country Members and Developing Country Members declaring themselves in a position to do so, shall ensure that preferential rules of origin applicable to

[727] The second rationale of the provision is that it aims to shorten and ease the process of applying for concessions or measures under Article XVIII, which was found as cumbersome and resulted in few Developing Countries and LDC's utilising the provisions.
[728] This approach holistically addresses enforcement of right regarding market access negotiations.
[729] Wording Adopted from Paragraph 16 of Doha Declaration (n 1 above).

imports from Developing Country Members and Least-Developed Country Members are transparent and simple, and contribute to facilitating market access.[730]

5.9 When applying an ad valorem percentage criterion to determine substantial transformation, preference-granting Members shall develop or build on their individual rules of origin arrangements applicable to imports from Least-Developed Countries, allowing the use of non-originating materials up to 75% of the final value of the product, or an equivalent threshold in case another calculation method is used, to the extent it is appropriate.[731]

5.10 A Developing Country or Least-Developed Country may request for technical or financial assistance to participate effectively in the negotiations under Article 5.1 through capacity building, and be accorded such assistance as set out under Article 9.

The importance of market access in S&DT has been repeatedly emphasised in this study, as it is central to attaining the development objective of increased trade commensurate with needs. Chapter 3 of this thesis highlighted the inadequacies of market access S&DT provisions under the current WTO dispensation, particularly regarding products of export interest to Developing Country Members. This is one of the components that Article 5 of the S&DT Framework Agreement, which establishes rules relating to market access, attempts to redress.

The opening paragraph places an obligation on Members to enter into negotiations to reduce or eliminate tariffs and non-tariff barriers, particularly on products of interest to Developing Countries and LDCs in line with paragraph 16 of the Doha Declaration. It was

[730] Derived from *Decision on Measures in Favour of Least-Developed Countries* (n 538 above) and Annex F of the *Hong Kong Declaration* (n 369 above).
[731] World Trade Organization Preferential Rules of Origin for Least Developing Countries Ministerial Decision of 19 December 2015 Nairobi Ministerial Conference WT/MIN(15)/47 — WT/L/917 para 1.1 (WTO *Nairobi Decision Preferential Rules of Origin for Least Developing Countries).*

indicated in the footnote that this is to directly address the pertinent issue of lack of market access in products of interest to Developing Members, even in existing PTA's. An example of this was the US, which maintains high tariffs on many of the products that come from developing economies it has RTAs with. It was found that in agriculture, AGOA excludes a range of high-duty products and offers very limited additional market access over and above the GSP.[732] Further, more importantly, AGOA agricultural preferences are only available for in-quota quantities, and, therefore, AGOA does not liberalise out of quota duties on a number of agricultural products.[733] This, therefore, means that once the quota is full, the full MFN duty is applicable, which limits imports from Developing Countries. The importance of Article 5.1 is that it would place an obligation on Developed and Developing Members, in this particular instance, the US, to reduce or eliminate non-tariff barriers in negotiations for products of interest to a negotiating Members, which would be notified under Article 3.2. Tea and coffee *exporting* Members which are party to AGOA, which have notified needs and interest regarding market access under the said sector under Article 3.2, would be able to engage with the US overextending preferential access, and eliminating NTB's for increased export in the said agricultural sector.

The inclusion of Article 5.1 and 5.2 is to remedy the scenario above to bind Developing Countries through PTA's or negotiations in order to accord meaningful market access through reduced tariffs. The latter article echoes Paragraph 45 of the Doha Work Programme that requires Members to provide DFQF market access in areas of interest, thereby seeking to bind Developing Members to accord market access in areas where Developing Countries can make necessary trade gains. The enquiry of ascertaining what the areas of interest are is done through the notification process under Article 3.2, which Article 5.2 cross references. This allows Developing Countries and LDCs to direct which products it seeks to prioritise for purposes of export, appropriate to their needs. Further, the chapter provides for rules regarding implementation and enforcement at Article 5.6, where a Developing Country or LDC, which feels a Developed Country fails to consider lodged needs

[732] N Condon & M Stern *The effectiveness of African Growth and Opportunity Act (AGOA) in increasing trade from Least Developed Countries: A Systematic Review* (2011) Review: University of London, 30.
[733] Condon & Stern (as above).

or fails to reduce or eliminate tariffs of interest may trigger consultation and subsequent determinations by the CTD. This is to ensure Developing Countries have simplified recourse to enforce the rights regarding market access. Under the example of AGOA, this would mean Members, such as Namibia which has an interest (and comparative advantage) in beef exports,[734] which is notified under Article 3.2, may request for consultations with the US regarding quotas which it maintains on agricultural goods such as beef and even seek a determination from the CTD if the US fails or refuses to reduce tariffs or NTB's. This is an efficient method of enforcing rights, through clear, defined obligations on Developing Countries and implementation measures.

Market Access rules also apply to Developing Countries and LDCs, which require Developing Countries to reduce tariffs in line with the WTO primary objective of trade liberalisation. The Framework, therefore, prescribes rules that address tariff negotiations in general, which are sensitive to the stages that Developing Countries are in. Article 5.4 provides a tiered formula that takes into account the different tariff structures of Developed, Developing and Least-Developed Country Members. Chapter 3 of this thesis identified the lack of technical, and financial capacity of negotiators of Developing Countries, particularly LDCs, as a hurdle. The Framework recognises the complexity of negotiations by incorporating a provision at Article 5.10 that provides for request and granting of technical and financial assistance to participate effectively in tariff negotiations, under the modalities of Article 9. Assistance in this regard can be for negotiation in Multilateral Agreements or PTA's.

Lastly, chapter 3 of this thesis highlighted how RoO play a significant role in market access for Developing Countries, with Annex II of the Agreement on Rules of Origin recognising the application of preferential RoO. The Framework, under Article 5.9, provides for relaxed RoO through Preferential Rules of Origin for Least-Developed Countries, obligating preference granting Members to allowing the use of non-originating materials up to 75% of the final

[734] UNCTAD website Namibia Trade Policy Framework https://unctad.org/system/files/official-document/ditctncd2016d2_en.pdf (accessed on 13th November 2020).

value of the products. This is in line with the Hong Kong Declaration.[735] Further, RoO are incorporated to redress the challenge identified under the current dispensation of complex RoO. Article 5.10 mandates that preferential RoO are to be transparent and easy to follow, which is in accordance with paragraph 16 of the Doha Ministerial Declaration.

In summation, the above Article on market access appropriately seeks to address the lingering challenges regarding market access. This is through mandatory provisions on Developed Countries regarding tariff and NTB's and simplified and efficient implementation and enforcement rules for Developing Countries regarding engagement in consultations and deliberations by the CTD.

Protective Measures

Article 6: Protective measures

Domestic Support

6.1 Special and differential treatment remains an integral component of domestic support, and the needs and conditions of Developing Countries, particularly Least-Developed Country Members, shall be considered regarding reduction commitments by Developing Countries.[736]

6.2 WTO Members shall not apply any form of export subsidies, with the exception of:

(a) Developing Country Members which shall only benefit from the application of provisions of Article 9.4 of the Agreement on Agriculture until the end of 2023;[737]and

[735] WTO *Nairobi Decision Preferential Rules of Origin for Least Developing Countries* (n 731 above); derived from paragraph 1.1.
[736] WTO *Decision of the Doha Work Programme adopted by the General Council* (n 369 above) 6-8.
[737] WTO *Nairobi Decision on Export Competition (n 418 above)*. The wording is derived from paragraph 7 and 8 of the Paragraph 2. It provides that Developing country Members shall eliminate their export subsidy entitlements by the end of 2018, however, allows them to benefit from the provisions of Article 9.4 of the Agreement on Agriculture (n 25 above) until the end of 2023, i.e. five years after the end-date for elimination of all forms of export subsidies.

(b) Least-Developed Countries and net food-importing Developing Countries listed in the Decision on WTO List of Net Food-Importing Developing Countries for the Purposes of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, G/AG/5/Rev.10, which shall only benefit from the application of provisions of Article 9.4 of the Agreement on Agriculture until the end of 2030, however they shall not apply any other form of export subsidies.[738]

6.3 Nothing in this Agreement can be construed to give any Member the right to provide, directly or indirectly, export subsidies in excess of the commitments specified in Members' Schedules.

6.4 Members agree that the Green Box list of "general services" in Annex 2 of the Agreement on Agriculture is expanded to include:

(a) spending related to land reform;

(b) water management;

(c) rural livelihood security; and

(d) other purposes related to development and reducing poverty,[739]

for Developing Countries and Least Developed Countries only.

Public Stockholding for Food Security Purposes

6.5 Developing Countries and Least-Developed Country Members may derogate from commitments under Articles 6.3 and 7.2 (b) of the Agreement on Agriculture, in relation to support provided for traditional staple food crops in pursuance of public stockholding programmes for food security, provided that they:

[738] WTO *Nairobi Decision on Export Competition* (as above) para 8.

[739] World Trade Organization *General Services* Ministerial Decision of 7 December 2013 Bali Ministerial Conference WWT/MIN(13)/37 and WT/L/912 (WTO *Bali Decision – General Services*).

(a) notify the Committee on Agriculture that it is exceeding or is at risk of exceeding either or both of its Aggregate Measurement of Support limits (the Member's Bound Total AMS or the de minimis level) as result of its programmes mentioned above;

(b) have fulfilled and continue to fulfil its domestic support notification requirements under the Agreement on Agriculture in accordance with document G/AG/2 of 30 June 1995, as specified in the Annex;

(c) have provided, and continue to provide once every six years, and upon change in national trade policy additional information by completing the template contained in the Annex, for each public stockholding programme that it maintains for food security purposes; and

(d) provide any additional relevant statistical information described in the Statistical Appendix to the Annex as soon as possible after it becomes available, as well as any information updating or correcting any information earlier submitted.[740]

6.6 Members shall not challenge or refer a matter to the DSB regarding breaches of domestic support commitments by Developing Country Members or Least-Developed Countries, under Annex 2 of the Agreement on Agriculture provided:

(a) there was a need as established under Article 3.2; and

(b) the CTD undertakes an analysis of the measure in accordance with Article 3.11 to examine whether the measure subscribes to Annex 2, where requested by any Member.

Anti-Dumping Measures

6.7 With regarding to Article 15 of the Anti-Dumping Agreement, Developed country Members shall consider the special situations of Developing Country Members when

[740] Wording derived from Paragraph 3 of the Bali Decision on Public Stockholding for Food Security Purposes. This attempts to provide a "permanent solution" to the issue, by continuing to implement the currently applicable exception.
World Trade Organization *Public Stockholding for Food Security Purposes* Ministerial Decision of 7 December 2013 Bali Ministerial Conference T/MIN(13)/38 and WT/L/913.

considering the application of anti-dumping measures under the Anti-Dumping Agreement, and shall:

(a) not apply anti-dumping measures where a constructive remedy is available; and
(b) shall apply for consultations under Article 3.6 of this Agreement if the goods are in relation to an interest notified under Article 3.2; and
(c) may apply for expedited determination by the CTD under Article 3.8, which shall be provided by the CTD within a month.[741]

Special Support Mechanism[742]

6.8 Developing Countries and Least-Developed Countries may utilise Special Support Mechanism under this Article, by employing tariff barriers to protect sensitive sectors which have been notified under 3.2, from import surges and price falls, regarding the Agreement on Agriculture. [743]

6.9 Developing Country and Least-Developed Country Members shall lodge a report under Article 3.2 of this Agreement, with additional evidence of decline in domestic price or an imminent foreseeable decline, and when applying the Special Support Mechanism under Article 6.8, and:

(a) the Member shall only employ a Special Support measure on a specified product, as notified by identifying a particular tariff classification;

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[741] This provision aims to clarify Article 15 of the *ADA* (n 8890 above), which is vague. It was identified in chapter 3 that Article 15 of the *ADA* which contains parts on S&DT to consider "special situations" of Developing Countries cannot be breached. It was mentioned above that in *US - Steel Plate* which ruled on Article 15 of the ADA that "Members cannot be expected to comply with an obligation whose parameters are entirely undefined." *US – Steel Plate* (n 463 above). Also see TWAIL Article, https://www.twn.my/title2/WTO.info/twninfo20080503.htm (accessed 1 September 2019).

[742] WTO *Nairobi Decision Preferential Rules of Origin for Least Developing Countries* (n 731 above). The provision provides that the Developing Country Members will have the right to have recourse to a special safeguard mechanism (SSM) as envisaged under paragraph 7 of the Hong Kong Ministerial Declaration (n 346 above). This Article is an envisaged provision which seeks to address technical parameters which include inter alia trigger clauses, remedies and duration were to still be negotiated.

[743] World Trade Organization website, Agriculture https://www.WTO.org/english/news_e/news18_e/agri_26oct18_e.htm (accessed 20 November 2019). This provision links the modalities for applying tariff barriers with the process of notification under Article 3.2. The process under Article 3 regarding opposing a measure and the CTD making a determination over the particular matter is followed if the notification is opposed.

(b) the criteria regarding use of Special Support Services shall be limited to food security, livelihood security and rural development needs;[744]

(c) the application of the measure shall be for a maximum of eight (8) months, with the possibility of re-application of the measure following a review after notification to the CTD by submitting a report under Article 3.2; and

(d) The measure shall not be applied to more than 2.5% of tariff lines in any 12-month period.[745]

6.10 A Member opposed to the proposed Special Support Measure by a Member under Article 6.8 may request for consultations under Article 3.4, to clarify the facts of the situation and to arrive at a mutually agreed solution, and follow the subsequent implementation mechanism under Article 3 of this Agreement.

Enforcement

6.11 A Developing Country and Least-Developed Country Member may enforce its rights under Article 4, where a preference granting Member:

(a) fails to consider any development, financial and trade need lodged with the CTD under Article 3.2 during negotiations regarding any protective measure under the WTO Agreements;[746] *or*

(b) fails to reduce or eliminate domestic support as obligated under any WTO Agreement."

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[744] ICTSD website https://www.ictsd.org/special-products-and-the-special-safeguard-mechanism-an-introduction-to-the-debate-and-key-issues-in (accessed 1 November 2019). WTO Member agreed on a framework in agriculture that will constitute the basis for the negotiations of full modalities. Paragraph 41 of the framework clearly states that "Developing Countries will have the flexibility to designate an appropriate number of products as Special Products, based on criteria of food security, livelihood security and rural development needs".

[745] World Trade Organization *Guidance on the time-line and the maximum application to time-lines from Revised draft Modalities for Agricultural Special Safeguard Mechanism* 6 December 2008 Committee on Agriculture TN/AG/W/7. Paragraph 3 established modalities for the application of SSM and provides that SSM shall not be applied to more than 2.5% of tariff lines for more than 12 months.

[746] The primary objective is to ensure Developing Countries can enforce protective measures efficiently under the centralised enforcement provision of Article 4 of this conceptual Framework.

Protective measures have been incorporated into the Framework Agreement that address sensitive S&DT issues. The protection of key industries[747] is central to growth in trade of Developing Countries, which frequently forms part of domestic trade policy. The Framework provides for rules on Domestic support, which incorporates extension provided from export subsidies[748] under Article 9.4 of the AoA in accordance with the Nairobi Decision on Export Competition, 19 December 2015. Domestic support also incorporates the expansion of "general services" in Annex 2 of the AoA in line with the Bali Ministerial Decision on General Services, 7 December 2013. Ministers agreed to expand the Green Box list of "general services" in Annex 2 of the AoA to include spending related to land reform, water management, rural livelihood security and other purposes related to development and reducing poverty. The Framework on S&DT, therefore, incorporates these changes, which are critical S&DT to LDCs and Developing Countries, particularly the exemption of rural livelihood security to Members. Rural livelihood security incorporates programmes such as *inter-alia* land rehabilitation, drought management and flood control and rural employment programmes.

Article 6.4 is a critical provision following the drought and water crisis, following widely reported El-Niño conditions which affect food security and agriculture in Southern and Eastern Africa, Asia, the Pacific and Latin America.[749] Most countries in Africa also lack the necessary capacity and resources to make required progress to address the challenges of droughts, leading to more severe impacts of droughts which has resulted in significant loss of life, negative effects on people, and damages to the economy and environment.[750] This, therefore, necessitates exemptions to limitations on domestic subsidies to counter the negative consequences. Article 6.6 exempts Developed Countries from challenging Domestic support under Annex 2 of AoA, which is a significant variation from rules on challenging or

[747] This refers to a particular economic activity or sector that a Member as a means of pursuing government policies considers to have strategic importance in the economic Development of the Country.
[748] The exception is in respect of certain marketing and internal transportation subsidies.
[749] Food and Agriculture Organization of the United Nations Publication, http://www.fao.org/3/CA2530EN/ca2530en.pdf (accessed 10 November 2019) 1.
[750] I Masih, S Maskey, FEF Mussá & P Trambauer 'A review of droughts on the African continent: A geospatial and long-term perspective' (2014) 18(9) *Hydrology Earth System Sciences* 3636.

requesting for consultation regarding measures. This is to ensure Developing Countries are able to utilise the critical provisions freely to address critical issues. A balancing measure, however, is incorporated in the provision – it requires the CTD to make an analysis of whether the measure subscribes to Annex 2 in order to prevent abuse of process on the part of Developing Countries.

Protective Measures in the Framework also incorporate Public Stockholding for Security Purposes. This provides for rules relating to notification when a Developing Country seeks to derogate from commitments under Articles 6.3 and 7.2 (b) of the AoA in relation to support provided for traditional staple food crops in pursuance of public stockholding programmes for food security. The Framework Agreement, in this regard, is to provide "a permanent solution that takes into account the possibility for the economies of LDCs to set up public stockholding programmes which are not yet in place" which addresses the Central African Republic's concerns regarding lack of decisiveness on the issue.[751]

Further, anti-dumping measures are incorporated in the Framework to clarify the vague application of Article 15 of the ADA which requires Members to consider the "special situation" of Developing Countries. This is through establishing specific actions required in considering the "special situations" such as not apply anti-dumping measures where a constructive remedy is available and expedited determinations under Article 3.11 of the Framework Agreement before applying an anti-dumping measure.

Lastly, the Framework provides for SSM rules for LDCs and Developing Countries which seek to employ tariff barriers to protect sensitive sectors which have been notified under 3.2, from import surges and price falls, regarding the Agreement on Agriculture. The notification and reporting procedure is aligned with rules under Article 3, which means sensitive sectors should be notified on a yearly basis. Implementation follows a report process at Article 3.2 and Members opposed to the measure may request for consultations with the CTD making determinations over the issue at Article 3.11. The importance of SSM in the MTS has been

[751] WTO *Minutes of the Meeting Held in the Centre William Rappard on 28 February 2019* General Council WT/GC/M/176 para 8.

advocated for repeatedly in chapter 3 of this thesis. The importance of SSM to the LDC group was also reiterated as being a solution to "preserve the vulnerable, small scale agriculture in our countries" in a General Council meeting in early 2019.[752]

Flexibilities of Commitments

Article 7: Flexibility of commitments

7.1 S&DT provisions in all WTO Agreements that provide for flexibility of commitments shall:

(a) be specific and detailed;

(b) include simplified modalities for application;

(c) include enforcement provisions;

(d) be specific to the needs of Developing Countries; and

(e) be linked to a Developing Country's capacity to implement a particular WTO provision and a WTO Agreement.[753]

7.2 All Developing Countries or Least-Developed Countries entitled to special and differential treatment under a particular WTO Agreement shall notify the CTD of a specific need under Article 3.2 and may enforce its rights under Article 4, where a preference-granting Member refuses or fails to:

(a) consider any development, financial and trade need lodged with the CTD under Article 3.2; or

(b) accord special and differential treatment to Developing Countries and particularly Least-Developed Countries.[754]

[752] WTO *Minutes of the Meeting Held in the Centre William Rappard on 28 February 2019* (as above) para 79.

[753] This is a response to challenges that were identified in chapter 3, the envisaged provision seeks to provide general cross-cutting guidance with regards to application and use of S&DT provisions. This approach also incorporates the *TFA* (n 24 above) which establishes a unique approach to transitional time-provisions regarding implementation. The mandate of the *TFA* establishes that Developing and Least-Developed Members would not be obliged to undertake investments in infrastructure projects beyond their means.

The Article on flexibilities of commitments operates a dual function. The first function is that it prescribes rules for existing flexibilities and future and current WTO Agreements rules. The provision seeks to remedy persisting challenges under the MTS regarding flexibilities. Article 7 requires S&DT rules to be *inter alia* specific and detailed, include simplified modalities and be specific to Developing Countries' needs. It further draws inference from the structure of the said Trade Facilitation Agreement by requiring that S&DT be linked to Developing Countries' needs. The provision ensures that flexibilities are relevant, to adequately fulfil the requirement of being aligned to Developing Countries' needs to secure a share in global trade.

The second provision is an enforcement and implementation provision, which enables a Developing Country or LDC to take action where a Developing Country fails to consider a flexibility or to accord S&DT. It follows the established requirement under most provisions of the Agreement that require notification of needs under Article 3.2 and that allows for implementation and enforcement of the flexibilities.

The Article envisages that flexibilities will be an important means to not only facilitate the compliance of Developing Countries and LDCs with WTO rules, but also make significant trade gains in areas of interest to the said Members. Flexibilities such as RoO are critical for trade gains. It was well observed by De Melo and Portugal-Perez that the gains from rich nations applying more relaxed rules on imported inputs are six times greater than the simple act of removing tariffs.[755] This further buttresses the needs to ensure flexibilities are accorded in critical areas such as RoO, which are relevant to improving exports. Further evidence of this can be seen with the case of Lesotho exports to the US, where in 2004 after just three years of Lesotho being eligible for preferences under AGOA, clothing exports to the US from one of Africa's poorest land-locked nations had trebled to $460 million,

[754] The objective is to address any S&DT flexibility provision which has inefficient or complex enforcement measures through a simplified process.
[755] World Bank *Preferential Market Access Design: Evidence and Lessons from African Apparel Exports to the US Preferential market access design: evidence and lessons from African apparel exports to the us and the EU* Policy Research Working Paper Series 6357 The World Bank.

providing employment for over 50,000 workers.[756] This is due to flexibility in rules of cumulation.[757] In 2017, textiles and apparels were at $290 million with 99.5% thereof produced under AGOA, which indicates consistency in the preferential treatment provisions, which Lesotho continues to benefits from.[758] Article 7, therefore, ensures, through provisions that direct the form that flexibilities should subscribe to, that developmental objectives are attained through effective and meaningful S&DT [flexibilities] that positively impact trade for Developing Countries, and LDCs in particular.

Transitional Periods

Article 8: Transitional Periods for Developing and Least-Developed Country Members

8.1 Standard and differential treatment provisions in all WTO Agreements that provide for transitional time provisions shall:

(a) be specific and detailed;

(b) include simplified modalities for application;

(c) shall be specific to the needs of Developing Countries;[759] and

(d) be linked to a Developing Country's capacity to implement a particular WTO provision and a WTO Agreement.[760]

[756] L Edwards and R Lawrence 'AGOA rules: The intended and unintended consequences of special fabric provisions' (2013) *VOXEU*.

[757] Lesotho under AGOA is allowed up to at least 35% of the value of the product that is considered to be originating from the beneficiary country (local cumulation). Further, up to 15% of the required 35% may be of US origin or/and the remainder from other AGOA beneficiary countries (regional cumulation). However, LDC's such as Lesotho have an exception to this rule. Lesotho qualifies for the third-country provision, which is a special rule that allows them to export textiles and garments duty free even if they source inputs from non-AGOA beneficiary countries.

[758] See AGOA website, https://agoa.info/images/documents/15552/lesothocountrybrochureagoafinal.pdf, (accessed 2 March 2020).

[759] This is a response to challenges that were identified in chapter 3; the envisaged provision seeks to provide general cross-cutting guidance with regards to application and use of S&DT provisions.

[760] This is also a response to challenges that were identified in Chapter 3; the envisaged provision seeks to provide general cross-cutting guidance with regards to application and use of S&DT provisions. This approach also incorporates the Trade Facilitation Agreement which establishes a unique approach to transitional time-provisions regarding implementation. The mandate of the *TFA* (n 24 above) establishes that developing and Least-Developed Members would not be obliged to undertake investments in infrastructure projects beyond their means.

8.2 The extent and the timing of implementation of transitional provisions of WTO Agreement shall be related to the implementation capacities of Developing and Least-Developed Countries.

8.3 All WTO Agreements to be negotiated shall contain three categories of provisions related to the implementation of transitional provisions:

Category A

(a) A Category that contains provisions that a Developing Country Member or a Least-Developed Country Member designates for implementation upon entry into force of the particular Agreement, or in the case of a Least-Developed Country Member within a particular period of time after entry into force;

Category B

(b) A Category which contains provisions that a Developing Country Member or a Least-Developed Country Member designates for implementation on a date after a transitional period of time following the entry into force of the particular Agreement; and

Category C

(c) A- Category containing provisions that a Developing Country Member or a Least-Developed Country Member designates for implementation on a date after a transitional period of time following the entry into force of a particular Agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building, as provided for in Article 9 of the Agreement,

and each Developing Country and Least-Developed Country Member shall self-designate, on an individual basis, the provisions it is including under each of the Categories.[761]

8.4 Upon entry into force of a particular Agreement, each Developing Country and Least-Developed Country Member shall implement its respective Category commitments as provided for at Article 8.3 of this Agreement, and those commitments designated under the respective Agreement will thereby be made an integral part of the particular Agreement.

8.5 A Least-Developed Country shall notify the CTD of the provisions it has designated in Category A for up to a period of time as stated at Article 8(3)(a) after entry into force of this Agreement, and each Least-Developed Countries' commitments designated under Category A will thereby be made an integral part of a particular Agreement, and:

(a) for transparency purposes, notifications as provided under Article 8(3)(c) submitted shall include information on the assistance and support for capacity building that the Member requires in order to implement; and

(b) information on assistance and support for capacity building shall be submitted to the CTD to provide for transparency, as prescribed by the particular Agreement.[762]

8.6 A Developing Country and Least Developing Country may request an extension of a transitional time provision by notifying the CTD under the modalities set-out at Article 3.3 of this Agreement.[763]

[761] This provision replicates Article 14 of the Trade Facilitation Agreement (n 24 above) which links implementation of provisions to capacity. Further, it important to note that implementation schedules will be on an individual basis for Developing Countries as under the *TFA.* This is to ensure that WTO Agreements are not burdened by Agreements they are unable to comply with, but rather work towards implementing schedules based on their capacity.

[762] General provision accords rights to Developing and Least-Developed Country Members to Technical and financial assistance adopted from Article 22 of the Trade Facilitation Agreement (n 24 above).

An outcome from Chapter 3 of this thesis was that a number of WTO Agreements were crafted primarily with the interest of certain Western States and reflected outcome of their domestic trade policy. This followed an examination of the TRIPS Agreement in chapter 3 and it was concluded that a considerable number of Developing Countries, particularly in Sub-Saharan Africa, would not benefit from the application of the Agreement, which would, if anything, be a challenge in implementing and have negative effects in areas where there are, for example, [cheap] access to drugs. This, therefore, necessitates a deliberate change to redress the challenge of binding Developing Countries to WTO Agreements and provisions with negative impacts to trade and development. Transitional provisions are not an answer to permanently opt-out of particular provisions or Agreements, however, they are used to effectively counter-act these challenges.

The provisions under Article 8 on Transitional Periods are formulated as a response to challenges that were identified in chapter 3. The provision seeks to provide general cross-cutting guidance with regards to transitional provisions across differing WTO Agreements. This approach employed is predicated on the Trade Facilitation Agreement which establishes a unique approach to transitional time-provisions regarding implementation. Similar to the rules on flexibilities, it prescribes the format that transitional provisions should take, particularly in future WTO Agreements. The primary requirement is that transitional time provisions must be specific to the needs of Developing Countries and should be linked to a Member's ability to implement the provision.[764] The linkage to capacity is essential to implementation, which is incorporated under Article 8.3 which provides for assistance and support for capacity building to aid a Developing Country in implementing the Agreement.

In application, the Framework Agreement links transitional provisions to needs identified under Article 3.2 and the capacity of a Developing Country to implement the relevant

[763] In chapter 3 of this thesis, it was noted that a shortcoming of transitional provisions under the current MTS is that when a Developing Country or LDC requests for an extension of an exemption, there are modalities and/or guidelines in how to apply or request extensions to the relevant Committee in question and composition or structure of the Committee.
[764] See Article 8.1(a) and (b) of the S&DT Legal Framework Agreement.

Agreement. These provisions provide for temporary exemptions from imposition of WTO rules that may be detrimental to Developing Countries, in particular LDCs and SVE's, through delayed tiered application of WTO Agreements. Similar to the TFA, the Framework at Article 8.3 envisages that all Agreements should contain a tiered option which prescribes different implementation periods for LDCs and Developing Countries, which are notified by the Member itself. A further rule which accords further preferential treatment is the ability to extend through notification, which is a key provision that allows a Developing Country to further derogate where it requires further time to adjust or capacitate. This is done through modalities which require filing a report with justification and set timelines under Article 3.3.

This approach to transitional provisions under the S&DT Framework seeks to bridge the argument that Hoekman proposed of entering into Plurilateral agreements that Members may opt out of,[765] with an approach that does not prescribe Developing Members to preclude themselves or opt out of Agreements in totality. Singh's Plurilateral sentiments also follow when considering his argument that "[…] there are parts of WTO Agreements which do not advance the cause of development and, arguably, restrict it".[766] The transitional provisions under the Framework Agreement allows them delayed entry of force, which is self-designated and an approach similarly adopted in the TFA. The anticipated benefits of this approach are the increased participation in global trade through implemented Agreements, with time to adjust domestic trade policy and internal requirements to minimise the short-term trade-loss of Developing Countries and LDCs.

This approach, however, like the Plurilateral approach may have negative effects as it may undermine the WTO, as a truly multi-national MTS with active and full participation of Developing Countries. This argument has been advanced by the US that is of the opinion that exemption of WTO rules is unfair and creates an uneven MTS and it was contended that "[…] all the rules apply to a few (the developed countries), and just some of the rules

[765] Hoekman (n 87 above) 12.
[766] Singh (n 99 above).

apply to most, the self-declared Developing Countries".[767] It is important to qualify, however, that this does not reflect the position of most Developed Countries. The option of prescribing transitional provisions is significantly less damaging to the reputation of the WTO than totally opting out of entire Agreements. The approach straddles the line of ensuring Members are able to carry out specific provisions in Agreements, while facilitating their inclusion through capacitating them to eventually commit and be bound to obligations. The rules above allow transition periods to be more than adjustment tools but rather are structured to facilitate the implementation of WTO rules which are constructed to align with their trade and development related agenda. This is through allowing periods which are based on needs and capacity in order to enable time to develop trade policy which retains the trade objectives of the Member.

Technical and Financial Assistance

Article 9: Technical and Financial assistance

9.1 Assistance and support for capacity building shall be provided to help Developing Countries and Least-Developed Counties implement all the provisions of this WTO Agreement, in accordance with the nature and scope of the Agreement, [768] *which shall include:* [769]

(a) technical assistance; and

(b) financial assistance. [770]

[767] WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* (n 592 above).

[768] Adopted from Article 13 of the *TFA* (n 24 above), which in chapter 3 of this thesis was described as progressive in addressing Capacity to the extent of implementing Agreements.

[769] The provision is deliberately drafted in open non-exhaustive language and is non-restrictive to include any other type of assistance that may be envisioned in future Agreement.

[770] Further, the Nairobi Ministerial Declaration at Paragraph 16 established further need for assistance as follows:
"We recognise the importance of the Aid for Trade initiative in supporting developing country Members to build supply-side capacity and trade-related infrastructure and we shall accord priority to the LDCs' needs. We take note of the outcomes of the WTO global reviews on Aid for Trade, in particular the Fifth Global Review, and recognise the continuing need for this initiative". WTO *Nairobi Decision Preferential Rules of Origin for Least Developing Countries (n 731 above)*.

9.2 Where a Developing Country or Least-Developed Country lacks, or continues to lack, the necessary capacity to undertake or carry out a provision under a WTO Agreement, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired; [771]

(a) as may be determined by the CTD after the Member has lodged a report for exemption from the provision, containing information under Article 3.3; and

(b) a Member opposed to the proposed Special Support Measure by another Member at Article 6.8 may request consultations under Article 3.4, to clarify the facts of the situation and to arrive at a mutually agreed solution, and follow the subsequent implementation mechanism under Article 3 of this Agreement.

9.3 Special and & Differential Treatment provisions in all WTO Agreements that provide for technical or financial assistance shall:

(a) be specific and detailed;

(b) include simplified modalities for application;

(c) be specific to the needs of Developing Countries; and

(e) be linked to a Developing Country's capacity to implement a particular WTO provision and a WTO Agreement.[772]

9.4 A Developing Country and a Least-Developed Country may request technical or financial assistance from;

(a) the CTD;

(b) a preference-granting Developed Country, which a Developing Country or Least-Developed Country has particular trade related interest in under Article 3.2; or

(c) a Developing Member with a GDP per capita difference from the requesting Member as established by the CTD, which a Developing Country or LDC has particular trade related interest in under Article 3.2;[773]

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[771] WTO *Nairobi Decision Preferential Rules of Origin for Least Developing Countries* (as above) para 16.

[772] This is a response to challenges that were identified in chapter 3; the envisaged provision seeks to provide general cross-cutting guidance with regards to application and use of S&DT provisions. This approach also incorporates the Trade Facilitation Agreement which establishes a unique approach to transitional time-provisions regarding implementation. The mandate of the *TFA* (n 24 above) establishes that Developing and Least-Developed Members would not be obliged to undertake investments in infrastructure projects beyond their means.

and the Member may request for assistance in accordance Article 3.3 of this Agreement.[774]

9.5 Developed Countries, and where possible Developing Countries, shall provide technical and financial assistance to other Developing Countries and Least-Developed Countries as requested at Article 9.4 of this Agreement in accordance with a particular WTO Agreement, and:

(a) the CTD shall establish a fund where Donor-Members[775] *shall equitably contribute to the fund on an annual basis, in amounts linked to their respective GDP per capita;*

(b) use of the funds shall be allocated equitably upon assessment and determination of a need by the CTD at Article 3.11 of this Agreement, with preference given to Least-Developed Countries;[776]

(c) over and above the contribution to the fund at (a), a Donor-Member may individually directly provide technical or financial assistance to a Developing Country or Least-Developed Country;[777]*and*

(d) the formula regarding contributions shall be published by the General Council on a bi-annual basis, together with the minimum GDP per capita required for Members to contribute to the fund under (b).

9.6 To provide transparency to Developing Countries and Least-Developed Countries on the provision of assistance and support for capacity building for implementation of a particular Agreement, each donor Member assisting Developing Country Members

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[773] The CTD is to establish a GDP difference which is to be used to measure whether Developing Countries are so wide apart that the other may be obligated to render such assistance.

[774] In chapter 3 of the study, it was noted that a shortcoming of transitional provisions under the current MTS is that when a Developing Country or LDC requests for an extension of an exemption, there are modalities and/or guidelines in how to apply or request extensions to the relevant Committee in question, composition or structure of the Committee.

[775] Developed Countries and Developing Countries in such a position to contribute funds.

[776] One of the Challenges of financial and technical assistance identified in chapter 3 was that most WTO Agreements do not provide for who will be responsible for providing the assistance and, therefore, the Members are not bound to offer the said assistance.

[777] The inclusion of this provision is to ensure maximum contribution of funds and technical assistance to ensure Developing Countries are capacitated to the furthest extent possible.

and Least-Developed Country Members with the implementation of this Agreement shall submit to the CTD, at entry into force of this Agreement and annually thereafter, the following information on its assistance and support for capacity building that was disbursed in the preceding 12 months and, where available, that is committed in the next 12 months:

(a) a description of the assistance and support for capacity building;
(b) the status and amount committed and disbursed;
(c) the procedure for disbursement of assistance and support;
(d) the beneficiary Member or, where applicable, the region; and
(e) the implementing agency in the Member providing assistance and support.[778]

9.7 Technical and Financial assistance requirements by Developing Countries and Least-Developed Countries shall be considered in all negotiations, and Developing Countries and Least-Developed Countries may request the CTD to assist in:

(a) conducting studies and capacity-building measures to assist to participate effectively in the negotiations by making a request to the CTD with supporting documents under Article 3.29(a)(b)(c) and (d) of this Agreement;[779]*and*
(b) requesting a particular need from a Developed.

9.8 Targeted assistance[780] *and support should be provided to the Least-Developed Countries so as to help them build sustainable capacity to implement their commitments, given the special needs of Least-Developed Countries.*[781]

[778] Wording adopted from Article 22 of the *TFA* (n 24 above). This provision is important for establishing modalities for transparency of aid.
[779] Adopted from Paragraph 16 of the *Doha Declaration* (n 1 above).
[780] See Article 2 (definition section) of the Framework Agreement. Trade-related programmes projects to support Developing Countries and Least Developed Countries build trade capacity in a particular area or address specified trade related constraints.
[781] Wording adopted from Article 21(2) of the *TFA* (n 24 above); it is imperative to provide for particular preference to LDC's.

It was established in chapter 3 of this thesis that provisions on technical and financial assistance are contained in most WTO Agreements, particularly in the Uruguay round Agreements. The shortcomings across the numerous provisions which were identified were in the structure of WTO provisions which failed to establish key implementation issues, such as how such assistance is requested or that fails to state which Members should avail assistance and those eligible to receive it. Article 9 of the Framework Agreement focuses on redressing these particular issues.

The Framework Agreement, under Article 9.2, highlights the role of assistance in capacitating Members to implement WTO provisions. The provision prescribes that a Developing Country that lacks capacity to implement/undertake a commitment and that lodges a report requesting for exemption from the provision under the Article 3.3 will not be bound to the commitment until the necessary capacity is acquired. This is a critical provision that allows a Member to derogate, albeit for a specific period of time, from implementing a WTO provision due to lack of capacity. Any WTO Member may oppose the report and follow the necessary procedure until a determination is made by the CTD on the requested exemption. This provision enables Developing Countries to be excluded from applying specific WTO rules, until assistance is provided to adequately capacitate them to comply with the provisions.

Under the Framework Agreement, Developing Countries may request for technical or financial assistance from a particular preference-granting Developed Member or a Developing Country with a GDP difference from the requesting Member as established by the CTD. Where assistance is requested from a Developed or Developing Country, the requesting Member has to have a particular trade related interest under Article 3.2. The rationale is to place the obligation of according assistance on Members with markets of interest to Developing Countries. This is to increase the possibility of market access of exports from Developing Countries. The mechanism allows capacity and support to be provided under existing bilateral mechanisms, e.g. the SADC-EU EPA, where existing mechanisms regarding trade-related assistance exists, as will be examined at Chapter 6. It

also allows for requests for assistance from Members that they have trade interests in, however those that they may not necessarily have an existing Bilateral or Multilateral agreement with. It follows the structure of assistance in the TFA, particularly in providing for assistance and capacity support as identified by the Developing Countries themselves,[782] either "bilaterally or through the appropriate international organizations",[783] (the CTD in the instance of the Framework Agreement). The rationale is to ensure modalities are established for assistance to be targeted, and such rules dynamic enough to operate in both bilateral Agreements and through assistance under the MTS.

The Framework also establishes implementation rules regarding request for assistance, which may be made by lodging a report to the CTD under Article 3.3, which details specific assistance based on needs. The Framework Agreement also establishes a criteria for eligibility of assistance at Article 9.3. The areas of assistance have to be either specific to the needs of Developing Countries, or linked to capacity to implement a particular provision. This facilitates for targeted, measured and particular assistance for efficient results orientated assistance.

Upon receipt of the [direct] request, Developed Countries, and where possible, Developing Countries are then mandated to oblige and accord such assistance. A direct request can also be made by a Developing Country or LDC under the Article on SPS and TBT, at Article 10.1, where a preference-granting Member is obligated to provide a Developing Country which has interest in exports (as notified under Article 3.2) with assistance regarding SPS and TBT. A notification mechanism is also provided for transparency purposes, where Members which have accorded assistance notify the CTD of assistance disbursed within the last 12 months on a yearly cycle. This would cover assistance under Bilateral Agreements and other PTAs, with the rationale to ensure knowledge for equitable distribution of resources. This also prevents duplicity of efforts and resources. An example of "direct assistance", which can be accorded through the modalities of Article 9.4(b), is the USAID's trade facilitation

[782] *TFA* (as above) Article 16; the Article provides for notification of implementation dates, and specific information on assistance.
[783] *TFA* (as above) Article 21:1.

technical assistance for improving customs procedures. USAID has been successful through a progression of best customs practice procedures and technology, operated through three African Trade Hubs in Southern, East, and West Africa respectively.[784] The hubs are the African Global Competitiveness Initiative (AGCI), which has provided an organisational framework for USAID's African competitiveness portfolio of projects in Africa.[785]

In applying the S&DT Framework, a Member that would require assistance in complying with the TFA particularly regarding customs harmonisation with Members that would be able to request assistance under Article 9.4 from the US, if they are able to show they have a trade interest in the US market, demonstrated by needs lodged under Article 3.2. South Africa could be an example of such Member, which could apply for assistance in customs technology for its Beitbrigde one-stop-border-post project with Zimbabwe,[786] if the needs are notified under Article 3.2 as it has interest in the US market with large exports of fruits and wine to the US market. It is envisaged that assistance can be in relation to market-access, or trade-related commitments under binding WTO Agreements, such as meeting WTO TFA notified actions or deadlines.

Requests made to the CTD are assessed by the CTD, which makes a determination on allocation of funds, with preference going to LDCs, as provided for under Article 9(4)(a). Access to finances is critical for capacity related activities. A Fund under the Development Framework Agreement is to be administered by the CTD to assist Developing Countries to facilitate the capacitation of functions under the Agreement (such as notification of needs under Article 3.2) or for other specific needs as requested under Article 9.4. The establishment of a fund is provided for under Article 9.5, where Developed Countries, and Developing Countries (where possible), are mandated to contribute equitably towards the funds on an annual basis in amounts linked to their respective GDP per capita. The provision is crafted in such a manner that doesn't only bind Developed Countries, but rather Members

[784] The hubs are located in Gaborone, Botswana (Southern African Hub), Nairobi, Kenya (East Hub), and Accra, Ghana (West Hub), with a satellite office in Dakar, Senegal.
[785] OECD website Aid-for-Trade Case Story, https://www.oecd.org/aidfortrade/47434962.pdf (accessed 11 November 2019).
[786] African Union website OSBP Beitbridge project, https://www.au-pida.org/view-project/22/ (accessed 12 November 2019).

based on an objective measure, which is their GDP per capita. This, therefore, increases the revenue pool and mandates Developing Countries with high GDP per capita, such as China, with the second highest GDP in 2018 and Brazil with the eighth highest in 2018 according to the World Bank.[787] Similar funds under the WTO have been established, such as the DDA Global Trust Fund (DDAGTF) established in February 2002, where Members are committed to providing the Secretariat with around CHF 24 million annually as well as some CHF 6 million from the regular budget.[788] The S&DT Framework Agreement is specific with regards to financial obligations of the Fund in order to ensure Members undertake obligations in financing a fund that will be employed to capacitate Developing Countries and carry out development objectives of increasing trade in accordance with their needs.

The prioritisation of LDCs as beneficiaries from the fund follows the pattern established under paragraph 44 of the Doha declaration, the Enabling Clause and multiple WTO Agreements advocating for a larger share in trade, particularly of LDCs, and exemptions primarily aimed at Developing Countries. LDCs, under the Framework, are to be given priority in use of funds administered by the CTD for assistance as prescribed under Article 9.5. A similar approach is adopted by the WTO DDAGTF, which prioritises LDCs and African Countries for training and technical cooperation, which it states are the most in need of the WTO's technical assistance and trade-related technical assistance at large.[789] The S&DT Framework Agreement also provides for a mechanism where LDCs are able to request for and benefit from assistance in conducting studies and capacity-building measures to assist LDCs to participate effectively in the negotiations.

The Article on technical and financial assistance, in summation, will allow for predictable and clear rules that spell out obligations of Members. It further provides for implementation of rules on assistance, allowing Members to access assistance, primarily through the CTD.

[787] World Bank website Data Page: https://data.worldbank.org/indicator/ny.gdp.mktp.cd?most_recent_value_desc=true&view=map (accessed 12 November 2019).
[788] World Trade Organization *Doha Development Agenda Global Trust Fund* Technical Assistance and Training Plan 2008 – 2009 20 November 2007 Committee on Budget, Finance and Administration WT/BFA/W/163 para 6.
[789] OECD website ITTC Case Story on Trade Capacity Building in the WTO. Aid-for-Trade Case Story: WTO's Institute for Training and Technical Cooperation (ITTC), see oecd.org/aidfortrade/48413638.pdf (accessed 12 November 2019).

Such assistance is key in effectively implementing the S&DT Framework Agreement itself and also, by virtue of its application to other WTO Agreements, it is critical in ensuring capacity to participate in global trade.

The Framework Agreement is premised on counter-balancing the high costs Developed Countries incur in according all Developing Countries trade preferences under the current dispensation, with more binding S&DT to fewer Members which demonstrate particular needs. It is anticipated that targeted mandatory assistance would have a more positive impact in directly addressing Developing Countries' trade-related challenges, and significant long-term benefits in creating LDCs and Developing Countries which are less or no longer reliant on Developed Countries. This would further create Developing Countries which would be economically stable and more compliant to trade rules, which may enable deeper tariff cuts, which is in the interest of Developed Members. Peremptory assistance provisions may have significant short and mid-term costs, however the long-term gains are significant. The costs and benefits of the Framework Agreement are further examined under Chapter 6 of the Thesis.

SPS and TBT Provisions

Article 10: SPS and TBT Provisions

10.1 Developing Countries and Least-Developed Countries may submit their needs under Article 3.2 relating to compliance with Sanitary and Phytosanitary requirements, and Technical Barriers to Trade of a particular Developed Country, and the Developed country Members, in implementing their commitments on market access shall;

(a) take fully into account the particular needs and conditions of Developing Country Members; and

(b) provide a greater improvement of opportunities and terms of access through providing technical and financial assistance under Article 9.5(c) to a Member with a notified need.[790]

10.2 A Developed Country and Developing Country Members in a position to do so shall not introduce a new Sanitary and Phytosanitary requirement or Technical Barriers to Trade requirement before undertaking commitments under Article 10.1(a) and (b).[791]

10.3 A Developing Country and Least-Developed Country may enforce its rights under Article 4, where a SPS or TBT regulation by a Developed Country:

(a) creates an unnecessary obstacle to international trade as provided for by Article 2.2 of the Technical Barrier to Trade Agreement;[792] *or*

(b) introduces a new Sanitary and Phytosanitary requirement and Technical Barriers to Trade requirement before undertaking commitments under Article 10.1(a) and (b)."

Rules under the existing SPS and TBT Agreement do not do enough to adequately address challenges of Developing Countries in the MTS. Chapter 3 highlights the importance of adequate S&DT provisions which relate to SPS and TBT under the WTO. It was mentioned at section 3.2.1 above that Developing Countries and LDCs, who lack the necessary capacity, continue to struggle with complex regulatory SPS measures, which may be legitimate but that fragment trade, particularly in Agricultural exports. Agriculture makes a significant contribution to their economies, including to gross domestic production, export revenue

[790] This provision seeks to directly link assistance with complying with SPS and TBT Measures to particular Members. It requires a Developing Country (through Article 9.5(c)) to directly provide financial or technical assistance (as opposed to routing the need through the fund established at 9.5(a)).

[791] In chapter 3, it was identified that Article 10.1 of the *TBT Agreement* (n 406 above) lacks specificity with regards to steps Developed Countries must implement after consideration is made to Developing Countries' needs. This, therefore, means that the obligation to take Developing Countries' needs into account does not require any specific implementation beyond an enquiry into 'needs' of Developing Countries before applying new requirements.

[792] Article 2.2 sets out the test to be employed in determining whether technical obstacles create "unnecessary obstacles to international trade". It provides that the test is "[…] technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".

and employment as well as to rural development and livelihood security.[793] The provisions, therefore, should provide a solution to the SPS and TBT challenge.

Article 10 seeks to address the challenge imposed by SPS and TBT requirements through certain approaches. The first is through provisions which establish an obligation to aid Developing Countries and LDCs which engage Developed Countries for assistance to overcome the challenges, which should be identified by an assistance-requesting Member. The Article on Technical Assistance requires member-states to alert the CTD of needs through filing reports under Article 3.2. This is an important step in overcoming SPS and TBT, as Developed Countries are to directly engage with the Developing Country, in particular with the notified need and assist the Member through providing technical and financial assistance under Article 9.5(c). It is envisaged that through the mandatory assistance, that Developing Countries would overcome the SPS and TBT requirements and make trade gains through increased exports to the preference-granting Member.

The second provision at Article 10.3 is an enforcement-based one, which provides Developing Countries with recourse to utilise the CTD dispute mechanism, which starts with consultations under Article 4. This provision may be utilised where the Member is of the opinion that a SPS or TBT creates an unnecessary obstacles to international trade. The mechanism may also be triggered where the Member is of the opinion that a new SPS or TBT measure has been introduced without extending assistance to Developing Members who have interest in the new measures. The CTD may make a determination on the validity of a SPS or TBT measure introduced or make a determination on the need to accord assistance to a particular Developing Country.

The two approaches are critical in ensuring Developing Countries are able to secure a larger share of global trade through capacitation to increase exports and enforcement of rights where market access can be lost through SPS and TBT requirements. The example of East-Africa's challenge in Nile-perch (fish) exports, particularly Uganda, Kenya and Tanzania, is

[793] FAO website http://www.fao.org/3/a-y3997e.pdf (accessed 13th November 2020).

one that highlights the importance of the provisions contemplated under Article 10. Nile perch exports were extremely profitable until they faced a number of restrictions on trade with the EU in 1996 following detection of Salmonella in a number of consignments of Nile perch from Kenya, Tanzania and Uganda at the Spanish border. Spain immediately prohibited imports and the European Commission in April 1997 introduced a requirement for Salmonella testing of all consignments of Nile perch from the region.[794] The effects were devastating for Kenya, the price of Nile perch fell, leading to short-term loss of exchange earnings, bankruptcies and unemployment.[795] In applying the provisions under the S&DT Framework Agreement, Article 10 would require preference-granting Developing Countries, such as the EU in this instance, to engage with Kenya, Tanzania and Uganda and accord them assistance to overcome SPS and TBT related challenges in the fisheries sector. The provision would prohibit the EU to impose new restrictions without this process of engagement as provided for under Article 10.2. It is important to note that the EU would still be able to impose the measure if the measure created unnecessary obstacles to trade (unjustified under the exception for health under GATT 1994 XX(b)) or measures which are not commensurate with the threat. A measure which may be unjustified could be a ban on fish imports from Uganda, which would enable Developing Countries (in this instance, Kenya, Uganda and Tanzania) to recourse triggered under Article 10.3. A reasonable measure commensurate with the circumstances would be imposition of mandatory tests of fish imports as opposed to a ban in the short-term. This would have constituted a measure that would address concerns of an importing Member, without the economic devastation to the exporting Developing Countries. In the long-term, technical and financial assistance could be sought by the Developing Countries to meet import standards.

Article 10 further extends the obligations not to impose new Sanitary and Phytosanitary requirements and Technical Barriers without considering needs to *'Developing Countries in a position to do so.'* It is important for the S&DT Framework Agreement to incorporate provisions that bind and obligate emerging Members to accord a preferential treatment to

[794] U Kleih, P Greenhalgh & A Marter A 'Sustainability impact assessment of proposed WTO negotiations: Final report for the fisheries sector study' (2016) *National Resource Institute* Final Report 11.
[795] Kleih and others (as above).

both LDCs and Developing Countries. Considering the increasing trade between LDCs, certain Developing Countries and emerging economies such as China, and the considerably different levels of development between the two, S&DT in such a relationship may benefit the LDCs and Developing Countries more than preferential treatment from Developed Countries which they have low trade with. Members such as China, Brazil, Singapore, Taiwan and South Korea have trade and economic indicators similar to Developed Countries. It is, therefore, pivotal to extend the application of S&DT beyond the parameters of Developing and Developed Countries in order to attain the primary objective of ensuring Developing Countries attain a larger share of trade.

Provisions under Article 10 on SPS and TBT requirements are critical in facilitating the inclusion of Developing Countries into the global economy. This is particularly the case with sub-Saharan African Countries which rely on exports of agricultural products, which are prone to SPS and TBT compliance challenges in preference-granting Members. Article 10 contains binding provisions which will enable Developing Countries to overcome SPS and TBT challenges through mandatory consultations and assistance. They also establish clear obligations and incorporate modalities for enforcement or rights regarding imposition of strenuous SPS and TBT requirements. The provisions also balance Developed Countries' rights to apply SPS and TBT requirements, to the extent that they are justified and do not impose unnecessary obstacles. This is, therefore, a considerable improvement to rules under the current dispensation.

4.3.5 Part IV - The Committee on Trade and Development

Part IV - The Committee on Trade and Development

Article 11: Functions of the Committee on Trade and Development

11.1 Nothing in this Agreement can be construed to derogate from the Mandate of the CTD and powers conferred at Article IV(7) of the Agreement Establishing the WTO.

11.2 The CTD shall serve as a focal point for the consideration and coordination of work on development in the WTO, [796] and as part of its functions, the CTD shall:

(a) periodically review the special provisions in the Multilateral Trade Agreements in favour of Developing Countries, and in particular Least-Developed Country Members, and report to the General Council for appropriate action;

(b) make determinations regarding special and differential treatment, particularly relating to rights and obligations and arrangements and measures under this Agreement, and any other WTO law through the Review Panel which shall be composed under Article 11(4) of this Agreement;

(c) provide analysis of special and differential treatment issues;

(d) undertake studies of special and differential treatment with a specific scope and objective under WTO Agreements;

(e) publish and disseminate information regarding special and differential treatment to Members through the WTO Secretariat;

(f) enforce special and differential treatment through determinations by the Review Panel;[797]

(g) coordinate and operate the monitoring mechanism for special and differential treatment; and

(h) analyse and make determinations on graduation of a Member.

11.3 The CTD shall establish a Review Panel which shall;

(a) make determinations regarding special and differential treatment, particularly with regards to Members' rights and obligations, and measures and arrangements thereto;[798] and

(b) publish a report containing details of the determination.

[796] World Trade Organization website on Committee of Trade and Development: https://www.WTO.org/english/tratop_e/devel_e/d3ctte_e.htm (accessed 1 September 2019).
[797] This is done under Articles 3.9 and 4.4 of the S&DT Legal Framework Agreement.
[798] Articles 3.9 and 4.4 of The Framework.

11.4 A Review Panel shall be composed of three panellists with one representative each from a Developed Country Member, a Developing Country Member, and a Least Developed Country Member.[799]

11.5 Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

11.6 Where a matter primarily requires an economic determination, the panel may comprise of five members with;

(i) three panellists with a backgrounds in economics, particularly international economics or international trade law, with one representative each from a Developed Member, a Developing Member, and a Least Developed Country Member;

(ii) two panellists with a background in law, particularly international trade law, one from a Developed Country Member, and another from either a Developing Member or a Least Developed Country Member.

11.7 Citizens of Members whose governments are parties to consultations regarding a matter referred to the CTD under Article 3.11 or 4.4 of this Agreement shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise."

[799] This provision seeks to obtain representation from all three categories of Members, Developed Countries, Developing Countries and LDCs. This is to ensure the various classified Members are represented accordingly for increased ownership of determinations and perspectives. This is similar to Article 8(10) of the DSU (n 3 above), which provides that "[w]hen a dispute is between a developing country Member and a developed country Member, the panel shall, if the developing country Member so requests, include at least one panellist from a developing country Member".

From a cursory observation, the CTD, under the Conceptual Framework, plays a vital role in the implementation, enforcement, and enhancement [through reporting and recommendations] of S&DT. The CTD serves as a focal point for consideration and coordination of work on development in the WTO and its relationship to development-related activities in other multilateral agencies.[800] The CTD's mandate is set out at Article IV(7) of the Agreement Establishing the WTO. This is to "periodically review the special provisions in the Multilateral Trade Agreements in favour of the Least-Developed Country Members and report to the General Council for appropriate action". Despite its developmental focus, Article IV(7) doesn't restrict membership to representatives from Developing Members only, but opens it up to representatives of all Members. This is an important feature in the configuration of the CTD as Developed Countries are key stakeholders in development under the WTO in their function as preferential right-granters. This is an important feature as the Conceptual Framework prescribes for additional functions that the CTD is to undertake, which include a quasi-judicial role, as will be expounded below. It is, therefore, essential that the CTD be represented by all stakeholders to ensure fairness in the functions of the CTD and the accountability of the processes, including decisions by the CTD which may affect rights and obligations regarding S&DT.

Part IV of the Conceptual Framework details the functions of the CTD, which extend beyond the general scope of those provided under the WTO Agreement of 'reviewing' S&DT provisions and 'reporting' them to the General Council. The Agreement Establishing the WTO prescribes that the General Council may establish such additional Committees with such functions as it may deem appropriate. It is envisaged that the General Council, therefore, as a competent authority would prescribe additional functions that the conceptual S&DT Framework Agreement designates.

The CTD plays an overwhelmingly vital function in the WTO regarding Development. In addition to the above-mentioned functions, the CTD plays the role of reviewing and

[800] World Trade Organization *Decision by the General Council on 31 January 1995* WTO Committee on Trade and Development 23 February 1995 WT/L/46, para 1.

reporting on S&DT to the General Council and establishing the Monitoring Mechanism. The CTD is also currently responsible for *inter-alia*;

- Preferential arrangements between Developing Countries, however, are notified under Paragraph 2(c) of the Enabling Clause to the CTD;
- Information on assistance to the Committee on Trade Facilitation established under Article 23 at paragraph 1(1) of the TFA, by both donors and receivers for purposes of transparency;
- Provision of guidelines for technical assistance activities of the WTO;
- Dedicated Work Programmes on small economies, as agreed by the Doha Declaration and the General Council;[801] and
- Reviewing Aid-for-Trade.[802]

It was expounded how the CTD has been underwhelming in delivering its function regarding the Monitoring Mechanism in chapter 3 of this thesis. One of the reasons advanced for the performance, or lack thereof, was lack of participation from Developing Countries, particularly in establishing modalities for the Monitoring mechanism.[803] The above-notwithstanding, it is envisaged that by establishing detailed rules on the structure and composition of the CTD and functions of the foregoing, that this will facilitate for a capacitated Committee to effectively carry out its mandate. Further, with the operation of Article 9 of the Framework Agreement on S&DT, financial and technical assistance to enhance participation from Developing Countries in the processes will be a key driver in attaining the objectives of the *CTD*.

Part IV, Article 11.2 of the Framework Agreement establishes functions of the CTD in relation to this agreement. The provision firstly prescribes a function already designated to the CTD which is particular to the Framework Agreement, specifically that the CTD shall

[801] WTO website: https://www.WTO.org/english/tratop_e/devel_e/dev_wkprog_smalleco_e.htm (accessed 14 October 2019).
[802] WTO website https://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm (accessed 13th November 2020).
[803] As of the 5th of July 2018 Committee on Trade and Development meeting, no written submissions from Members had been made. WTO *Committee on Trade and Development* 5 July 2018 Meeting (n 694 above); Paragraph 3As indicates that no written submissions from Members had been made. Further, while the creation of the Monitoring Mechanism was envisaged in the decision taken by the General Council in July 2002, it had taken 11 years for Members to agree to the establishment of the Mechanism.

periodically review S&DT provisions and report to the General Council for appropriate action. This provision is similar to Paragraph 4 of the CTD's Terms of Reference.[804] Another vital function assigned to the CTD is the power to make determinations regarding special and differential treatment, particularly relating to rights and obligations and arrangements and measures under this Agreement and any other WTO law. This is a new function, which the General Council as the competent authority would have to designate. It is imperative to note that the General Council, however, can prescribe "any additional functions assigned" to it.[805] This function is an extension in the CTD's mandate from which is designated at Article IV(7) of the Agreement Establishing the WTO. The function requires the CTD to undertake a quasi-judicial function in determining the legality of S&DT measures undertaken, and in making determinations regarding the use of S&DT measures where opposing Members contend the use of the provisions. The use of this provision has been addressed in detail in the discussion on implementation and enforcement of S&DT. The CTD is a critical structure in monitoring S&DT and potentially preserving S&DT rights under this S&DT Framework Agreement. The DSB has encountered significant challenges in operating its judicial function, as will be briefly examined further-on under this sub-chapter. It is acknowledged that the same issues the Appellate Body has encountered would flow to the CTD, specifically opposition of its judicial activism (in creating new law and academia, instead of adopting interpretations), questions of the binding nature of decisions, and inconsistency in rulings.[806] The above not-withstanding, there is still vital need to provide interpretation and rulings regarding S&DT for legal certainty. Expanding the CTD from a political entity to a quasi-judicial body would require political buy-in from Members, which is one of the biggest challenges the Framework Agreement would encounter. The need to provide certainty and enforce provisions, however, is critical to the MTS as a whole and any potential that S&DT under trade rule has in enforcing rules.

Other critical functions that the CTD performs have already been expounded in this Agreement. They include *inter alia* critical reporting functions regarding the publishing and

[804] WTO *Decision by the General Council on 31 January 1995* (n 800 above).
[805] *The WTO Agreement* (n 42 above) Article IV(7).
[806] VOCXEU Centre for Economic and Policy Research Portal website: https://voxeu.org/article/wto-dispute-settlement-and-appellate-body-crisis (accessed 15 June 2020).

dissemination of information relating to S&DT, the monitoring mechanism as will be expounded upon, and making determinations with regards to the issue of graduation, which will also be detailed below.

Part IV also provides for the composition of review panels which assigned the function of making determinations regarding S&DT, particularly with regards to Members' rights and obligations and measures and arrangements thereto and publishing reports containing details of the determination. This is aligned with the functions under Articles 3.11 and 4.4 regarding implementation and enforcement of S&DT, where the CTD plays a critical function of subjecting provisions through a "development test" as explained earlier in this chapter and in line with Hoekman's approach.[807]

Article 11 further prescribes details of the composition of the panel. The Article provides that the Review Panel shall comprise of three panellists from all three categories of Members, Developed Countries, Developing Countries and LDCs. This is to ensure that the various classified Members are represented accordingly for increased ownership of determinations and perspectives. This is a similar approach adopted under Article 8(10) of the DSU.[808] Further particulars are provided on the criteria and competencies of panellists. This is also very similar to the approach adopted in the Article 8(1) of the DSU which provides for a criteria which includes *inter alia* "well-qualified governmental and/or non-governmental individuals" and "persons who have served as a representative of a Member in the WTO".

The only particular divergence to the DSU is a provision that requires a panel to have at least five (5) panellist with a background in economics, particularly international economics or international trade law and where the matter primarily requires an economic determination. The rationale for requiring panellists with backgrounds in international economics or international trade is that a considerable number of disputes are based on

[807] Hoekman (n 87 above) 10.
[808] Article 8(10) of the Dispute Settlement Understanding (n 2 above) provides that "[w]hen a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panellist from a developing country Member".

economic arguments, particularly relating to development issues which require examining and evaluating data, indices and examining empirical factors in making determinations. It is further envisaged a competent international economics panellist would be able adjudicate over arguments, and further that an international trade law jurist would be conversant with similar arguments, as well as WTO rules, structures and arguments presented. Hoekman and Mavrodis proposed parallel arguments in reforming the Appellate Body stating that increasing the use of economics and improving the quality of panellists should be a priority area.[809] Experience is also a considerably important factor, as it is also requires the panellist should include a person who has served on or presented a case to a panel, represented a Member to the WTO, served as a representative to the Council or Committee, or taught or published on international trade law or policy, International economics or served as a senior trade policy official of a Member. The list attempts to ensure competency through experience and knowledgeability about subject matter through academic qualification.

This configuration is adaptable to the nature of the function that the Review Panel will be performing, as it was established above that unlike the DSU, the determinations will not be strictly legal but consider developmental factors that may require economic application. Further, the documents to be submitted after consultation under the Chapters on enforcement and implementation are predominantly data and require economic interpretation. Further, determinations on critical areas such as graduation, as will be examined below, require an economic assessment. This structure is essential for carrying out the new mandate of the CTD of implementation and enforcement of S&DT, which should be dynamic enough to adequately hear and make determinations on such matters.

Lastly, there is a requirement prescribed in the Conceptual Framework which provides that Panellists shall not be Citizens of Members whose governments have been party to

[809] B Hoekmand and P Mavroidis 'Party like it's 1995: Necessary but not sufficient to resolve WTO Appellate Body crisis' VOCXEU Centre for Economic and Policy Research Portal website https://voxeu.org/article/party-it-s-1995-resolving-wto-appellate-body-crisis#:~:text=Party%20like%20it's%201995%3A%20Necessary,resolve%20WTO%20Appellate%20Body%20crisis&text=In%20December%202019%2C%20the%20WTO,US%20stops%20blocking%20new%20appointments. (Accessed 15 June 2020).

consultations regarding a matter referred to the CTD under Article 3.11 or 4.4 of this Agreement. This provision has been implemented to promote impartiality of the Panellists, and is in line with Article 8(3) of the DSU.

The provisions above indicate the importance of the role of CTD and its functions under the Conceptual Framework and beyond to other Agreements that contain S&DT. Its responsibilities are increased in an attempt to operationalise S&DT and reduce Developing Countries' processes in implementing, enforcing, and reporting. It is envisaged that this approach will increase the use and effect of S&DT and improve the application and substance of preferential treatment through information reporting and recommendations to the General Council and various negotiating bodies.

4.3.6 Part V – Miscellaneous

"***Part V – Miscellaneous***

Article 12: Graduation

12.1 A Member shall graduate from classification of a Least-Developed Country to a Developing Country, or from a Developing Country to a Developed Country by:

(a) the prospective-graduate Member lodging a review of its classification with the CTD Council, in the format prescribed under Article 12.2 of this Agreement; or

(b) any other Member lodging a review of the classification of another Member with the CTD Council, in the format prescribed under Article 12.2 of this Agreement.

12.2 A review of graduation of classification to the CTD of a Member under Article 12.1 shall contain the following, in relation to the prospective-graduate Member:

(a) a statement of the Member instituting the review under Article 12.1;

(b) GDP per capita;[810]

(c) Human Development Index by the United Nations;

(d) World Bank Country Classification by income level;[811]

(e) share of global trade of Member (import and export);

(f) World Bank data on poverty[812] *and growth of economy;*[813]

(g) vulnerability of economy;

(h) data on industrial structure and competitiveness;

(j) data on agriculture;

(k) negotiation capacity at WTO;

(l) infrastructure report;

(m) any other any other document or evidence in support of (a) to (l) or other information in support of the application.

12.3 A prospective-graduate Member may oppose review proceedings brought against it under Article 12.1(b) for graduation, by lodging a Statement of Opposition, accompanied by documents which contain information in Article 12.3(b) to (m), to the CTD within 60 days from the application under Article 12.1(b).

12.4 A Member classified as a Least-Developed Country shall graduate to the category of a Developing Country upon determination by the CTD through an objective assessment of:[814]

(a) considerations under Article 12.2(a) to (m); [815]

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[810] This was referenced by Developing Countries in the argument against graduation, in The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness (n 516 above).

[811] The World Bank classifies Countries by gross national income per capital levels. World Bank website: https://datatopics.worldbank.org/world-development-indicators/stories/the-classification-of-countries-by-income.html (accessed 2 November 2019).

[812] This was used in WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* (n 592 above).

[813] WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* (as above).

[814] It is essential to note, however, that this is a guide provision which is subject to adjustment. It offers a solution to the issue of graduation of an LDC Member.

(b) the Member categorisation as;

(i) a Least-Developed Country by the Committee for Development Policy, of the United Nations Economic and Social Council;[816] *or*

(ii) a low-income, or lower-middle income Country by the World Bank.[817]

12.5 A Member classified as a Developing Country shall graduate to the category of Developed Country upon determination by the CTD through an objective assessment of:[818]

(a) considerations under Article 12.2(a) to (m); and

(b) the Member's categorisation as[819]*;*

(i) a "high income" country by the World Bank; or

(ii) a Member that accounts for no less than 0.5 per cent of global merchandise trade (imports and exports).[820]

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[815] This criterion accords an opportunity to consider other factors which are not restricted to the U.N classification of a LDC and World Bank classification. It opens the door for uncertainty, however, considering the economic ramifications of graduation, as an LDC should be accorded the opportunity to furnish wide developmental considerations. The criteria also places the U.N and W.B classification as a factor for consideration, as they are based on indices and economic factors which provide guidance as to development levels and considerations of Members. It is deliberately not confined to one International Organisations classification but is a wide objective enquiry.

[816] The LDC criteria by the U.N is primarily based on three elements, income, human asset and economic vulnerability. The graduation threshold is set at 20 per cent above the inclusion threshold (at 2018, the inclusion threshold was $ 1,025). This threshold at 2018 was $ 1,230. See UN website: https://www.un.org/development/desa/dpad/least-developed-country-category/LDC-criteria.html (accessed 2 September 2019).

[817] This means that, currently, if a Country has a GDP per capita of 3,896 - 12,055 (Upper-middle income) or over 12,055 (High-income), then the prospective-graduate Member would lose its classification as an LDC.

[818] Similar objective criteria to that provided at Article 12.4

[819] This position was one of the proposed provisions in the Draft forwarded to the General Council by the US Communication from the US dated 15 February 2019. WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* (n 592 above).The other two criteria, which were deliberately excluded from the envisaged Framework was:

i. A WTO Member that is a Member of the Organisation for Economic Cooperation and Development (OECD), or a WTO Member that has begun the accession process to the OECD;

ii. ii. A WTO Member that is a member of the Group of 20 (G20);

The rationale is that a membership to the G20 and OECD excludes examination of wider development considerations set out under Article 11.2. Further, the question should be whether the WTO MTS envisages a Developed Country to be one that has secured a "share in global trade commensurate with the needs of economic development".

[820] The classification of the two categories above, in being a high-income country and having a significant share in global trade (at 0.5 of global merchandise trade), is an indication of having attained that level. It is essential to note, however, that this is a guide provision, which is subject to adjustment. It offers a solution to the issue of graduation.

12.6 A Member may not lodge a review of classification under Article 12.1(b) of a particular prospective-graduate Member within two years of the prospective-graduate Member undertaking a review under Article 12.1.[821]

12.7 If any Member is opposed to the determination the CTD makes under Article 12.1, it may refer the matter to the DSB within 30 days of the decision, for the immediate establishment of a Panel, unless the DSB decides by consensus not to establish a Panel.[822]

12.7 Upon graduation of a Member, the prospective-graduate Member shall be entitled to the continued use of special and differential treatment for a period of one year from the decision of the decision of the CTD under Article 12.4 and 12.5 if it is not referred to the DSB, or one year from the date the DSB's decision is adopted."

Article 13: Monitoring Mechanism[823]

13.1 A monitoring mechanism for special and differential treatment under the WTO shall be coordinated and operated by the CTD through the Monitoring Mechanism Sub-Committee, which shall serve the following functions:

(a) analyse special and differential treatment provisions;
(b) review all aspects of implementation of special and differential treatment;
(c) preparing annual reports; and
(d) make recommendations, where the report at (c) identifies a problem in special and differential treatment.

[821] This is to avoid abuse of the review process and expense of undertaking any opposition.
[822] Derived from Article 4.4 of *SCM Agreement* (n 392 above).
[823] At the Ninth WTO Ministerial Conference (MC9) held in Bali, Ministers decided to establish the Monitoring Mechanism (MM) on Special and Differential Treatment (S&D). The Decision establishing the Monitoring Mechanism was contained in WTO *Monitoring Mechanism on Special and Differential Treatment* (n 289 above).

13.2 The monitoring mechanism Sub-Committee shall comprise of one representative from each Member, who shall;[824]

(a) be a well-qualified governmental and/or non-governmental individual;

(b) in the case of a representative from a Developing Country or Least Developed Country Member, shall be responsible for submitting that Member's notification of specific development, financial and trade every six years, or upon any change in national trade policy, and at the beginning of every trade negotiation if there is any change in national trade policy; and

(c) make or submit written inputs and submissions from their respective Membersregarding special and differential treatment.

13.3 The monitoring mechanism shall compile, examine and review information from:

(a) submitted notifications by Developing Countries and Least-Developed Country Members under Article 3.2 to the CTD;

(b) reports filed under Article 3.3 to the CTD;

(c) reports by the Review CTD under Article 3.11;

(d) written inputs and submissions made by Developing Members and Least-Developed Country Members, particularly on implementation of special and differential treatment;

(e) reports received from other WTO bodies to which submissions by Members could also be made; and

(f) any other document or submission made in relation to special and differential treatment.[825]

13.4 The monitoring mechanism shall make recommendations to the relevant WTO body in charge of the technical substantive negotiations;

[824] This is to ensure the various classified Members are represented accordingly for increased participation in the Mechanism.

[825] This is one of the core objectives of developing modalities of the mechanism - to ensure sources of data and information are sourced actively from reporting or submissions.

(a) for the initiation of negotiations which contain special and differential treatment;[826] *and*

(b) during negotiations regarding special and differential treatment.[827]

13.5 The monitoring mechanism shall publish an annual report, which detail shall include:

(a) statistics and data on use of special and differential treatment;

(b) review all aspects of implementation of special and differential treatment; and

(c) recommendations on improved use of and enforcement of special and differential treatment.[828]*"*

Part V contains Miscellaneous Rules, which address the contentious issue of graduation and also establishes a Monitoring Mechanism.

Graduation has been greatly politicised, with polarising debates on the issue, as was examined at the beginning of this Chapter with the US and Developing Countries divided on the issue. Differentiation and graduation were examined in chapter 1 of this study where it was established that WTO Rules do not apply evenly to all Members. S&DT in WTO rules themselves similarly do not apply the same way and are specific to various circumstances and developmental factors and the needs of Developing Countries respectively. The S&DT Framework will have to integrate principles of differentiation in conferring the extent of preferential treatment to resolve pending issues under the current MTS. Chapter 1, which examined the issue of differentiation, elaborated on the controversies regarding differentiation and self-declaration. Arguments from the contentious debate on graduation were appraised in detail, reviewing the positions in the recent exchange of communication to the General Council in early 2019, specifically the US' communication to the General Council titled "An Undifferentiated WTO: Self-Declared Development Status Risks

[826] World Trade Organization website on Monitoring Mechanism: https://www.WTO.org/english/theWTO_e/minist_e/mc9_e/brief_monit_mecha_e.htm (accessed 2 September 2019).
[827] The reference of ensuring recommendations on S&DT are forwarded to the negotiating body, whether or not S&DT is a consideration, is to ensure the inclusion of Developing Countries' needs and interests, particularly LDC's into Agreements.
[828] A monitoring mechanism of S&DT which would assist in understanding implementation challenges and deficiencies regarding same.

Institutional Irrelevance"[829] and Developing Countries' counter-statement titled "The Continued Relevance Of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness".[830] The primary two challenges identified, under chapter 1 with the WTO issue of graduation, is the lack of consensus on criteria to satisfy graduation, as evidenced from the above-mentioned communications and non-willingness to even address the issue on the part of Developing Countries (particularly China). The difficulty in addressing the issue of graduation was well summated by Keck and Low that;

> "[…] it is very difficult to transform an historically politicised notion such as graduation into a precise policy outcome, especially if this is presented in binary terms across the entire legal edifice of the WTO. The GATT/WTO has never been able to agree on a definition of Developing Countries, so it is difficult to see how countries would now agree to being graduated."[831]

One of the reasons for Developing Countries' unwillingness to concede on the graduation subject, is that self-declaration has facilitated trade-gains and allowed developing Members to gradually comply with GATT 1994/WTO disciplines and to integrate themselves in the multilateral trading system with a negotiated degree of policy space.[832] The integration of Developing Countries in the MTS is also an objective of the WTO, which runs parallel to the objective of trade liberalisation, as affirmed in the 2001 Doha Ministerial Declaration. Further, the question of the self-declaration system and the need for differentiation in the Developing Member groups is one closely tied to WTO objectives. It is undisputedly a key structural tool utilised to offset the trade balance between Developing Countries and Developed ones. Developing Countries' contention in their communication to the General Council was that WTO Members agreed in Marrakesh that WTO would adopt an approach to trade policy consistent with Members' respective needs and concerns at different levels

[829] WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* (n 592 above).
[830] WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above).
[831] Keck & Low (n 460 above) 10.
[832] WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above) para 5.11.

of economic development.[833] This position motivates the approach adopted regarding graduation in this thesis.

The approach to be adopted in the framework regarding graduation and differentiation in the S&DT framework is twofold. Firstly, the framework focuses on specific measures and links the measures with particular needs as evidenced by a Developing Country under Article 3.2 of the Framework Agreement. This, therefore, would mean the right to use S&DT is primarily linked to a Member's ability to demonstrate a subjective need (as opposed to linkage to a Country's self-declared status). The needs shall be based upon the agreed broad-based needs that a Developing Country or a Least-Developed Country Member may have.[834] This approach was adopted by the Appellate Body in *EC–Preferences*, where it required needs to be assessed based on an objective standard "as set out in the WTO Agreement or in multilateral instruments adopted by international organisations".[835] The deliberate approach is to ensure that "Countries should be "graduated" out of access to particular S&D provisions at the level of individual provisions".[836]

This is a similar approach to that proposed by Xainkun above, that emphasised that "[…] rather than continuing the doctrinal and conceptual debate on the developmental status of emerging economies, negotiators could look at the specifics of each negotiating subject in a flexible and pragmatic manner to find solutions".[837] The proposed approach focuses on measures that are to be undertaken, rather than on Member status. This addresses the issue of graduation and differentiation, whilst increasing the need for S&DT structure to suit the needs of Developing Counties in line with Paragraph 44 of the Doha Declaration. This attempts to appease the calls by Developing Countries to focus on substantive needs-based S&DT, as opposed to focusing on graduation.

[833] WTO *The Continued Relevance of Special and Differential Treatment* (as above) para 5.12 (y).
[834] See Annex 1 to the S&DT Legal Framework Agreement.
[835] *EC – Tariff Preferences* (n 19 above) para. 163.
[836] Keck & Low(n 460above) page 10.
[837] L Xiankun (n 129 above) 67.

The approach above, however, fails to address the issue of the absence of modalities of Members which seek to self-declare from LDC to Developing or from Developing to Developed. A case in point, as indicated at chapter 1, was that of Brazil, which announced in March 2019 that is seeks to move away from pursuing special and differential treatment in upcoming negotiations at the WTO.[838] This may also be the case in question for Developing Members which do not utilise S&DT and which demonstrate multiple metrics of Developed Countries,[839] and in practice, accord preferential treatment to LDCs. Developing Country Members, as unlikely as it may be due to loss of preferences, may seek to self-graduate. As stated in chapter 1 of this study, modalities on the graduation process are not provided under the WTO.

The approach above also fails to address the issue of avoidance of obligations by an emerging economy, that is, an economy which indicates numerous economic and trade characteristics of Developed Countries. Emerging economies are reluctant to self-designate as "developed" not only due to potential loss of trade preferences, but also due to the burden which comes with conferring assistance and market access to Developing Countries. Developed Countries are obliged to confer preferential treatment under the current WTO dispensation, even more so under the conceptual Framework which proposes modalities for rendering such preferential treatment. This study argues that loss of such preferences for emerging economies, which avoid self-designation, deprives other Developing Countries (LDCs in particular) of the right to trade preferences. The said preferences would have been accorded if the emerging economy was deemed to have graduated. The above deficiency runs parallel with an argument under Paragraph 7 of the Enabling Clause, which states that:

> "Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and would

[838] IISD website https://www.iisd.org/library/WTO-differentiation-debate (accessed 26 June 2019).
[839] Example of this is metrics used by United Nations, International Monetary Fund, and World Bank such as GDP per capita, Human Development Index by the United Nations, World Bank Country Classification by income level and share of global trade of Member (import and export).

accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement".[840]

The foregoing motivates the second approach the S&DT Framework employs regarding graduation, which is contrastingly different from the first approach. The Conceptual Framework adopts a two-pronged approach which allows an LDC and a Developing Country to graduate respectively. The procedure may be triggered either by the prospective graduate member, or any other Member.

Graduation under the conceptual framework is done by lodging a review of the prospective graduate member with the CTD Council. The CTD is designated as being accorded the function to review applications made to it. The review application is to contain information (data, indices or metrics) that include *inter alia:*

- *a Statement of the Member instituting the review under Article 12.1;*
- *GDP per capita;*[841]
- *negotiation capacity at WTO;*
- *vulnerability of economy;*
- *data on industrial structure and competitiveness; and*
- *data on Agriculture.*
- *Human Development Index by the United Nations;*
- *World Bank Country Classification by income level;*[842] *and*
- *World Bank data on poverty*[843] *and growth of economy.*[844]

[840] *The Enabling Clause* (n 18 above).
[841] This was referenced by Developing Countries in the argument against graduation in WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above).
[842] The World Bank classifies Countries by gross national income per capital levels. World Bank website: https://datatopics.worldbank.org/world-development-indicators/stories/the-classification-of-countries-by-income.html (accessed 2 November 2019).
[843] This was used in WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* (n 592 above).Table 1.
[844] WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* (as above) Table 1.

The list above seeks to balance considerations which both Developed and Developing Countries have pushed to be included in the determination of graduation of a Member.[845] The list broadens the criteria established by International Organisations to consider factors such as data on infrastructure, poor population,[846] and industrial structure and competitiveness. The objective is to create criteria that objectively examines a Member's trade and economic shortcomings and deficiencies, and needs, if any. This will allow the CTD to formulate an objective opinion on whether the Member should graduate as it is done through objective determination. The economic ramifications of graduation are significant, the rationale of the wide criteria is that an LDC or Developing Country should be accorded the opportunity to furnish wide developmental considerations to evaluate its development status. The criteria, therefore, are deliberately not confined to one International Organisations' [UN or World Bank] classification criteria, but are a wide, objective enquiry of development factors and levels of the Member in question. This is significantly different from the World Bank rules which are based solely on Gross National Income, with Members' graduations with changes in their economic growth, inflation, exchange rates, and population.[847] The objective criteria established by the World Bank allows for predictability, however, it does not consider the wide developmental factors contained in Article 12.2 of the Framework Agreement. The World Bank's categorisation is based exclusively on the income levels of a Country, measured by per capita Gross National Income (GNI).[848] The modalities established under this procedure allow a prospective-graduate Member to oppose review proceedings brought against it for graduation. Further, to avoid abuse of process, the Framework prescribes that Members are barred from bringing a review of

[845] WTO *An undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance Under the WTO* (as above). The criteria above were incorporated from the US communication and from the Developing Countries communication.

[846] Top 10 countries with the Largest Proportion of the World's (MPI) Poor, 2017- 2018. See Oxford Poverty and Human Development Initiative Global Multidimensional Poverty Index (2017-2018), University of Oxford. See: http://ophi.org.uk/multidimensional-poverty-index/global-mpi2017/ (accessed 25 January 2019).

[847] World Bank website https://blogs.worldbank.org/opendata/new-country-classifications-income-level-2019-2020 (accessed 15 June 2020).

[848] World Bank website https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups#:~:text=For%20the%20current%202020%20fiscal,those%20with%20a%20GNI%20per (accessed 15 June 2020) The current GNI is as follows: (i) low-income countries (LIC) with GNI per capita of $1,025 or less in 2018;
(ii) lower-middle-income countries (LMIC) with GNI per capita of between $1,025 and $3,995;
(iii) upper-middle-income countries (UMIC) with GNI per capita of between $3,996 and $12, 375; and
(iv) high-income countries (HIC) with GNI per capita of over $12,376.

Classification of a particular prospective-graduate Member within two years of the prospective-graduate Member undertaking a review.

Finally, an appeal procedure is provided for where a party opposed to the determination of the CTD may refer the matter to the DSB within 30 days of the decision, for the immediate establishment of a Panel.

Developed Countries are not the only advocates for the approach of developing rules which address self-declaration and graduation. Cambodia, in a WTO General Council meeting, when commenting on the Communication from Developing Countries to the General Council regarding S&DT and graduation urged;

> "Members to discuss and negotiate matters involving applying rules and self-declaration within the comprehensive rules-based system through a round of multilateral negotiations that took into account the fundamental rules in the WTO and that respected the provisions on WTO Agreements including the GATT 1947 and the Marrakesh Agreement".[849]

Cambodia further advanced that it is "important to preserve and respect Paragraph 44 of the Doha Declaration in that regard which stated that S&DT was an integral part of the WTO Agreements".[850] The provisions on Graduation aim to implement a similar approach to that which Cambodia advanced. The chapter walks a tight line of considering S&DT and its objectives in the context of ensuring Members receive entitled preferential treatment, however, it addresses the critical issue of classification, ascribing criteria to determine development levels and modalities regarding how such rules may be applied and implemented by and to other Members.

It was emphasised that the graduation debate has questioned the credibility of the WTO itself and that failure to resolve this issue could jeopardise the existence of the WTO. The

[849] WTO *General Council Minutes 28 February 2019* (n 671 above) Para 7.72.
[850] WTO *General Council Minutes 28 February 2019* (as above).

Article on graduation seeks to walk a legal and political tightrope of ensuring parties are progressively and fairly accorded the status in line with their economic and developmental needs and status. The modalities are crafted to ensure the process is consistent with the legal argument that Developing Countries "should not be expected, in the course of negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs"[851] by undertaking an objective, robust assessment of considerations in determining a Members status, as it has significant financial and trade-preference related ramifications.

Monitoring Mechanism

As indicated above, Part V also established modalities regarding the monitoring mechanism. Chapter 3 expounded how a Decision was taken at the Bali Ministerial Conference in December 2013 to establish a Monitoring Mechanism on S&DT to analyse and review the implementation of S&DT provisions.[852] Chapter 2 and chapter 3 both detailed the failure of the CTD in establishing the monitoring mechanism to date. Switzer accurately described it as "a resolute failure, an empty tool box spurned by the very Members it was designed to assist".[853] This statement partially alludes to Developing Countries' inability or ineffective reporting and lack of active or meaningful participation in establishing modalities for the mechanism.

The monitoring of S&DT would assist in understanding implementation challenges and deficiencies regarding same, as noted at the Bali Decision. The Mechanism was to be undertaken on the basis of written inputs or submissions made by Members, as well as on the basis of reports received from other WTO bodies to which submissions by Members could also be made. The Conceptual Framework is structured to follow the same process. The Mechanism goes a step further and prescribes modalities in a simplified for operation of

[851] GATT 1994 (n 12 above) Article XXXVI Paragraph 8.
[852] WTO *Monitoring Mechanism on Special and Differential Treatment* (n 289 above). The Monitoring Mechanism which operates in Dedicated Sessions of the CTD is to act as a focal point within the WTO.
[853] Switzer (n 267 above) 123.

the mechanism. The objective is to keep compliance costs as low as possible for Developing Countries, whilst ensuring reporting remains as consistent as possible.

The Article on the mechanism mandates the CTD to undertake a coordination and operation role. The specific functions of the mechanism are to analyse S&DT provisions, review all aspects of implementation of S&DT, preparing annual reports, and make recommendations, where the report identifies a problem in S&DT. A monitoring mechanism sub-committee is established to undertake this function under Article 13.2, which also details the criteria and obligations of representatives of the said sub-committee.

As mentioned above, the objective is to ensure compliance cost that, particularly for LDCs and Developing Countries, remain relatively low and that processes are simplified and as un-burdensome as possible. The mechanism, therefore, established automatic reporting, where submitted notifications by Developing Countries and Least-Developed notifications under the provision on notifications at Article 3.2 and 3.3, together with CTD reports under Article 3.11, are to be forwarded to the CTD for review. Further written submissions may be made to the CTD under the provisions.

The Framework further prescribes that the mechanism may make recommendations to a negotiating body for ongoing negotiations, which may or may not contain S&DT provisions as well as to initiate negotiations.[854] This is to ensure S&DT remains relevant and embedded in Agreements to facilitate the inclusion of Developing Countries, particularly LDCs. Further, in line with the primary mandate of reporting on S&DT, the monitoring mechanism is mandated by publishing annual reports which detail statistics and data on use of special and differential treatment, aspects of implementation of special and differential treatment, and recommendation on improved use of and enforcement of special and differential treatment.[855]

[854]WTO website, Monitoring Mechanism: https://www.WTO.org/english/theWTO_e/minist_e/mc9_e/brief_monit_mecha_e.htm (accessed 2 September 2019).
[855] A monitoring mechanism of S&DT which would assist in understanding implementation challenges and deficiencies regarding same.

4.3.7 Part VI - Dispute Settlement

Finally, Part VI sets out rules on dispute settlement. It was established in chapter 1 of this thesis that this study will not address the issue of S&DT and dispute settlement for purposes of narrowing the scope of this research as well as brevity. The Article was inserted in recognition of the need to address the issue of S&DT in the DSU, however, modalities and contents of this Article will not be detailed.

The WTO, and particularly the Appellate Body, has come under attack, specifically by the US. This started in 2016 during the Obama administration, which blocked the reappointment of the Korean jurist, Seung Wha Chang, following a number of US losses at the Appellate Body. It is notable to state that this included a loss to China In the *US — Antidumping Methodologies* dispute, where the Panel upheld China's complaint that the USDOC had committed multiple violations of the Anti-Dumping Agreement.[856] The Trump administration continued to block appointments, and by mid-December 2019 the AB had only one member, making the WTO appeals function dysfunctional, as Article 17 of the DSU stipulates the quorum is three.[857]

The primary challenges on the Appellate Body by the US are twofold; Firstly that the Appellate Body has overstepped its mandate,[858] and that the Appellate Body has been inconsistent in its rulings.[859] The US's sentiments can be summarised in a statement that

[856] World Trade Organization United States *Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China* 2016 Panel Report WT/DS471/R para 8.1.
[857] Foreign Policy Website https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/ (accessed 13 November 2020).
[858] Statements by the US at the Meeting of the WTO Dispute Settlement Body December 18, 2018, para. 10, https://geneva.usmission.gov/wp-content/uploads/sites/290/Dec18.DSB_.Stmt_.as-deliv.fin_.public.pdf (accessed 15 June 2020). In December 2018, the US made the following argument to the WTO's Dispute Settlement Body: "The United States requested this agenda item to draw Members' attention to an important systemic issue, the concern that the Appellate Body has sought to change the nature of WTO dispute settlement reports from ones that assist in resolving a dispute, and may be considered for persuasive value in the future, to ones that carry precedential weight, as if WTO Members had agreed in the DSU [Dispute Settlement Understanding] to a common law-like system of precedent," in neglect of a deferential standard of review in antidumping litigation to disrespecting the statutory deadlines for issuing AB reports.
[859] VOCXEU Centre for Economic and Policy Research Portal website: https://voxeu.org/article/wto-dispute-settlement-and-appellate-body-crisis (accessed 15 June 2020); The second issue the US has with the Appellate Body is that the AB is not doing a good enough job, reflected in inconsistency of rulings and a case law that lacks coherence, and thus does not provide the predictability governments and businesses need.

there is need to make the "[…]WTO a more effective forum to adjudicate unfair trade practices."[860] This statement, coupled with political and trade skirmishes particularly with China alluded to earlier in this Chapter, has resulted in the US discrediting the trade-system, with the Appellate Body bearing the brunt of the attack.

The Framework Agreement requires strong dispute settlement rules, and a functioning Panel and Appellate Body system. Under its structure, contentious issues are disputed from the CTD to the Panel. The DSU, and the functioning of the CTD as a quasi-judicial body, therefore plays a significant role in enforcing S&DT and providing certainty and predictability to trade rules. It is envisaged that the Framework Agreement, like other WTO Agreements, would only be enforceable if there is political buy-in, as contentious negotiations are inevitable with many polarising issues, as will further be expounded in Chapter 6. However, should a two-thirds majority agree to adopt the Agreement, the CTD would be able to withstand the challenges currently plaguing the Appellate Body, particularly regarding S&DT. Rules on appointment of panellists cannot be used to block appointments and the criteria for appointment seeks to improve quality and diversity of fields, from legal jurists, to legal economic jurists. The decisions, further, do not operate as binding precedent, as the scope of the CTD would be to interpret and make decisions on disputes.[861] The S&DT Framework rules, however, do not affect the DSU, the Panel and Appellate Body as it is not in the ambit of S&DT rules.

Trade rules should be reformed to address legitimate concerns raised by the US regarding the WTO Appellate Body, and also prevent the use of DSU rules to impose specific trade-related policies and dissatisfaction with the WTO. It was well summarised that "[…]consensus should not enable countries to block others that wish to explore cooperation in an area. Nor should consensus apply to processes and the day-to-day business of WTO bodies such as whether to invite outside experts to inform the deliberations of a

[860] National Security Strategy of the United States of America, THE WHITE HOUSE at 41, https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017- 0905.pdf (accessed 15 June 2020)
[861] WTO website https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm (accessed 13th November 2020).

committee."[862] The Framework is not anticipated to change trade rules, however should be adaptive to ensure fairness and predictability to the application of the MTS. A resolution on the current impasse regarding DSU rules and the Appellate Body is therefore critical to the MTS as a whole. The Dispute Settlement plays a significant role in ascertaining and enforcing the rights of Developing Countries regarding S&DT.

4.4 Conclusion

The legal S&DT Framework Agreement envisaged is conceptual. It is theoretical in nature. It emerges from a scientific analysis of preferential treatment, an enquiry on challenges and causes for the challenges under the current dispensation as well as proposed adaptation to WTO rules to address the challenges. This, therefore, may mean that the Framework would not be fully implemented by Members in an MTS that is riddled with political and complex trade-dynamics. With varying interest, Members and various international forums have diverging positions of the role the WTO should play. These issues are polarising and have led to the questioning of the MTS' function-ability.[863] S&DT is one such area which is particularly contentious as evidenced by the Doha Round. Negotiations on the proposed S&DT Agreement would likely be deadlocked, particularly under a dispensation that employs the single undertaking rule.[864]

Notwithstanding the above, the Framework Agreement overall greatly enhances S&DT through clarification and implementation of rules. The Framework addresses contentious issues which have lingered in the MTS and contains pragmatic solutions for the incorporation of the development agenda of the WTO. The scope and application of S&DT were extended beyond the legal ambits permissible under the current MTS in order to

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[862] B Hoekman and P Mavroidis *Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know it?* 2020 EUI Working Paper Robert Schuman Centre for Advanced Studies Global Governance Programme-381

[863] See G20 Leaders Declaration, Buenos Aires: https://www.consilium.europa.eu/media/37247/buenos_aires_leaders_declaration.pdf (accessed 20 October 2019). The Declaration at paragraph 27 provided that "[t]he system is currently falling short of its objectives and there is room for improvement".

[864] Many observers of the WTO are not convinced that 153 Members with enormous diversity in their economic needs and bureaucratic capacity can ever agree on, let alone implement, dozens of complex new provisions all at once. See R Wolfe 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor' (2009) 12(4) *Journal of International Economic Law* 835 - 858.

accommodate development considerations in a number of areas. An example of this is factors to consider when the CTD undertakes determination of the use of S&DT under Article 3.11 or 4.4 of the Framework or when considering graduation of a Developing Country or Developed Member under Article 12. This approach was motivated by the historic and legal development of the MTS examined in chapter 2 and the non-inclusion of meaningful structural reforms to S&DT throughout the MTS's development. Developing Countries, when utilising S&DT (which essentially derogate WTO rules) should be able to consider intrinsic developmental factors that are not necessarily within the scope of trade rules. To this extent, the study would propose expansion of WTO rules, justified under the development objective, to facilitate the participation and inclusion of Developing Countries in the MTS.

Despite the seemingly pro-developmental substantive provisions in the Agreement, the study also attempts to accommodate concerns of Developed Countries regarding S&DT. This balance means the inclusion of provisions which prevent arbitrary use or abuse of S&DT, by linking S&DT to identifiable needs so that Members have restricted rights to the provisions. Further, an objection process has been incorporated into the Agreement for instances where a Developing Country is of the opinion that S&DT is improperly utilised. Provisions on graduation, which have been a great concern for Developed Countries, is also included, albeit with an enquiry which considers wide factors as proposed by Developing Countries.[865]

The Framework also extends beyond theoretic application, as it is founded on existing WTO provisions to ensure implementation and workable application of its rules in the MTS. From an examination of the structure, content and approaches adopted in the Framework, it is evident that the envisaged umbrella Agreement follows the general structure of WTO Agreements for the most part. The conceptual framework further utilises nomenclature in the existing WTO Agreements, Decisions and Declarations, in order to align with the existing rules under the MTS, as already explicated in this sub-chapter. This is to ensure relative ease

[865] WTO *The Continued Relevance of Special and Differential Treatment* (n 481 above).

of application to other Agreements, as the Framework applies all S&DT provisions across the MTS.

The S&DT Framework intends building on existing WTO rules through expounding on interpretation and rules on implementation. It is imperative to note that the proposed S&DT Framework Agreement, to a large extent, is legally compatible and consistent with existing S&DT under WTO Agreements. The conceptual Framework's divergence, however, is that where the existing S&DT fails to meet the WTO development objectives [as examined in this thesis] rules are either prescribed in Part III on specific provisions or the implementation and enforcement provisions under General provisions apply. To this extent, the Framework Agreement is a new approach to S&DT. The conceptual Agreement breaks away from traditional approach and structure of S&DT in the GATT 1947, GATT 1994 and WTO, which has failed to successfully promote development.[866]

Another novelty in this approach is in how the Framework Agreement centralises all general S&DT principles in one instrument, without significantly requiring amendments to pre-existing S&DT provisions under WTO Agreement. It operates as an addition to most pre-existing S&DT rules where the provisions where previously undefined or unspecified. The rationale of the framework is not to undo all S&DT provisions, as some of them are well-placed in and deeply integral and embedded in WTO Agreements. Chapter 3 of this thesis identified positive S&DT provisions which Developing Countries have utilised and are fundamental in integrating Developing Countries into the trade system, particularly the Enabling Clause. It, therefore, would be prudent to introduce a Framework to the MTS to streamline S&DT. This approach enhances the pre-existing provisions and provide for additional modalities for implementation and enforcement of S&DT, establish rules on interpretation of S&DT, and simplify rules to increase use by Developing Countries.

[866] Hoekman (n 87 above) 19.

Chapter 5: S&DT and the SADC-EU EPA; Establishing SADC Trade Objectives and Development Needs through SADC Trade Agreements & Instruments

It was explained under chapter 1 of this study that the SADC-EU EPA will be utilised as the test which the Legal Framework (the Hypothesis) is to be applied to determine whether the Framework attains the objective/outcomes anticipated. S&DT is structured to address Developing Countries' developmental [trade-related] needs and to integrate them into global trade in order to obtain a larger share. The primary objective of this chapter is to establish SADC trade objectives and developmental needs as well as the SADC-EU EPA trade objectives which relate to SADC trade needs through legal texts, instruments and key policy documents. This is the test of the Framework. The said objectives shall be utilised in the next chapter to determine whether the S&DT Framework that was established duly addresses SADC trade objectives and needs of SADC as well as needs expressed in the SADC-EU EPA.

The chapter will include a short description of the birth of SADC and its general objectives and shall specifically focus on trade objectives laid out in its key legal texts, such as the SADC Protocol on Trade, SADC Regional Indicative Strategic Development Plan (RISDP) and the SADC Treaty. The chapter shall also establish trade objectives established in the SADC-EU EPA and S&DT in the RTA. The chapter also identifies S&DT provisions under the EPA.

5.1 SADC: Legal Background & Structure

It is imperative that the background and structure of SADC be examined in order to establish contextual understanding of the Organisation and RTA, which will be utilised as a test. Following the liberation of several Southern African states from colonial rule, which commenced in the 1960s, the newly formed Sates redirected focus from the liberation struggle [from white minority rule] to the need for self-determination and "economic

liberation".[867] Southern African States found common purpose through the establishment of the Frontline States (FLS),[868] which was committed to ending apartheid and minority rule in South Africa, South West Africa and Rhodesia in the 1970s, and concentrated efforts on reducing economic dependence on South Africa.[869] The FLS states became the nucleus of the newly founded Southern African Development Coordination Conference (SADCC) established on 1 April 1980 in Lusaka, Zambia, where a statement of strategy was signed, Southern Africa: Towards Economic Liberation (the Lusaka Declaration).[870] The focus of SADCC was similar to that of the FLS on pursuing policies aimed at economic liberation, however, it comprised of a widened objective to include integrated development of national economies and coordinated efforts towards regional and economic development.[871]

On the 17th August 1992, the SADC Treaty was adopted establishing the SADC, replacing the SADCC. SADC currently comprises of 15 States namely; Angola, Botswana, DR Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe. SADC redefined the basis of cooperation among Members and charted a new path in setting out new objectives. The over-arching mandate of SADC was set out in the Preamble of the SADC Treaty 1992,[872] which is to establish a regional community to promote "interdependence and integration of […] national economies for […] development of the Region".[873] The objectives established in the Treaty include *inter alia* improvement in the standards of living and quality of life, freedom and social justice, peace and security, achieving development and economic growth, and

[867] Economic liberation, in this context, is not related to the lessening of government regulations and restrictions and greater participation of private entities (under the doctrine of classic liberalism). Economic liberation, in this context, is with regards to liberation of SADCC countries economically from dependence on the Republic of South Africa to overcome economic fragmentation and coordinate efforts towards regional and economic development.

[868] The Frontline States were a loose coalition of African Countries which consisted of Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe. The role of the Frontline States was recognised at the Ninth Extraordinary Session of the Council of the Ministers of the Organization of African Unity (OAU) in April 1975 and were formally recognised as an ad hoc committee of the OAU.

[869] F Söderbaum The Political Economy of Regionalism, The Case of Southern Africa (2004) 65.

[870] *Southern Africa: Towards Economic Liberation* (1980) A Declaration by the Governments of Independent States of Southern Africa made at Lusaka on the 1 April 1980; The SADCC states comprised of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

[871] *Southern Africa: Towards Economic Liberation Declaration* (as above) 3.

[872] Southern African Development Community Declaration and Treaty of Southern African Development Community (1992) (*SADC Treaty*).

[873] *SADC Treaty* (as above) Preamble.

achieving complementarity between national and regional strategies and programmes.[874] The overall aim of SADC is to achieve regional integration and poverty eradication.[875]

The SADC has aligned itself through its Legal framework to other international conventions, agreements and continental treaties. The SADC Treaty and SADC Protocols recognise the said International Instruments through commitments regarding implementation by SADC States, as well as through provisions recognising the use of these instruments for Interpretation. The African Economic Community (AEC), the African Continental Free Trade Agreement (AfCFTA) and WTO Agreements are some of the numerous International Agreements recognised by SADC. The SADC Treaty specifically recognises the role of the AEC in establishing SADC as one of the 8 Regional Economic Communities (REC) which are the building blocks that the Abuja Treaty designates to bring stronger integration and the eventual creation of the African Economic Community.[876] This is reflected in the preamble of the SADC Treaty.[877] All SADC States are members of the African Economic Community (AEC). The AEC aims to increase economic reliance and promote self-sustained development through integrating African economies and harmonising policies within those communities.[878]

SADC utilises Protocols as legal instruments which Members are bound to and that set out objectives and procedures of the REC. According to Chapter 1 of the SADC Treaty, a Protocol "means an instrument implemented of this Treaty, having the same legal force as this Treaty". In order for a Protocol to enter into force, two thirds of the Members need to ratify or sign the Agreement. Amendments to Protocols can also be made through a decision of three-quarters of Members of SADC, after a Member forwards a proposal to the Executive Secretary of SADC, which is considered by the SADC Council.

[874] *SADC Treaty* (as above) Article 5 (1).
[875] SADC Website: https://www.sadc.int/about-sadc/overview/sa-protocols/ (accessed 5 November 2019).
[876] African Economic Community *African Economic Community Treaty* (1991) (*AEC Treaty*) Article 6:2. The Article sets out the stages required for integration of RECs.
[877] The Preamble of the SADC treaty takes into account Lagos Plan of Action and the Final Act of Lagos of April 1980 and the Treaty establishing the African Economic Community signed at Abuja, on the 3 of June 1991.
[878] *AEC Treaty* (n 876 above) Article 4:1 (a) and (d).

There are currently twenty-seven (27) Protocols which address a number of areas from Corruption to Culture, Information and Sport, Gender, and Wildlife and conservation. The primary Protocol which shall be examined under this paper to establish SADC Trade Objectives regarding trade in goods and whether S&DT adequately enables SADC-States to meet Developmental needs, is the SADC Protocol on Trade which entered into force in 1996. This protocol shall be examined in the section below.

5.2 SADC Trade Objectives

Establishing SADC Trade objectives and developmental needs are central to this study as they are the test that the framework is applied to in order to ascertain whether the Framework facilitates or attains Developing Countries' specific needs. S&DT should be robust enough to be applied to varying situations and trade dynamics. SADC trade objectives are primarily set out in the SADC Protocol on Trade, which was amended in 2000, 2007 and 2008, and in the two Regional Indicative Strategic Development Plans (RISDP,) namely RISDP 2000-2015 and Revised RISDP 2015-2020, and the SADC Industrialisation Strategy and Roadmap 2015-2063. It was established in Article 5.1 that one of SADC's general goals established in the SADC Treaty is to attain regional integration for economic development in Southern Africa. The RISDP 2015-2020 similarly prescribes trade and economic objectives, namely trade and financial liberalisation and integration, attainment of macroeconomic stability and convergence, competitive and diversified industrial development, and increased investment in the SADC region.[879] The SADC Protocol on Trade, which entered into legal effect on the 25th of January 2000, placed these objectives into operation through text of the Agreement.[880] There are more specific trade related objectives which appear from a cursory examination of the said Protocol and the RISDP.

The objectives which shall be examined in this chapter are those which directly address SADC Members' trade-in-goods. There are a number of objectives which are incidental to or

[879] Southern African Development Community, *Revised Regional Indicative Strategic Development Plan 2015-2020* (2015) (*SADC RISDP 2015-2020*).
[880] *SADC Treaty* (n 872 above). Article 2 (4). The Article sets out as one of the objectives "economic development" and the preamble of the Protocol further recognises that "[…] development of trade and investment is essential to the economic integration of the Community".

related to trade-in-goods, however, they are not directly related. These include the improvement of the climate for domestic cross-border and foreign investment at Article 2(3) of the Protocol on Trade and ensuring efficient production within SADC reflecting the current and dynamic comparative advantages of its Members.[881] These objectives shall not be addressed as stand-alone objectives in this chapter as they will be examined in the context of other wider objectives.

5.2.1 Objective 1; Trade Liberalisation and Establishing the SADC FTA

SADC's primary trade objective is the objective of trade-liberalisation, particularly within the SADC Region. This is expressed in two paragraphs under Article 2 of the SADC Protocol on trade which established the objectives of the protocol. The first objective is to "liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements". Trade liberalisation, in this context, refers to the reduction of customs duties and other barriers to trade on imported products from each other. This feeds into the wider objectives of the SADC and the SADC Trade Protocol, that is, Regional economic integration through the creation of an integrated regional market. SADC States aim to attain this objective through liberalising intra-regional trade in goods. And further through establishing a regional framework on the phased reduction and eventual elimination of tariff and NTBs to trade among Members. This objective also spills over to SADC Industrialisation Strategy and Roadmap 2015-2063 that identifies regional integration as one of its pillars in contextualising industrial development and economic prosperity.[882]

The second liberalisation objective is to create a Free Trade Area in the SADC Region.[883] The SADC members agreed to remove customs duties and other barriers to trade affecting substantially all trade among themselves as well as settling for at least 85 per cent of its trade. The FTA and its progress will be further expounded below. The SADC FTA, set out

[881] *SADC Treaty* (n 872 above) Article 2(2).
[882] Southern African Development Community *Industrialisation Strategy and Roadmap 2015-2063* (2015) (*SADC Industrialisation Strategy and Roadmap2015-2063)* 16.
[883] Southern African Development Community *Protocol on Trade* (1996) as amended in 2016 (*SADC Protocol on Trade*) Article 3(c) and Article 6.

under Article 2(5) of the SADC Protocol on Trade, goes against the MFN treatment rule in according favourable or preferential tariffs to SADC Members. The FTA was done pursuant to Article XXIV:8 of GATT 1994 which states that "substantially all of trade" must be liberalised if a customs union or a free trade area is qualified to meet the requirements for exemption under Article XXIV. There is currently no adopted DSB case which offers conclusive interpretation or sets a criteria of "substantially all of trade" or a decision on the issue, particularly on the rate of liberalisation of internal trade of an FTA to meet the requirements (this includes the question of whether it is a quantitative requirement only or a quantitative and qualitative requirement).[884] The target of 85 per cent is a significant attempt to comply with Article XXIV:8, albeit through partial liberalisation which has significant economic benefits for the Developing Countries,[885] which SADC managed to reach through working out an average calculation covering all Members.[886]

The SADC Regional Indicative Strategic Development Plan (RISDP) signed on 1 March 2001 sought to launch its Free Trade Area in 2008, its Customs Union in 2010 and a Common Market by 2015**.** FTAs are defined in GATT 1994 Article XXIV:8(b) to be "a group of two or more customs territories in which the duties and other restrictive regulations of commerce […] are eliminated on substantially all the trade between the constituent territories in products originating in such territories". A customs union on the other hand, in simple terms, is an FTA with a common external tariff. Customs unions are defined in paragraph (a) of Article XXIV:8 of the GATT 1994.[887]

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[884] M Matsushita & D Ahn *WTO and East Asia: New Perspectives* (2004) 497.

[885] A Saurombe 'The Southern African Development Community trade legal instruments compliance with certain criteria of GATT Article XXIV' *Potchefstroom Electronic Law Journal* (2011) (14)4 304. Partial liberalisation is ideal for SADC, where the majority of the Members still rely heavily on tariffs as a source of revenue. Evidence is shown of the extent to which BLNS76 countries are dependent on the income from the SACU Revenue Pool, which accounted for between 13% (Botswana), 28% (Namibia) and 51% (Lesotho and Swaziland) of total government income in 2001. Also see World Trade Organization *Trade Policy Review* 2003 WT/TPR/G/114, Geneva.

[886] Saurombe (as above).

[887] Article XXIV:8 of the GATT 1994 (n 12 above) prescribes that Customs Unions are defined as:

"[…] the substitution of a single customs territory for two or more customs territories, so that:

(i) Duties and other restrictive regulations of commerce […] are eliminated with respect to substantially all the trade between the constituent territories…and

(ii) […] substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union".

In 2001 SADC states commenced their phased programme of tariff reductions that resulted in the attainment of minimum conditions for the Free Trade Area (85 per cent of intra-regional trade amongst SADC states reached zero duty) amongst the partner states. SADC has experienced problems with the implementation of these goals. The SADC FTA was achieved in August 2008 when minimum conditions were met. However, maximum tariff liberalisation was only attained in January 2012 when the tariff phase down process for sensitive products was completed, with the exception of Angola and the DRC which remain outside of the FTA[888] through non-participation. Five Other SADC States, namely Mozambique, Tanzania, Zimbabwe, Malawi and Seychelles faced challenges or took the decision to join later. With respect to Mozambique, the process of maximum tariff liberalisation and tariff phase down process for sensitive products was envisaged to only be completed in 2015 in respect of imports from South Africa.[889] Zimbabwe experienced problems in implementing its tariff commitments on sensitive products and was allowed to suspend tariff phase-downs from 2010 until 2012.[890] Annual reductions for Zimbabwe were to resume in 2012 for completion in 2014. And in Tanzania, the Government applied for derogation to levy a 25% import duty on sugar and paper products until 2015 in order for the industries to take measures to adjust.[891] Malawi fell behind with the implementation of its tariff phase-down schedules since 2004, however, in December 2010, Malawi undertook a tariff reform exercise to align its tariff schedule to the COMESA and SADC tariff regimes.[892]

The failure to attain full liberalisation commitment from all member-states has resulted in accurate criticism that SADC's FTA in reality it is not a consolidated trade arrangement, as not all states have implemented their tariff reduction commitments and related obligations.[893] Further, the 2010 deadline for the establishment of its Custom Union was not achieved, nor has it been achieved by 2020. The above-notwithstanding, the FTA and RISDP

[888] SADC Website: SADC Free Trade Area https://www.sadc.int/about-sadc/integration-milestones/free-trade-area/ (accessed 20 May 2019).
[889] SADC website https://www.sadc.int/about-sadc/integration-milestones/free-trade-area/ (accessed 15th November 2020).
[890] SADC website (as above).
[891] SADC website (as above).
[892] SADC website (as above).
[893] Erasmus & Hartzenberg (n 86 above) 1.

have resulted in the growth of intra-regional trade within SADC within the last decade. The intra-regional trade share of the SADC has gradually increased, as figures indicate that in 2007 intra-regional imports were at 18,20 per cent and intra-regional exports were at 15,20 per cent and in 2016 imports rose to 21,20 per cent and exports to 24,90 per cent.[894] This has also resulted in a recent increase in foreign direct investment (FDI) and intra-regional trade which is attributed to SADC FTA efforts.[895]

5.2.2 Objective 2; Diversification and Industrialisation

This objective of diversification and industrialisation is entrenched in the SADC Protocol on Trade at Article 2(4) which provides that in addition to economic development, the its objective is the "diversification and industrialisation" of the Region. This was later expounded when SADC Members on 29 April 2015 approved and commenced the SADC Industrialisation Strategy and Roadmap, which seeks for technological and economic transformation of the SADC region through industrialisation, modernisation, skills development, science and technology, financial strengthening and deeper regional integration.[896]

While South Africa and Tanzania obtain relatively diversified investments, the other SADC State Economies remain undiversified.[897] Hoflinger, from an examination of FDI-inflow, demonstrates that major recipients like Mozambique or Angola and the majority of the other SADC states, are dominantly directed at oil, gas, coal and metals. Commodity prices appear to be the key a determinant of FDI-inflows for most parts of the SADC and the dependency implies that the external-relevance of the region as a trading ground is

[894] T Hoflinger 'Comparative analysis of the trade performance of the Southern African Development Community & the Pacific Alliance' (2018) I (25) *Maastricht Policy Journal*.
[895] T Hoflinger (as above) 23.
[896] *SADC Industrialisation Strategy and Roadmap 2015-2063* (n 882 above) Page 16.
[897] SADC countries have undiversified economies with only few commodity products and (natural/mineral) resources suitable for export – in most cases even only to overseas. Some states are extremely dependent on a single export-good with percentage shares far above 70 % of total exports, such as Angola with 99 % (crude oil and diamonds), Botswana 96 % (diamonds), the DRC 89 % (diamonds), Lesotho 99 % (clothing) and Malawi with 76 % (food) in 2003. See G H Oosthuizen 'The Future of the Southern African Development Community' in D Burger (eds) (2007) *South African Yearbook of International Affairs 2006/07* 87-98 and see J Muntschick 'Developing less developed countries: Regional integration in Southern Africa' Paper for 2nd ECPR Graduate Conference 25-27 August 2008, Barcelona 12.

comparatively unstable. In the case of continuously low natural-resource prices, SADC seeks to diversify its economies in order to prevent a further decrease in FDI.[898]

SADC members are able to pursue diversification policies through enabling S&DT provisions and RTAs. The objective of Diversification is closely tied to S&DT. The 2001 Doha Ministerial Declaration reaffirmed the importance of S&DT provisions and also stressed that the integration of Developing Countries into the MTS will require, not only meaningful market access, but also support for diversification of their production and export base.[899] S&DT provisions which relate to diversification are those on particularly technical assistance and particularly on the areas of trade and industrial policies in the context of changing dynamics of the global economy, such as global value chains and disruptive technologies. Further, diversification objectives by Developing Countries can be attained through purposive S&DT provisions which address market access and subsidy flexibilities intended for bolstering exports from Developing Countries. Another area of S&DT which is critical for diversification is the protection of domestic industries through measures identified at chapter 3.4 of this thesis, which is vital to the growth and development of areas of interest.

Previous RTAs which have been key to SADC Members' trade growth, such as the Lomé Convention, had dissatisfying results with regards to diversification as it has been concluded that very little was done to help expand and diversify ACP exports generally.[900] Diversification itself has the ability to militate against effective implementation of the RTAs, as SADC Members would be unable to take advantage of market access opportunities. The SADC-EU EPA through Article 13(3), however, attempts to address this through cooperation and technical and financial assistance through the diversification of the economic base of SADC Members. The above commitment by the EU is preferential treatment that will aid SADC Countries in an effort to diversify its economy.

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[898] H Bezuidenhout 'Investment perspectives in a changing international investment landscape' (2015) *South African Institute of International Affairs*.
[899] *Doha Declaration* (n 1 above) Paragraph 42.
[900] A Keck & A Piermartini 'The Economic Impact of EPAs in SADC Countries' (2005) *Staff Working Paper WTO Economic Research and Statistics Division* 3.

On the industrialisation front, the review of the RISDP which was completed in 2014 pointed to an urgent need to frontload industrialisation so as to bring about socio-economic transformation in SADC Members. The Revised RISDP 2015-2020 (approved in April 2015) focuses on industrialisation to facilitate the deepening and acceleration of market integration and regional integration opportunities.[901] The SADC industrialisation drive under the Revised RISDP is to place the importance of technological and economic transformation, modernisation, skills development, science and technology, competitiveness, financial deepening, geographical considerations at the heart of regional integration and economic prosperity. The Revised RISDP also recognise the importance of special programmes of regional dimension that are expected to galvanise SADC's industrial revolution with national and regional value chains being well integrated into the global value chain architecture.[902]

The objective of diversification and industrialisation ties into the other objective of "ensuring efficient production within SADC reflecting the current and dynamic comparative advantages of its Members" in Article 2(2). This strategy has been adopted in various policies and programmes by SADC, including Agriculture where it is acknowledged that Cooperation areas can yield significant benefits as can greater economic integration by taking advantage of comparative advantages. The SADC region possesses comparative advantage in natural resource-based production and exports and the SADC Industrialisation Strategy seeks to enhance SADC States' competitiveness to supplement this advantage.[903] The Strategy ties the objective of diversification and taking advantage of competitiveness together through beneficiation and value addition while taking cognisance of the need to transform the industrial base.[904]

[901] SADC website https://www.sadc.int/files/5415/2109/8240/SADC_Revised_RISDP_2015-2020.pdf (accessed 15th November 2020).
[902] SADC website, Summary of the SADC Revised Regional Indicative Strategic Development Plan 2015-2020, https://www.sadc.int/files/5415/2109/8240/SADC_Revised_RISDP_2015-2020.pdf (accessed 29 May 2019).
[903] SADC website SADC Industrialization Strategy & Roadmap https://www.sadc.int/files/2014/6114/9721/Repriting_Final_Strategy_for_translation_051015.pdf (accessed 15th November 2020).
[904] *SADC Industrialisation Strategy and Roadmap2015-2063* (n 882 above) 16.

The objective of efficient production which reflects comparative advantage also operates parallel to diversification. The Industrialisation Strategy and Roadmap identifies new products and processes that "fit" the country's actual and nascent comparative advantage.[905] Part of developing and taking advantage of nascent industries where SADC States have comparative advantage is in establishing safeguard measures to protect such industries.

Technological transformation is critical to the objective of Industrialisation. It is a critical component to almost all objectives set out in Article 2 of the Protocol on Trade. The SADC Industrialisation Strategy and Roadmap 2015-2063 identifies technological transformation as one of its main objectives and drivers for industrial development. It is highlighted as one of the core features of Phase III (2051 to 2063) of the SADC ISR.[906] Technological transformation is at the heart of increased integration, growth in trade, industrialisation and economic growth. It is included as a trade-objective due to its significant ability to attain wider SADC objectives of regional integration and its importance in attaining other trade objectives.

The SADC Industrialisation Strategy and Roadmap seeks to engender a major economic and technological transformation at the national and regional levels within the context of deeper regional integration.[907] The Strategy with technology transformation at the forefront is designed as a modernisation scheme and is predicated on maximum exploitation of comparative advantage and creating enduring conditions for competitive advantage at enterprise level. Technological transformation feeds into quantitative and qualitative strategic goals.[908] This involves technological transformation that changes the way of doing business, scaling-up productive capacity, and enhancing economic interlinkages to unlock regional potential in general.[909]

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[905] *SADC Industrialisation Strategy and Roadmap 2015-2063* (as above) 13.
[906] *SADC Industrialisation Strategy and Roadmap 2015-2063* (as above) 7.
[907] *SADC Industrialisation Strategy and Roadmap 2015-2063* (as above) 1.
[908] *SADC Industrialisation Strategy and Roadmap 2015-2063* (as above). The qualitative strategy seeks to *inter-alia* "[p]rovide a framework for technological and industrial catch-up, export diversification, natural resources beneficiation, enhanced value-addition and increased regional trade and employment generation."
[909] *SADC Industrialisation Strategy and Roadmap 2015-2063* (as above).

Technology is also essential for trade liberalisation and trade-facilitation and central to realising the SADC FTA and Customs Union. It allows for automation of customs procedures and allows for the possibility of interchanging data with trade users by direct link or on machine-readable media. The Protocol on Trade recognises the need for support in computerised inventory control, accounting for goods, revenue, declaration processing, statistics and enforcement. [910]

Technology-transfer and SADC Members' ability to establish enforceable and operational rights regarding same is essential in realising technology-transformation. Chikabwi *et al* conducted a study where major drivers of the manufacturing sector were examined and the productivity growth of nine SADC States were investigated.[911] The study concluded that technology transfer among other factors positively influenced manufacturing sector productivity growth in the SADC countries. And that the study, therefore, recommends policy makers to put in place policy mechanisms aimed at promoting technology transfer to realise meaningful growth in the manufacturing sector.

5.2.3 Objective 3; Sustainable Food Security

A particular trade related concern for SADC Countries, which is encompassed in WTO trade rules in the form of S&DT, is with regards to sustainable food security, as provide for in the SADC Protocol on Trade below. Southern Africa has always been affected by extreme shifts between droughts and floods.[912] With climate change progressing, this has increased the intensity and occurrence of both droughts and floods, resulting in increased food shortages. Other market related fluctuations have long contributed to unstable food access across the SADC region.[913] To manage the situation, Early Warning Units were established in 12

[910] *SADC Protocol on Trade* (n 883 above) Article 6(1).
[911] D Chikabwi, C Chidoko & C Mudzingiri 'Manufacturing sector productivity growth drivers: Evidence from SADC Members' (2017) 9(2) *African Journal of Science, Technology, Innovation and Development* 163.
[912] SADC website Food Security Update https://www.sadc.int/files/6213/5404/6717/fsb200702.pdf (accessed 15 November 2020).
[913] SADC website Revised RISDP 2015-2020 https://www.sadc.int/files/5415/2109/8240/SADC_Revised_RISDP_2015-2020.pdf (accessed 15 November 2020) page 4.

Members to collect, analyse, and disseminate early warning information covering seasonal rainfall and crop development, harvest forecasting, import and exports, food stocks, price and market monitoring.[914]

The above is indicative of the need of SADC states to have sufficient policy space as individual member-states to address a number of issues, such as droughts causing lack of food due to droughts or natural disasters or the effects of import surges and downward price swings in the increasingly volatile agricultural markets. This might mean derogating against WTO law, particularly tariff commitments and the AoA. Section 3.4 of this study indicated how the WTO has attempted to address this through S&DT under exemptions to quantitative import restrictions, variable import levies, minimum import prices and discretionary import licensing where countries face domestic challenges regarding food security. Exemptions are also present in the SADC Protocol on Trade. The general exception was included in Article 9, which allows a Member to take measures necessary to prevent or relieve critical shortages of foodstuffs in any exporting Member.

The Revised RISDP 2015-2020 highlights the SADC goal regarding Agriculture and food-security that aims to develop, promote, coordinate and facilitate harmonisation of policies and programmes aimed at increasing agricultural and natural resources production and productivity and competitiveness in order to ensure food security and sustainable economic development in the region.[915]

5.2.4 Objective 4; Attaining SPS and TBT Standards

One of SADC's trade related objectives includes Strengthening compliance with sanitary and phytosanitary (SPS) measures. Although the SADC Protocol on Trade does not establish this as a general objective under Article 2, the attainment of SPS standards is a critical objective identified in the main body of the Protocol at Article 16 and Annex VIII, which is a dedicated

[914] SADC website https://www.sadc.int/sadc-secretariat/services-centres/regional-climate-data-processing-centre/ (accessed 15 November 2020).
[915] *SADC RISDP 2015-2020* (n 879 above)75.

Annex that provides for SPS measures. It is provided for in the RISDP and food safety measures are also set out in the RISDP 2015-2020 and the SADC Industrialisation Strategy and Roadmap 2015-2063.

The need to address SPS issues is closely tied to the objective of food-security, as adherence to SPS Measures and standards by producers in line with WTO Agreements not only provides for increased-market access, but also allows for sustainable food production. The SADC Industrialisation Strategy and Roadmap 2015-2063 provides that low quality of agricultural products from the SADC region can be addressed through improving adherence to SPS standards.[916] It further provides that this can be done through recognising equivalent standards and also establishing harmonised measures to implement.[917] This objective flows into the SADC Protocol on Trade which at Article 16(1) provides that "Members shall base their sanitary and phytosanitary measures on international standards, guidelines and recommendations, so as to harmonise sanitary and phytosanitary measures for agricultural and livestock production and food safety". The objective of the provision is to provide for adherence to SPS measures.

SPS measures greatly affect SADC Members' market access opportunities, particularly regarding Agricultural exports of interest. SADC Members such as South Africa's fruit and nuts market comprised of 3.9% of their total exports at $3.7 Billion in 2018, making it the seventh largest export product,[918] while Botswana's lucrative beef market in 2018 made it the third largest export product at 1.7% of total exports at $81 million.[919] The need to strengthen SPS Measures is evident in the beef sector, as the EU (Botswana's biggest beef export market) put in place additional SPS requirements through its European Food Safety Authority (EFSA).[920] EU requirements are higher than those of the Organisation for Animal

[916] *SADC Industrialisation Strategy and Roadmap 2015-2063* (n 882 above) 65.
[917] *SADC Industrialisation Strategy and Roadmap 2015-2063* (as above) 65.
[918] World's Top Exports website, Estimates from the Central Intelligence Agency. See: http://www.worldstopexports.com/south-africas-top-10-exports/ (accessed 17 February 2019).
[919] World's Top Exports website, Estimates from the Central Intelligence Agency: http://www.worldstopexports.com/botswanas-top-10-exports/ (accessed 17 February 2019).
[920] Additional requirements are in terms of, for example, traceability, age of slaughter animals and feed standards. D Cassidy 'Case Study: SPS Issues and Regional Trade in Livestock and Livestock Products in the SADC Region' (2010) AECOM International Development USAID 23.

Health (OIE).[921] It appears Namibia, Botswana and South Africa have been able to meet SPS requirements and find markets regarding beef. However, it was identified that when it comes to implementation of specific provisions of the OIE as well as general capacity, SADC is not actually very compliant.[922] This highlights the need to adapt to SPS standards of export markets by SADC Members for increased access to markets.

The Protocol on Trade addresses the challenge of SPS measures by requiring SADC Members to base their SPS measures on "international standards, guidelines and recommendations, so as to harmonise sanitary and phytosanitary measures for agricultural and livestock production and food safety".[923] The Protocol also requires Members to enter into consultations on the recognition of the equivalence of SPS measures in accordance with the WTO SPS Agreement if so requested.[924] SADC Members incorporated an annex "Concerning Sanitary and Phytosanitary Measures (Human, Animal and Plant Life or Health)" at Annex VII. The objectives of the Annex are overall structures to capacitate SADC Countries in attaining international SPS Standards and providing regional structures geared to this objective.[925] The Annex also critically addresses the important issues of technical capacity, and establishes a SADC Sanitary and Phytosanitary Coordinating Committee at Article 14(1) which is to *inter alia* identify regional needs/challenges and facilitate the development and implementation of programmes to address them as well as facilitating capacity building in the region for sanitary and phytosanitary matters through cooperation and collaboration with relevant organisations. The Annex further critically addresses the challenge of resources in attaining these standards. It provides for the SADC Secretariat to facilitate resource mobilisation for technical assistance to enhance Members' capacity to implement and monitor sanitary and phytosanitary measures including promoting greater use of international standards at Article 12(2).

[921] Cassidy (as above) 22.
[922] Cassidy (as above) 22.
[923] *SADC Protocol on Trade* (n 883 above) Article 16(1).
[924] *SADC Protocol on Trade* (as above).
[925] *SADC Protocol on Trade* (as above) Article 2 of the Annex VIII Concerning Sanitary and Phytosanitary Measures.

The general objective regarding SPS resonates throughout the Protocol on Trade and the relevant Annex. This is to align SADC Members with International Standards. A critical issue identified above still poses a major hurdle to market access for SADC exports, namely that certain WTO Members have higher SPS standards than international standards. A case in point is that the EU, SADC EPA Group's largest trade partner's SPS requirements are higher than those of the Organisation for Animal Health (OIE).[926] It is imperative that this issue is addressed by the WTO multilateral rules, particularly through the existing Agreements such as the SPS Agreement and GATT 1994, specifically, in ensuring Developing Countries attain standards despite their challenge in lack of resources and the expensive process of reaching such high standards. Alternatively, domestic SPS measures that exceed the International SPS Standard are to be aligned to the Standard level, which would be an option that would likely receive resistance from Developed Countries. Attaining SPS standards by SADC Members, however, is an objective required to ensure Developing Countries are to attain a larger share of global trade.

5.3 S&DT under the SADC-EU EPA and SADC Development Objectives

WTO S&DT provisions have also been utilised and incorporated in the SADC-EU EPA, as shall be examined further in this section. The said S&DT provisions have accorded SADC Members preferential rights, which have been utilised in attaining their trade and developmental objectives. There is a need to rationalise SADC trade objectives, with existing S&DT under the current WTO dispensation, to examine the extent to which the provisions assist SADC Members with accomplishing trade and developmental objectives and facilitating increased trade gains. This section rationalises S&DT under the SADC-EU EPA and examines the extent to which the existing provisions currently facilitate SADC Development objectives. It is envisaged that where the provisions fall short, the Legal Framework Agreement established in chapter 4 should be able to address the challenges.

[926] Cassidy (n 920 above) 22.

5.3.1 Background

The SADC-EU EPA is a Regional Trade Agreement between six SADC States, namely Botswana, Lesotho, Mozambique, Namibia, Eswatini and South-Africa, and all the European Union Members.[927] Regional Trade Agreements (RTAs) are reciprocal preferential trade agreements between two or more partners as defined by the WTO.[928] They allow countries to negotiate rules and commitments that go beyond the MTS' parameters. This is the case particularly in the current environment where multilateral negotiations stall. RTAs provide an alternative avenue to pursue trade liberalisation and establish new rules on emerging issues. RTAs are to be notified and subscribe to Article XXIV of the GATT 1994 and Paragraph 2(c) of the Enabling Clause as elucidated in chapter 3 of this thesis. WTO Members, therefore, are permitted to enter into preferential agreements and conclude RTAs, as a special exception provided certain strict criteria are met.

The pre-EPA arrangements between ACP-Members (SADC included) and the EU entered into legal effect following the expiration the non-reciprocal Lomé Convention and the Cotonou Agreement, which had challenges in conforming to WTO law. *EC – Bananas III* shifted the approach of the EU on its ACP Agreements, when the second Panel concluded in favour of Latin American companies regarding violation of the GATT 1994. The Panel found that the Lomé Convention's Banana Protocol was not GATT 1994 consistent due to *inter alia* the fact that it favoured one group of developing countries over another (violation of Article I on tariffs).[929] The EU in its green paper considered between creating a FTA (consistent with Article XXIV:5 of the GATT 1994), generalising Lomé trade preferences to non-ACP

[927] Southern-African Development Community-European Union Economic Partnership Agreement (2016) (*SADC-EU EPA*). All the European Union Members are party to the SADC-EU EPA, namely, the Kingdom of Belgium, The Republic of Bulgaria, The Czech Republic, The Kingdom of Denmark, The Federal Republic of Germany, The Republic of Estonia, Ireland, The Hellenic Republic, The Kingdom of Spain, The French Republic, The Republic of Croatia, The Italian Republic, The Republic of Cyprus, The Republic of Latvia, The Republic of Lithuania, The Grand Duchy of Luxembourg, Hungary, The Republic of Malta, the Kingdom of the Netherlands, The Republic of Austria, The Republic of Poland, The Portuguese Republic, Romania, The Republic of Slovenia, The Slovak Republic, The Republic of Finland, The Kingdom of Sweden, The United Kingdom of Great Britain (Brexit transition date 31 December 2020, as will be examined later in this sub-chapter) and Northern Ireland.

[928] WTO website https://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 15 November 2020).

[929] *EC – Bananas III* (n 474 above) 97. The panel stated;
"In respect of Article XIII of GATT, we find that the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it. We further find that the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT."

Countries, or seeking a waiver.[930] The EU eventually opted to conclude FTAs, giving rise to the EPAs which shift ACP-EU relations from aid into a new trade partnership where reciprocity was incorporated.

The EU EPAs, in general, are structured to factor in development needs of the Developing Member that the EU enters the RTAs with. They are described by the EU as:

> "[…] trade agreements respecting the rules of the World Trade Organization, but they go beyond conventional free-trade agreements by focusing on ACP development, taking account of their socio-economic circumstances and including cooperation and assistance to help ACP countries implement the agreements".[931]

The SADC-EU EPA primarily deals with trade in goods. The Agreement also contains provisions which govern services and rendezvous clauses on other trade-related areas such as investment, competition law and policy, intellectual property rights and public procurement. The EPA further incorporates development related rights and principles through the text of the Agreement which will expounded upon in the next two sub-chapters.

On the 29th of March 2017 the United Kingdom invoked Article 50 of the Treaty on European Union (the Lisbon Treaty) by giving formal notification to the European Council of its wish to leave the EU. This immediately triggered the formal negotiation process between the UK and remaining 27 EU Members, for which two years are allocated for the negotiations. The UK was scheduled to cease being a member of the EU at the end of 29 March 2019 Brussels time (UTC+1), however, this did not transpire. After turbulent uncertainty and numerous extensions granted, the United Kingdom left the EU on 31 January 2020, with an eleven (11) month transition period. The UK's decision to leave the EU following a referendum on the 23rd of June 2016 has significant consequences on trade for various SADC Countries and on the SADC-EU-EPA. The SADC-EU EPA will no longer apply to the UK

[930] The EU in its green paper considered between creating a FTA (consistent with Article XXIV:5 of the GATT), generalising Lomé trade preferences to non-ACP Countries, or seeking a waiver

[931] European Commission website (Trade), EU Economic Partnership Agreement Factsheet, September 2018: http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155300.pdf (accessed 24 February 2018) 1.

when it leaves the EU, which therefore means that UK obligations under the EPA would cease and the same applies for SADC EPA Members.

It has already been emphasised how important the EU market is for SADC Members. This similarly applies to the UK market for certain SADC States. The UK accounts for approximately 15 per cent of all South Africa's trade with the EU, representing 3.7 per cent of South Africa's global trade.[932] The UK remains one of the most strategic trading partners for Botswana, ranking as number 13 in the World as a destination for Botswana's total exports between 2013 and 2017.[933] In order to avoid trade disruption it has been agreed that the SADC-EU EPA be rolled over into a standalone trade agreement with the SACU (which would therefore include Botswana, Lesotho, Namibia, South-Africa, and Eswatini) and a separate agreement between Mozambique and the UK.[934] SADC Members negotiating the UK SACU trade agreement are seeking to "replicate the effects" of the SADC-EU EPA, notably by the UK extending to the southern African countries the same trade preferences they currently enjoy.

Negotiations on the rollover of the SADC EPA into a functional standalone SACU and Mozambique and UK Agreement progressed well. The Members initialled the SACU-M UK EPA on 10 September 2019, which is to apply post the end of the Brexit transition date, which is the 31 December 2020 to avoid trade disruption. Cumulation with the EU and Sanitary Phytosanitary (SPS) Measures proved challenging during negotiations. Issues surrounding cumulation relate to a proposition from SACU and Mozambique regarding a transitional arrangement to preserve exiting value chains, which provides for recognition of EU materials and processing for a period of three years while the Parties negotiate a permanent arrangement.[935] Further, the UK wants to cumulate with any material from EU, a

[932] R Gibb 'The Impact of Brexit on South Africa' (2016) *The Brenthurst Foundaton* Discussion Paper 9/2016 Page 7.
[933] The Southern Times Africa, Document presented to Parliament by Minister of Investment, Trade and Industry, Bogolo Kenewendo: https://southerntimesafrica.com/site/news/botswana-raises-red-flag-over-brexit-fears-disruption-of-sacuuk-trade (accessed 27 July 2019).
[934] TRALAC website https://www.tralac.org/documents/news/2641-update-on-the-negotiations-of-a-rollover-epa-between-sacu-and-mozambique-and-the-uk-dti-presentation-13-february-2019/file.html (accessed 15 November 2020).
[935] TRALAC Website, Update on the negotiations of a rollover Economic Partnership (Deputy Director-General International Trade & Economic Development Division): https://www.tralac.org/documents/news/2732-update-on-the-rollover-epa-

condition that is currently not provided for in the SADC-EU EPA, which SACU-M Members required further domestic consultations on.[936] Finally, SPS issues which are to be addressed emanate from the fact that once the UK leaves the EU, the UK will have to put in place its own SPS framework, which will place SACU Members and Mozambique at the disadvantage of adjusting to new UK operational requirements.[937]

The UK's decision to leave the EU was a tumultuous one, riddled with uncertainty, missed exit deadlines and internal political deadlocks.[938] If Agreements were not reached between SADC States, the UK, and Mozambique upon Brexit occurring, exports from SADC States to the UK would have been subjected to tariffs and trade under terms extended to other World Trade Organization members and preferential regime enjoyed under the SADC EU-EPA will be lost. Even after the SACU-M UK EPA, the biggest threat to SACU and Mozambique would be reduced export demand if the Brexit negotiations damage the UK economy.

5.3.2 SADC-EU EPA Objectives

This section examines the objectives of the SADC-EU EPA, which as stated at the beginning of this chapter, will be utilised as a test that the framework will be applied to. An analytic examination of the objectives will provide contextual understanding of what the North-South Members hope to attain, which will also provide a cursory indication of trade objectives of the respective States, which flow into the main text of the EPA.

Article 1 of the EPA lists the broad objectives of the SADC-EU EPA. It is notable that the Agreement provides for an objective that mirrors Article XXXVI:3 of the GATT 1994, which calls for "positive efforts designed to ensure that less developed contracting parties secure a

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between-sacu-mozambique-and-uk-dti-presentation-to-portfolio-committee-on-trade-and-industry-13-march-2019/file.html (accessed 27 July 2019).

[936] TRALAC Update on the negotiations of a rollover Economic Partnership (n 824 above).

[937] TRALAC Update on the negotiations of a rollover Economic Partnership (n 824 above).

[938] Federation of American Scientists website *Congressional Research Service Brexit Status and Outlook* https://fas.org/sgp/crs/row/R45944.pdf (accessed 15 November 2020) page 2.

share in the growth in international trade commensurate with the needs of their economic development". Article 1(c) sets out that the objective of the Agreement is to *inter alia* "promote the gradual integration of the SADC EPA States into the world economy in conformity with their political choices and development priorities". The Agreement generally incorporates SADC policy and priorities through provisions that acknowledge SADC Regional economic arrangements and structures, and trade needs within the said structures.[939] This is particularly apparent from Article 1(f) of the EPA which states that one of the objectives of the Agreement is to "strengthen the existing relations between the Parties" through the consolidation and implementation of the SADC Protocol on Trade and the SACU Agreement. The EPA proceeds to incorporate a number of SADC trade objectives as set out in the Protocol for Trade into the EPA as will be examined below.

Article 1 of the EPA primarily establishes broad and general objectives as will be demonstrated in this section. The focus of this chapter shall be objectives which are specific to trade. All the SADC objectives identified under Article 4.2 emerge as objectives under the SADC-EU EPA, save for the objective of technological transformation, which the EPA doesn't identify as a priority or a goal under the EPA. Technology has very few sporadic references under the EPA, particularly under Article 13(4) in the context of cooperation for supply-side competitiveness under Article 13(4) and under Article 13(3) to develop a competitive business enhancing environment.

The general objectives established under Article 1 will only be referenced to the extent that they relate to specific objectives. The objectives under Article 1 of the SADC-EU EPA are the following:

> "(a) contribute to the reduction and eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the MDGs and the Cotonou Agreement;

[939] *SADC-EU EPA* (n 927 above) the Preamble. The preamble recognises the SACU and the SADC Treaty.

(b) promote regional integration, economic cooperation and good governance to establish and implement an effective, predictable and transparent regional regulatory framework for trade and investment between the Parties and among the SADC EPA States;

(c) promote the gradual integration of the SADC EPA States into the world economy in conformity with their political choices and development priorities;

(d) improve the SADC EPA States' capacity in trade policy and trade-related issues;

(e) support the conditions for increasing investment and private sector initiatives and enhancing supply capacity, competitiveness and economic growth in the SADC EPA States; and

(f) strengthen the existing relations between the Parties on the basis of solidarity and mutual interest. To this end, consistent with WTO obligations, this Agreement shall enhance commercial and economic relations, consolidate the implementation of the Protocol on Trade in the Southern African Development Community (SADC) Region, signed on 24 August 1996 ('SADC Protocol on Trade') and the SACU Agreement, support a new trading dynamic between the Parties by means of the progressive, asymmetrical liberalisation of trade between them and reinforce, broaden and deepen cooperation in all areas relevant to trade".

The specific trade-objectives of the SADC-EU EPA are set out below.

5.3.2.1 Trade Liberalisation and Regional Integration

The first apparent objective the EPA provides for is trade-related. The Article establishes the objective for progressive trade liberalisation by Members. Article 1(f) of the EPA provides "support [for] a new trading dynamic between the Parties by means of the progressive, asymmetrical liberalisation of trade between them and reinforce, broaden and deepen cooperation in all areas relevant to trade". The Agreement is progressive in its approach of being both reciprocal and as asymmetric [in favour of SADC States], replacing the Cotonou Agreement which was non-reciprocal. The asymmetrical nature of the Agreement is

evidenced through the preferential treatment accorded to SADC Members through the Agreement. Liberalisation of trade is the primary objective, with EU offering 100% duty free access to its market to SADC EPA States and 98.7% to South-Africa. SACU, in return, provides 86.2% duty free access. This positively impacts market access of goods from SADC and SACU Members.

The EPA, at a cursory examination, incorporates SADC Members' objectives and needs. The EPA recognises regional integration objectives set out in the SADC Treaty and Protocol through trade in goods and setting out the SADC FTA. The Preamble provides that Members are committed to promoting "regional cooperation and economic integration, and to encourage the liberalisation of trade in the SADC region". Further, Article 3(2) of the EPA entrenches the EPA members' support for SADC economic integration by reaffirming "[…] the importance of regional and sub-regional integration among the SADC EPA States to achieve greater economic opportunities, enhanced political stability and to foster the effective integration of Developing Countries into the world economy". This is in line with the over-arching objective of SADC, which is to achieve Regional Integration and Poverty Eradication, as elucidated in chapter 4 of this thesis. This is also in line with the Protocol on Trade which recognises that development of trade and investment is essential to the economic integration of the Community, and the SADC Industrialisation Strategy and Roadmap 2015-2063 identifies Regional Integration as one of its pillars.

Intra-SADC Regional integration and continental integration is essential to SADC Members' trade growth. SADC has been party to a number of continental Agreements, which includes the Tripartite Free Trade Area Agreement[940] (TFTA) entered into with other African RECs COMESA[941] and EAC.[942] SADC Members are also party to the African Continental Free Trade Agreement (AfCFTA).[943] The Tripartite FTA negotiations commenced in 2008 in the first TFTA Summit in Kampala, Uganda, emanating in the final TFTA Agreement, dated 10 June 2015

[940] Tripartite Free Trade Area Agreement (2015) (TFTA).
[941] Common Market for Eastern and Southern Africa established through the COMESA Treaty. Common Market for Eastern and Southern Africa (1994) (COMESA Treaty);
[942] East African Community established through the EAC Treaty. East African Community (EAC Treaty) (2000).
[943] Agreement Establishing the African Continental Free Trade Area (2018) (*AfCFTA*).

which came from the third Tripartite Summit. The TFTA consists of three of Africa's Regional Economic Communities, which includes 27 Members, of which 22 have signed the Agreement.[944] The Tripartite agreement envisaged establishing a Tripartite Free Trade Area was based on a development integration agenda that combined market integration, industrial development and infrastructure development. The TFTA Agreement would, amongst others, facilitate the harmonisation of trade regimes of Members and allow for the free movement of business persons (albeit for limited periods). One of the overriding objectives of the TFTA was the potential to new and dynamic markets and there was potential to stimulate industrial development, investment and job creation, as established at Article 3 of the Tripartite Agreement. The Agreement requires 14 ratifications to enter into force, currently only four countries have ratified the Agreement.[945]

Efforts at establishing a truly continental FTA have overtaken the TFTA. In March 2018, in Kigali, 44 of the 55 members of the African Union (AU) signed an agreement to establish an African continental free trade area (AfCFTA). The SADC Members party to the EPA all signed the African Continental Free Trade Agreement, which was formulated to fast-track the integration of African markets with the AEC.[946] The AU re-galvanised efforts for continental economic integration under and through the AfCFTA, which now stands as the focal point of intra-Africa trade.

The AfCFTA opens up markets within Africa and the AU optimistically predicts that it has the potential of increasing intra-African trade by 52.33 percent by 2022 from 2010 levels. This is through setting up a Continental market for goods and services,[947] laying the foundation for a continental customs union,[948] and resolve the spaghetti-bowl challenge within the

[944] TRALAC website, Tripartite Free Trade Area Agreement, https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html (accessed 25 June 2019).
[945] Tripartite Free Trade Area Agreement (n 830 above). The four Members that have ratified are Kenya, Egypt, Uganda, and most recently, South Africa,
[946] Tripartite Free Trade Area Agreement (n 830 above) Para 1.
[947] *AfCFTA* (n 943 above) Article 3(a). The provision provides for the creation of "a single Market for Goods, Services, and Movement of Persons in order to deepen the economic integration of the African Continent and in accordance with the Pan African Vision of 'An integrated, prosperous and peaceful Africa' enshrined in Agenda 2063".
[948] Tripartite Free Trade Area Agreement (n 830 above) Article 3(c).

continent.[949] Increased Intra-African trade is to be attained by liberalising goods and services within the African Continent and through tariff reduction.[950] The Continental Customs Union is to be set up through improved trade facilitation and customs cooperation throughout Africa.[951] Further, the multiple and overlapping memberships issues are to be addressed through structural reforms that the AfCFTA undertakes through its "top down" approach. It is, therefore, essential that regional integration be an objective that is recognised by the EPA in order to enable SADC Members the ability to take advantage of regional and continental market access opportunities, reduce trade costs, and increase trade in goods and services. The AfCFTA envisages to create new continental market access opportunities for SADC Members, which potentially would reduce dependency on preferential treatment from Developed Countries. The Continental Agreement, therefore, has the potential to impact the use and reliance of S&DT by Developing Countries.

5.3.2.2 Sustainable Development & Food Security

Sustainable Development is also an objective under the EPA. Article 7(2)(a) of the Agreement provides the parties shall "[…] fully take into account the human, cultural, economic, social, health and environmental best interests of their respective populations and of future generations" in applying the EPA. The use of "shall" imposes a legal obligation on all SADC-EU Members to apply the above sustainable development considerations in carrying out the terms of the EPA.

Sustainable development also feeds into food-security and poverty eradication. In this regard, the EPA also incorporates the SADC trade objective for sustainable food security. The EPA recognises the "importance of agriculture and sustainable development in poverty

[949] Tripartite Free Trade Area Agreement (n 830 above) Article 3(g). Also see J Bhagwati, D Greenaway & P Arvind 'Trading preferentially: Theory and Policy' (1998) 108(449) *The Economic Journal* 1128-1148. The Spaghetti Bowl refers to challenges of multiple and overlapping memberships at a Regional Level. Much has been written about the effect of the Spaghetti Bowl and its adverse effects as set out by Jagdish Bhagwati, who coined term. Bhagwati argued that PTA proliferation makes trade procedures more complicated by increasing the number of tariffs and rules of origin.
[950] *AfCFTA* (n 943 above) Article 4(a) and (b).
[951] *AfCFTA* (as above) Article 4(e).

alleviation in the SADC EPA States"[952]. This speaks to the reality that most SADC Members are undiversified, are primarily dependent on agriculture, and that SADC has had food security challenges.

The EPA is also in line with the RISDP 2015-2020 regarding Agriculture and food-security which is to develop, promote, coordinate and facilitate harmonisation of policies and programmes aimed at increasing agricultural and natural resources production, productivity and, competitiveness in order to ensure food security and sustainable economic development. The EPA, to this extent, aligns with this objective through Article 26 which contains a general exception for SADC EPA Members (with the exception of South-Africa) to impose temporary customs duties or taxes in connection with the exportation of goods. This action is justified "where essential for the prevention or relief of critical general or local shortages of foodstuffs or other products essential to ensure food security".

The EPA further contains an Article on Food Security Safeguards, which acknowledges that the removal (or reduction) of trade barriers between parties to the SADC-EU EPA "may pose significant challenges to the SADC EPA States' producers in the agricultural and food sectors".[953] Article 36(2) provides for special safeguard measures which SADC Members may apply where essential for the prevention or relief of critical general or local shortages of foodstuffs or other products in order to ensure food security of a SADC EPA. According to the said Article, measures may be applied immediately if delay would cause irreparable damage.[954] In the absence of such exigent circumstances, SADC Members which do not reach a "satisfactory solution" within thirty (30) days of referring the matter to the CTD may adopt the appropriate measures to remedy the circumstances. The first available measures regarding food-security is the suspension of the further reduction of the rate of import duty under the EPA.[955] The second measure is increasing the customs duty on the product

[952] *SADC-EU EPA* (n 927 above) the Preamble.
[953] *SADC-EU EPA* (as above) Article 36(1).
[954] *SADC-EU EPA* (as above) Article 34(8).
[955] *SADC-EU EPA* (as above) Article 34 (3)(a).

concerned up to a level which does not exceed the MFN applied rate at the time of taking the measure.[956] And lastly, introducing tariff quotas on the product concerned.[957]

The concept of sustainable development links the EPA with development objectives or focus-areas as set out in the SADC treaty, Protocols, RISDP and Strategy documents and other governmental policies SADC Members have.

5.3.2.3 Economic Development, Diversification and Industrialisation of the SADC Region

The economic development, diversification and industrialisation of SADC States is an objective of the parties in the SADC-EU EPA. These three areas are not primary objectives explicitly set-out in Article 1 of the EPA which lists objectives of the Agreement. The three objectives, however, are entrenched in provisions scattered around the EPA. Further, these objectives fall in line with the objective set-out in Article 1 of integration of SADC EPA states into the world economy in conformity with their "political choices and development priorities". These three objectives are critical development priorities established from SADC instruments and policy. This goal was carried through from Article 2(4) of the SADC Protocol on Trade which provides for the enhancement of "economic development, diversification and industrialisation of the [SADC] Region". The EPA aligns with SADC objectives, needs and interests. The preamble of the EPA recognises "[…] the special needs and interests of the SADC EPA States and the need to address their diverse levels of economic development, geographic and socio-economic concerns". The economic development, diversification and industrialisation, therefore, emerge as priority areas and needs of SADC States.

The preamble of the EPA sets out the SADC Parties' commitment to support economic development of SADC states and ties it with attaining the MDGs. Economic Development of SADC is also an objective through the principle of sustainable development as set out in the previous section, which is an objective under Article 1(a) of the EPA. Sustainable

[956] *SADC-EU EPA* (as above) Article 34 (3)(b).
[957] *SADC-EU EPA* (as above) Article 34 (3)(c).

development at Article 6(2) comprises of three pillars, the first of which is economic development and the second and third are social development and environmental development.

The EPA established diversification as a bye-product or target which is to be attained as a result of implementation of the EPA. Article 26(10) which provides for export duties and taxes provide for the review of the said Article particularly with regards to impact on development and diversification of SADC States' economies. This, therefore, establishes development and diversification as a target or objective, which preferential treatment regarding customs duties under Article 26 are to attain. The EPA at Article 13 recognises priority areas for trade and economic cooperation and established diversification as a target-measure. One of the key areas in cooperation regarding supply-side competitiveness identified by the parties is diversification of an economic base.[958]

Industrialisation was identified as a SADC objective earlier on in this chapter. It has not emerged as a primary or key priority under the EPA, but is rather carried through as a target or anticipated by-product of other objectives; and also as a SADC needs and objective which the EPA seeks to preserve. An example of the former, is Article 17 of the EPA which envisages the provisions on cooperation on public procurement to promote economic development and industrialisation. Further, cooperation on agriculture is seen at article 68 of the EPA as a "basis for wider industrialisation and sustainable development, as well as to contribute to the objectives of the Agreement".

The EPA further provides for preferential treatment on the basis of industrial development needs. EPA States are entitled to introduce temporary customs duties in connection with exportation of certain products to the EU where said States "can justify industrial development needs". The above industrial related provisions indicate that the incorporation of industrialisation flexibilities into the EPA SADC-EPA States is a priority for SADC States, linked to their developmental needs.

[958] *SADC-EU EPA* (as above) Article 13 (3).

5.3.2.4 Attaining SPS Standards for SADC EPA Members

Sanitary and Phytosanitary standards are an important part of the SADC-EU EPA, with a chapter dedicated to the subject matter.[959] The objectives regarding SPS measures are not general objectives set out in Article 1 of the Agreement, but rather specific objectives established in the main body of the Agreement. It was set out in chapter 5 of this thesis that the attainment of SPS measures is a SADC trade objective as identified in the main body of the Trade Protocol. Article 16 of the SADC Protocol on Trade and Annex VIII, which is a dedicated Annex, provide for SPS measures and the attainment of SPS Standards. It is also provided for in the RISDP and food safety measures as also set out in the RISDP 2015-2020 and the SADC Industrialisation Strategy and Roadmap 2015-2063.[960] The parties to the SADC-EU EPA incorporated provisions geared at attaining SPS goals regarding SADC states into the EPA.

The SADC-EU EPA sets SPS standards as a cooperation priority under under Article 13(2), alongside TBT, implementation of RoO and trade-defence instruments. The objectives regarding SPS standards are evidenced, however, under Chapter VI of the EPA. Chapter VI is a dedicated chapter on SPS Measures. The objectives of the parties regarding SPS measures at Article 60, which *inter-alia* provide for;

a) Strengthening SADC cooperation and regional integration on SPS measures regarding priority areas;
b) Promote collaboration aimed at recognition of appropriate levels of protection in SPS measures; and
c) Enhance SADC EPA States' technical capacity to implement and monitor SPS measures, and promoting greater use of international standards regarding SPS.

[959] *SADC-EU EPA* (as above) Chapter 6.
[960] *SADC RISDP 2015-2020* (n 879 above), page 75 and *SADC Industrialisation Strategy and Roadmap2015-2063*2063 (n 796 above) Page 44.

The Chapter proceeds to establish a Trade and Development Committee on SPS measures which monitors and reviews the implementation in Chapter VII, which *inter alia* monitors and reviews implementation of the Chapter.[961] The parties are to establish a mechanism for transparency[962] and set up an early warning system for new EU SPS measures that may affect SADC exports.[963] The Chapter also vitally capacitates SADC EPA States through cooperation, capacity building and technical assistance to maintain and expand market access opportunities.[964] Importantly, it was established that compliance with SPS measures requires considerable financial resources and technical capacity earlier in this chapter. An example of an important intervention that the EPA members agreed to can be found at Article 67(c)(vi) which provides that the parties agree to develop "capacities for risk analysis, harmonisation, compliance, testing, certification, residue monitoring, traceability and accreditation including through the upgrading or setting up of laboratories […] to help SADC EPA States comply with international standards". The EPA, therefore, established the objective of capacitating SADC-EPA States to better comply with international requirements and further created structures, and provisions for the facilitation of the objectives.

5.3.2.5 Trade Facilitation

The objective of trade facilitation and reduction in non-tariff barriers are part of the wave of trade-liberalisation objectives that the WTO and most Members have implemented in the MTS and RTAs. Trade Facilitation flows from the objective of Regional Integration of the SADC EPA States, however, is a stand-alone objective on its own. Under the EPA it contains a dedicated chapter which sets out objectives, structures in the form of Committees, and transitional arrangements as will be explained below.

The EPA addresses Trade Facilitation firstly through Article 13(2), which provides for means of cooperation in line with liberalisation commitments of the parties. One area of cooperation which is envisaged by the Agreement is trade facilitation. This does not

[961] *SADC-EU EPA* (n 927 above) Article 65(a).
[962] *SADC-EU EPA* (as above) Article 63(3).
[963] African Continental Free Trade Agreement (n 516 above) Article 64(2).
[964] African Continental Free Trade Agreement (n 516 above) Article 67.

establish Trade Facilitation as an objective on its own, but establishes it as one of the trade facilitation priorities that the EPA Members seek cooperation on. Trade Facilitation emerges as an objective of the parties at Chapter IV which is dedicated to Customs and Trade Facilitation. The objectives set out under Article 41 regarding Trade Facilitation are the following:

> "(a) reinforce cooperation in the area of customs and trade facilitation with a view to ensuring that the relevant legislation and procedures, as well as the administrative capacity of the customs authorities, fulfil the objectives of effective control and the promotion of trade facilitation;
> (b) promote harmonisation of customs legislation and procedures;
> (c) …
> (d) provide the necessary support for the SADC EPA States' customs administrations to effectively implement this Agreement."

The objectives regarding Trade Facilitation are geared at ensuring that the said harmonisation and simplification are carried out through "necessary support" as stated in Article 41(d). This is to be carried out through customs and administrative cooperation, which includes *inter alia* exchange of information on customs legislation and procedures and promotion of coordination between all related agencies, internally and across borders.[965] Article 48 also provides for cooperation and provides for support to the SADC EPA States' customs administrations. This is in the areas of modern customs techniques, control of customs valuation, classification and rules of origin, the facilitation of transit and the enhancement of the efficiency of regional transit arrangements, and transparency issues in the implementation of procedures and practices which reflect international instruments.[966] The latter assistance in implementing international instruments includes inter-alia the Kyoto Convention and the WTO Trade Facilitation Agreement.

[965] African Continental Free Trade Agreement (n 516 above) Article 42 (a) and (g).
[966] African Continental Free Trade Agreement (n 516 above) Article 48 (2) (a) to (e).

All SADC-EU EPA states are signatory to the recently commenced WTO TFA which is binding on the parties. The Members and SADC Members objectives re-enforce efforts at the simplification and harmonisation of trade documentation and procedures. Article 44(3)(c) uses peremptory wording regarding binding the EPA Members regarding transit trade facilitation requirements, by providing that the parties shall "[…] (c) use international standards and instruments relevant to transit […]". The EPA, therefore, mandates the EPA states to utilise the WTO TFA regarding transit goods.

The EPA's primary objective regarding Trade Facilitation as established from Article 41 coupled with modalities in chapter IV can be identified as the fulfilment of Trade Facilitation by EPA Members, particularly SADC-EPA States. This objective is in line with the SADC Protocol on Trade at Annex III which is concerned with the simplification and harmonisation of trade documentation and procedures.

5.4 Conclusion

It was established in the beginning of this study that the SADC-EU EPA will be utilised as the test to which the S&DT framework is to be applied. The primary question is to determine whether the proposed S&DT framework, when applying it to the EPA, will facilitate or appropriately attain developmental [trade-related] needs of Developing Countries. And further, whether the application of the framework would facilitate their integration into securing a larger share of global trade, whilst the framework legally complies or is justified under current WTO laws. In order to appropriately make this enquiry and linkage, it was prudent to establish the objectives of the SADC-EU EP, and determine Developing Countries' (SADC) development needs. This was done through analysing the structure and objectives of the SADC-EU EPA text, establishing contextual background of negotiations, and establishing SADC broad trade goals and specific objectives contained in its key legal texts, such as the SADC Protocol on Trade, SADC Regional Indicative Strategic Development Plan (RISDP) and the SADC Treaty.

It emerged from this chapter that most of the SADC trade objectives were fused into the SADC-EU EPA. The SADC trade-objectives identified were those of trade liberalisation (within the SADC Region and continental liberalisation), diversification and industrialisation, sustainable food security, technological transformation and attaining SPS and TBT standards. The EU, following its new EPA model, applies a reciprocal agreement which weighs in favour of SADC States through preferential provisions. These primarily apply to asymmetric market access, safeguards, flexible rules of origin and development commitments. The EPA accommodates SADC trade objectives and needs by incorporating them into the text of the Act. One of the challenges in the SADC Industrialisation Strategy and Roadmap 2015-2063 identified was the reduced or inadequate policy space for industrialisation due to trade arrangements with third parties, in particular the EU (through the EPA) and the WTO. The above-notwithstanding, the EPA, to a large extent, accommodated SADC needs and trade goals which are facilitated through the cooperation, both technical and financial, as set out in the Agreement.

The SADC-EU EPA contains most specific SADC trade objectives. From an examination of the objectives of the Agreement, the trade objectives that were identified were; trade liberalisation and regional integration, sustainability and food security, economic Development, diversification and industrialisation, attaining SPS standards for SADC EPA States and Trade Facilitation. The examination of SADC-EU EPA in relation to trade and development objectives, which was undertaken under this Chapter, also reveal a significant number of linkages to WTO S&DT. S&DT under the WTO is the legal basis for the EPA and preferential treatment contained in the said Agreement. Therefore, the importance of having binding, clear and operational S&DT under the WTO is paramount to the SADC trade and developmental objectives. It is envisaged that the Legal Framework Agreement would improve or enhance S&DT and facilitate for increased attainment of trade and developmental objectives.

SADC trade and developmental objectives will be used as the test in the next chapter to determine whether S&DT under the established Framework addresses SADC development

needs and trade objectives. This will determine whether the Framework appropriately attains the objective S&DT it set-out to achieve and further identify challenges and deficiencies of the Framework.

Chapter 6: The SD&T Framework Agreement and its application to the SADC-EU EPA

This chapter shall examine the potential effects or outcomes of applying the Framework Agreement to the SADC-EU EPA and specifically, the potential effect on the rights and obligations of both Developed and Developing Countries regarding S&DT. The Framework Agreement was created to improve or enhance preferential treatment under the WTO structure for Developing Countries' needs. The main question, therefore, will be to determine whether the provisions in the Framework facilitate for more effective and precise S&DT for SADC Members' needs under the SADC-EU EPA and to determine whether the framework would result in definitive, enforceable rights.

The hypothesis in this particular thesis (the S&DT Framework Agreement) was formulated in chapter 4 of this study and the test (the SADC-EU EPA) established in chapter 5 was identified as an RTA, which would be well-suited to examine the effectiveness of the legal provisions of the Draft Framework Agreement.

The primary determination is to establish whether the Framework Agreement attains the objective/outcomes of the framework (established in chapter 4) when applied to the SADC-EU-EPA. Some of the objectives of the Framework Agreement are: that S&DT should facilitate predictable, enforceable and equitable MTS, and further, that it should secure the rights of Developing Countries under WTO law for increased participation and integration in the MTS so as to increase their share of global trade.

6.1 Applying the Framework Agreement to the SADC-EU EPA

It was stated in chapter 5 of the study that the S&DT Legal Framework Agreement was envisaged to potentially improve or enhance S&DT and facilitate increased attainment of trade and developmental objectives. The Framework Agreement was created to improve on

S&DT, specifically regarding enforcement, implementation and clarity. Its application to the EPA, therefore, is expected to stretch or extend trade preferences for Developing Countries.

The linkage between the Framework Agreement and the SADC-EU EPA is that Members of the SADC-EU EPA would be bound by the rules therein. It was established in chapter 5 that the EPA is structured to be WTO compliant, with the Agreement described by the EU as "[…] trade agreements respecting the rules of the World Trade Organization […]".[967] There are multiple references in the EPA to the supremacy of WTO Agreements and respect of WTO obligations; in the preamble,[968] in Article 1 which is an Article establishing objectives,[969] and references within the main body of the EPA. The primary Article which establishes this principle is found under Article 112 of the EPA, which states that "[t]he Parties agree that nothing in this Agreement requires them to act in a manner inconsistent with their WTO obligations". Further to this, there are provisions such as Article 32 that indicate that SADC and EU Members are not only meant to subscribe to their WTO rights and obligations, but in certain instances, apply WTO Agreements and remedies under the said EPA. The Article, which addresses anti-dumping and countervailing measures, prescribes that rights and obligations shall be guided by the relevant WTO Agreements.[970] The above has a number of consequent implications regarding the applicability of the envisaged S&DT Framework Agreement.

If the S&DT Framework Agreement were to formulate part of WTO acquis, then the rights and obligations under the said Framework would be binding on SADC and their EU counterparts. This would require the Members to comply with any additional mandatory S&DT provisions prescribed under the Agreement. The Framework Agreement stretches the scope of S&DT and imposes new procedures and application of provisions which were previously WTO soft law. Both Developing and Developed Countries would have additional

[967] European Commission website (Trade) website (n 823 above).
[968] *SADC-EU EPA* (n 927 above). The Preamble takes account of "the Parties' rights and obligations in terms of their membership of the World Trade Organization ('WTO') and reaffirming the importance of the multilateral trading system".
[969] *SADC-EU EPA* (as above). The reference to the WTO under Article 1 can be found at Article 1(f), where the Parties Agree that in enhancing commercial and economic relations between the Members, they shall remain "consistent with WTO obligations".
[970] *SCM Agreement* (n 392 above) and *ADA* (n 88 above).

obligations under the S&DT Legal Framework Agreement. Not only would SADC EPA Members have additional rights to enforce under the WTO system, but the substantive EPA provisions could potentially be recast to reflect the substantive S&DT rights and duties in the Agreement.

6.2 General Rules on Special and Differential Treatment and the SADC-EU EPA

6.2.1 Notification and Implementation Rules

Notification and implementation of S&DT are the heart of the S&DT Framework. It was summated that the Article establishes operational rules and modalities on how S&DT is to be undertaken and it also provided for the rights and obligations of Members. This section examines how the proposed rules on notification and implementation are applicable in the SADC-EU EPA context. It also examines whether the provisions would potentially facilitate improved access to S&DT and effective implementation of the rules for Developing Countries.

From the onset, it is apparent that Article 3 of the Framework Agreement creates additional notification obligations on SADC Members in order for them to benefit from S&DT under the Agreement. Article 3.2 requires all Developing Countries, which would comprise all SADC Members party to the EPA, to notify the CTD of specific developments and financial and trade needs once every six years. The notification is expected to be accompanied by *inter alia* information on the extent of assistance, support or flexibility required, a trade or economic report highlighting development-related concerns containing facts and data justifying specific needs and supporting documents.

SADC Members have (prior to the TFA) struggled to comply with WTO obligations which require notification. This is primarily due to technical capacity, as opposed to lack of political will ,as is apparent from a number of WTO Agreements, and will be expounded below. Notification under WTO Agreements such as the Agreement on Import Licensing Procedures, requires publication of lists of products, subject to the licensing requirement, as

well as notification to the Committee on Import Licensing under Article 1(4)(a). Further notification is required for licensing procedures or changes in these procedures to the Committee within 60 days of publication under Article 5 and an annual questionnaire under Article 7. Botswana and Eswatini have never submitted an annual questionnaire since the establishment of the WTO.[971] Botswana and South Africa only submitted their first notification under Article 1(4)(b) in 2016.[972] Namibia has made only two notifications under Article 7 from 2008 to 2014,[973] and no notifications between 2016 and 2018 or compliance with fulfilling the annual questionnaire.[974] Lesotho made three notifications between 2009 and 2015,[975] with only one annual questionnaire being submitted (in 2010),[976] and no notifications between 2016 and 2018 or compliance with fulfilling the annual questionnaire.[977] The above is an indication of lack or failure to meet notification and other related obligations, particularly those that require annual responses or feedback. It is, however, important to note that notification under the Framework Agreement would be significantly less onerous for Developing Countries as they would require notification once every six years as opposed to annual questionnaires, which may facilitate higher rates of compliance by Developing Countries.

Notification under the WTO TFA, on the other hand, which was examined in detail in chapter 4 as having progressive S&DT through a self-regulating notification of commitment provisions, have been successfully complied with by SADC EPA Members.[978] Article 16(1) of the TFA Category B prescribes for notification of commitments where Developing Countries and LDCs require additional time to implement the measure (category B),[979] and

[971] WTO *Twelfth biennial review of the implementation and operation of the Agreement on Import Licensing Procedures* 12 October 2018 Committee on Import Licensing WTO Document, G/LIC/W/49.
[972] WTO *Twelfth biennial review of the implementation and operation of the Agreement on Import Licensing Procedures* (as above) p 4.
[973] WTO *Fourth Trade Policy Review of the Southern African Customs Union*, Annex 3, Namibia, WT/TPR/S/324 216.
[974] WTO *Twelfth biennial review of the implementation and operation of the Agreement on Import Licensing Procedures* (n 971 above).
[975] WTO *Fourth Trade Policy Review of the Southern African Customs Union* (n 973 above) Annex 2, Lesotho 152.
[976] WTO *Fourth Trade Policy Review of the Southern African Customs Union* (as above) Annex 2, Lesotho 152.
[977] WTO *Twelfth biennial review of the implementation and operation of the Agreement on Import Licensing Procedures* (n 971 above).
[978] WTO website https://www.tfafacility.org/notifications (accessed 20 November 2020). Most SADC Members notified under the respective *TFA* Categories (A, B, C).
[979] *TFA* (n 24 above) Article 16(1)(b). Developing Members were to notify Category B indicative date of commitment by the 22 February 2017 and LDC's by the 22 February 2021.

Commitments which require assistance and support for capacity building (category C).[980] All SADC EPA Members to-date have successfully notified both categories, with the exception of LDC Member Lesotho which has not yet notified definitive dates in Categories B and C, which is within its deadline under the TFA.[981] This notification process is considerably less onerous than the notification of once every six years, under the envisaged S&DT Framework Agreement.

The above examples raise contrasting positions on whether imposing further onerous notification and reporting requirements are practicable, even if technical and financial assistance is present, as this has proven to be a continuous hurdle. Lack of compliance under Article 3 of the Draft Framework Agreement could compromise the whole Agreement, as notified needs under the Agreement are the only enforceable and implementable needs that a Developing Country and LDC can benefit from S&DT under the proposed structure.

The negative effects of the notification process are that it would impose additional burdens on Governments, Customs Authorities, and other institutions in the respective SADC Countries. This Additional reporting would mean an additional shift of time and resources to perform reporting functions. It was well summated in a World Bank paper that the "bureaucratic burden imposed on all regional trade flows ties up regulatory and customs resources, limiting their attention on achieving the most pressing public policy objectives such as effective border management".[982]

Notwithstanding the above, the importance of the notification process under the S&DT Framework outweighs the burden of undergoing the notification process, particularly in the context of SADC EU-EPA Members. Firstly, Developing Members are able to undertake the critical process of identifying the "financial and trade needs" (as set out in Annex 1 of this

[980] *TFA* (n 24 above) Article 16(1)(c). Developing Members were to notify Category B definitive dates by the 22 August 2017 and LDC's by 22 August 2022.
[981] *TFA* website, *TFA* database https://www.tfadatabase.org/members/lesotho (accessed 28 November 2019).
[982] World Bank *Harnessing Regional Integration for Trade and Growth in Southern Africa* (2011) World Bank Paper, Prem Africa Region 58.

Framework Agreement) at a domestic level, which is a form of developing domestic trade policy. Members are able to seek concessions and preferential treatment in areas aligned with existing policies and where no policies exist, as rationalised in the development of the Framework Agreement under Chapter 4. The identification of needs through reporting under the Framework Agreement, allows Members to establish specific measures, industries, and the economic objectives a Member requires deliberate and particular action on. Trade Policy is an area that SADC EPA Countries has been slow to develop and consequently, is irregularly updated, as is apparent from an examination of the Members respective policies. Lesotho sought to develop its National Trade Policy for the first time in 2017.[983] Botswana had developed a National Trade Policy in 2010 for the first time and was assisted by UNCTAD through technical assistance to develop a zero draft of their Trade Policy Framework 2016-2020, which had considerable additional improvements from the previous draft.[984] The notification process under Article 3 of the Framework Agreement would, therefore, facilitate a critical function of ensuring regular updating of trade policy in order to enable securing preferential treatment in line with domestic interests, particularly where Members have no policy at all or have redundant policies which are no longer relevant due to lapse of time.

Secondly, Article 3 of the Framework Agreement allows SADC EPA Members to set out needs in line with their interests and impose/apply S&DT measures using a clear and simplified implementation framework. The "financial and trade needs" that would be applied are contained in Annex 1 of this Framework Agreement and adequately cover SADC EPA Members' trade objectives as identified in chapter 5. One of the primary SADC EPA Members' objectives identified was that of trade liberalisation amongst SADC Members and the establishment of a FTA.[985] Paragraphs 1 and 2 of Annex 1 of the Framework Agreement recognises needs which support trade liberalisation efforts. The SADC FTA, specifically, prescribes the needs related to technical and financial support in order to implement WTO

[983] See request for development of National Trade Policy on Government of Lesotho's website: https://www.gov.ls/documents/national-trade-policy/ (accessed 1 December 2019).
[984] UNCTAD website, Botswana's Trade Policy Framework 2016: https://unctad.org/en/PublicationsLibrary/ditctncd2016d1_en.pdf (accessed 2 December 2019).
[985] *SADC-EU EPA* (n 927 above) Article 20.

Agreements (including for GATT 1994 regarding reduction of tariffs).[986] Paragraph 6 of Annex 1 of the Framework Agreement provides for assistance to negotiate under the GATT 1994. The provisions of the Framework Agreement therefore may be utilised by SADC Members to advance tariff liberalisation through assistance.

Articles 3 and 9 of the Framework Agreement on Assistance provide for further notification provisions that would allow SADC EPA Members to make specific requests for technical and financial assistance, over and above that which is provided for in the EPA. Through these established rules in the Framework Agreement, a Member such as Lesotho, which notifies a need for technical assistance in trade-related adjustment strategies in preparation for tariff reduction efforts under the SADC FTA, could seek assistance under these provisions. The LDC, under the envisaged dispensation, would be required to lodge notification at the beginning of a particular year of the need under Article 3.2 of the Framework Agreement for assistance regarding liberalisation particularly adjustment in implementing the FTA. Further, request for technical or financial assistance under Article 9.4 of the Framework Agreement can be made to the CTD or directly to a particular Developed Country.

SADC EPA Members can also peruse S&DT which is relevant to other SADC trade objectives under the Framework Agreement. The SADC objective of diversification and industrialisation can be notified under the broad-based need at paragraph 5 of "*Diversification of economy*" under Annex 1. Further, SADC's interest of sustainable food security can be notified under the need for *"Food security"* at paragraph 3 of Annex 1. And lastly, attaining SPS and TBT Standards is through notification under the need "*Assistance complying with SPS and TBT requirements*" of Annex 1. The aforementioned provisions enable SADC EPA Members which seek to implement specific measures or access S&DT in areas of interest, to effectively do so if a need is notified at the beginning of the year under Article 3.2 of the Framework Agreement; and by lodging a report under Article 3.3 for the specific measure or access to preferential treatment. The modalities of Article 3 of the Framework Agreement, therefore,

[986] *SADC-EU EPA* (n 927 above) Article 1(f) and Article 13(2). The provision established that "…consistent with WTO obligations," the parties shall "broaden and deepen cooperation in all areas relevant to trade." Mutual assistance is provided in the EPA trade liberalisation under Article 13(2) on "…phasing out tariffs and customs duties in line with liberalisation commitments."

facilitate S&DT which is particular and relevant to a Developing Country, as the S&DT measure or preferential treatment will be at the instance of the said Country.

The notification process prescribed in the Framework Agreement would be significantly beneficial to SADC EPA Members post the EPA's entry into force, particularly during the implementation phase, as Members interests and needs evolve and as they seek to re-negotiate terms. Members, particularly SADC EPA Members, are able to notify preference-granting Members of changing interests and place their needs at the forefront and potentially derive meaningful preferential treatment. The notification process in the Framework, therefore, would significantly improve the SADC-EU EPA and S&DT under the WTO MTS.

6.2.2 Enforcement Rules

It was established at the beginning of this Chapter that the SADC-EU EPA contains a proviso which establishes the supremacy of WTO provisions over the EPA. The proviso states that "nothing in this Agreement requires them to act in a manner inconsistent with their WTO obligations".[987] The EPA also incorporates a provision that excludes Parties from using the EPA dispute settlement framework if the matter relates to WTO rights and obligations.[988] EPA dispute settlement and enforcement rules, therefore, cannot be used in relation to applying WTO rules, which would also include the S&DT Framework Agreement rules. The purpose of this sub-chapter is to identify rules which can be improved through a comparative examination of the provision of the two sets of rules, through divergences and similarities.

The S&DT Framework Agreement introduces an alternative dispute resolution mechanism. Dispute resolution and enforcement of rights are pivotal to the WTO. However, Developing

[987] *SADC-EU EPA* (as above) Article 112.
[988] *SADC-EU EPA* (as above) Article 95(1). The provision prevents Parties from arbitration regarding "disputes on a Party's rights and obligations under the WTO Agreement".

Countries, particularly from sub-Saharan Africa, have hardly participated in the DSB.[989] SADC members party to the EPA have not partaken or engaged in the DSU effectively.[990] Some members such as Botswana, Lesotho and Mozambique haven't participated at all. No Member to-date has instituted proceedings under the DSU as Complainant. South-Africa is the only SADC Member which has been a respondent to a dispute settlement case, with five cases[991] all relating to anti-dumping duties and measures, and 21 cases as a third-party.

Lack of participation in the DSB does not necessarily negate the interest of SADC Members in pursuing relief under WTO dispute settlements, as is evident from the number of third-party participation in dispute settlement, specifically from South-Africa. Namibia, Eswatini and South-Africa have been third parties to the DSB a total of twenty-five (25) times, with South-Africa notifying its interest as third-party twenty-one (21) times Eswatini three times and Namibia once. For a WTO member-state to participate as a third-party to a matter, it has to have "substantial interest"[992] in a matter before a panel and notify the DSB as provided under Article 10.2 of the DSU. Eswatini's participation in the DSU has been in relation to its critical market, specifically sugar.[993] Namibia's participation has been in its emerging seal market,[994] primarily consisting of seal skin and oil.[995] South-Africa's participation has been on a wide-range of issues which reflect its diversified economy,

[989] Alavi A African Countries and the WTO's Dispute Settlement Mechanism *Development Policy Review* 2007 25 (1) 39.
[990] Alavi (as above) 39. Four factors were forwarded for lack of participation; (1) lack of know how on bargaining and negotiation, (2)WTO's rules have not been drafted with African countries in mind, (3) low or inappropriate quality of the input they get from NGOs, the few demands and proposals that the group tables tend to be both unrealistic and intermittently pursued (4) marginality relates to a lack of internal coherence and a related incapacity to co-operate with other countries.
[991] WTO website, Member information, South-Africa: https://www.wto.org/englishWTO/theWTO_e/countries_e/south_africa_e.htm (accessed 26 November 2019) (WTO *Member Information, South-Africa*).
[992] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* adopted 12 January 2000 (Panel Report) WT/DS98/R (*Korea – Dairy*). The panel found that Article 10.2 of the DSU could not be interpreted to suggest that third parties need to have an "economic interest" and, in fact, that "Members were expected to be largely self-regulating in deciding whether any DSU procedure would be 'fruitful'. Also see also the discussion by the Appellate Body in *EC – Bananas III* (n 474 above).
[993] WTO website, WTO Member Information on Eswatini: https://www.WTO.org/english/theWTO_e/countries_e/Swaziland_e.htm (accessed 26 November 2019). Also see EC European Communities — Export Subsidies on Sugar 19 May 2005 (Appellate Body Report) (WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R.
[994] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* adopted 16 June 2014 (Appellate Body Report) WT/DS400/R, WT/DS401/R.
[995] Namibia exported over 400,000 seal skins between 2005 and 2015, see National Geographic Website: https://www.nationalgeographic.com/news/2016/09/wildlife-watch-cape-fur-seal-trade-Namibia/ (accessed 26 November 2019).

particularly on aluminium products, wine, corn, and export subsidies for agricultural products.[996] The crisis with the Appellate Body discussed under Chapter 4 may, however, reduce the interest of SADC Members in the dispute settlement system. This is due to lack of reliability in the system in settling disputes, weak DSU rules, and ease in which a Member can unilaterally cripple the system through blocking appointments of sitting members of the Appellate Body.

The Framework Agreement, for the first time in MTS dispensation, establishes a clear mechanism and specific remedial action where there is breach of S&DT obligations. The framework Agreement effectively allows SADC EPA Members to pursue enforcement of their S&DT rights under the said Framework Agreement through an initial request for consultation with a Member which it believes violates any S&DT provision. Specific circumstances which may trigger a request for consultation are clearly spelt out and directly relate to S&DT under Article 4.1 and 4.2 of the Framework Agreement. The first circumstance is where a Member refuses or fails to accord a Developing Country with special and differential treatment under Article 4.1(a). The second circumstance is where a Member fails to consider any development, financial and trade need a Developing Country has lodged with the CTD under Article 3.2. The obligation to "consider" S&DT under the interpretation clause is clarified in the Framework Agreement, which was previously ambiguous throughout WTO texts.[997] This development provides clarity with respect to an action an aggrieved Developing Country can take against another Member.

The third and fourth circumstances allow Developed Countries to enforce rights against Developing Members which firstly cause or will cause potential prejudice through the imposition of a special and differential treatment which is not notified under this Agreement or any other WTO Agreement, and secondly, which violate any special and differential

[996] WTO Member information, South-Africa (n 991 above).

[997] The obligation to "consider" under Article 2.1 under the Framework Agreement requires a Member to:

"(a) accord special regard to the special situation of a Developing country or Least-Developed Country; and

(b) undertake active measures, to accord the developing country member country or least-developed country with special and differential treatment, unless the obligated Member is unable to render such preferential treatment or is opposed to rendering the treatment, in which case the obligated Member shall file a notification of opposition with the Committee on Trade and Development under article 3.10 of this Agreement".

treatment provision under any WTO Agreement. This balance seeks to ensure fairness in application of S&DT rules and to prevent abuse of preferential treatment.

The enforcement provisions in the Framework Agreement contain provisions that the EU and other Developed Countries may have reservations acceding to, as it opens them up for possible action by Developed Countries under Article 4. The enforcement rules, however, are an essential component in operationalizing S&DT and ensuring that the preferential treatment provisions remain enforceable. To this extent, Developing Countries will have to seek political buy-in from their Counterparts, which they may justify as a provision aligned to Paragraph 44 of the Doha Declaration, where Members agreed to review S&DT to strengthen and operationalize the rules. It is important to note that the enforcement rules are similar to other provisions which call for under other WTO Agreements that establish a request for consultations, and eventually lead to dispute settlement.[998] This would mean that the new rules would not depart from the structure laid out under WTO Agreements.

The SADC-EU EPA has a Dispute Settlement Procedure at Part III, which is dedicated to any application and interpretation under the Agreement. Similar to the Framework and other WTO Agreements, the proceedings start with entering into negotiations.[999] Upon failure to produce a mutually agreed solution, parties are given an opportunity to mediate by the Chairperson of the Trade and Development Committee.[1000] Its opinion, however, is not binding. The EPA also utilises the Trade and Development Committee as a key body in facilitating consultations and disputes,[1001] which is a similar function the CTD is assigned under the Framework Agreement. The advantages of this is that the same Trade and Development Committee would have institutional memory and build jurisprudence with regards to S&DT related issues and disputes between Developed and Developing Countries. This may facilitate efficient delivery on matters and legally sound decisions. The risks,

[998] *DSU* (n 3 above) Article 4.
[999] *SADC-EU EPA* (n 927 above) Article 77.
[1000] *SADC-EU EPA* (as above) Article 78.
[1001] *SADC-EU EPA* (as above) Article 10(2) regarding consultations and Article 34(7)(b).

however, would be the over-burdening of the Trade and Development Committee with functions.

The last circumstance is that upon failure to mediate, a party may request for establishment of an arbitration panel under Article 79. The request is made in writing to the Party complained against and to the CTD. The panel is comprised of three Arbitrators; one Arbitrator appointed by each Party and the third Arbitrator appointed by the two appointed Arbitrators.[1002] If there are objections to selections of Arbitrators or if appointment is not made in twenty days, the Chairperson of the CTD may be requested to appoint Arbitrators from a list maintained by the said CTD under Article 94.[1003]

Overall, the Framework Agreement does not provide for any considerable new rules which would improve those contained in the EPA on enforcement. The only particular divergence in the rules on dispute resolution is that the S&DT Framework Agreement allows a party to appeal decisions under the mechanism to the DSB. The EPA does not provide for appeals of Arbitration decisions or rules detaining modalities related thereto. The justification is not to isolate S&DT rules from the rest of the WTO structure and not to exclude and usurp jurisdiction through the enforcement mechanism under Article 4 of the Framework Agreement. This would not be applicable to the EPA due to the lack of jurisdiction and due to Article 95 of the EPA examined above, which prevents the EPA parties from dispute settlement regarding WTO rules. The S&DT Framework, however, does provide SADC Members with a much-needed new forum and rules on enforcement on S&DT regarding WTO S&DT disputes. This is important following the lack of participation and unsuccessful use of the DSB.

6.3 Specific Rules on Special and Differential Treatment

6.3.1 Market Access

[1002] *SADC-EU EPA* (as above) Article 80.
[1003] *SADC-EU EPA* (as above) para 2 of Article 80.

The S&DT Framework Agreement sought to attain the 2001 Doha Ministerial Declaration objective of integration of Developing Countries into the MTS through meaningful market access. This is facilitated by entrenching critical market related provisions in the Agreement which require Members to provide DFQF market access in areas of interest[1004] and binding Developing Members to accord market access in areas where Developing Countries can make necessary trade gains.

The primary question regarding market access is whether the Framework's application to the EPA would result in increased market access for SADC Developing Countries. The novel aspect introduced by the Framework is the obligation to reduce or remove tariffs and NTBs which are specific to the trade or financial interests Developing Countries have and is facilitated through the notification process under Article 3.2, which Article 5.2 cross references. Further, the Framework Agreement provides for rules regarding implementation and enforcement at Article 5.6, where a Developing Country may trigger consultation and request a determination by the CTD where; (a) it is of the view that a Developed Country has failed to consider its lodged needs or (b) a Developed Country has failed to reduce or eliminate tariffs of interest.

The above-mentioned provision is useful in the context of the SADC-EU EPA. Market access is a critical feature of the EPA. It was established in chapter 5 that the primary objective behind Developing Countries entering into a North-South Trade Agreement is to secure market access.[1005] The EPA is no exception to this rule as countries such as Botswana, South Africa and Namibia rely on the EU for the export of minerals and agricultural products.[1006] The EPAs take the form of asymmetric liberalisation, with most SADC EPA Members, specifically Botswana, Lesotho, Mozambique, Namibia, and Eswatini, granted 100% free access to the EU market, with 98.7% free access to imports coming from South Africa. SACU

[1004] Paragraph 45 of the Doha Work Programme (n 369 above) incorporated into the S&DT Framework Agreement.
[1005] Behar (n 8 above) 4.
[1006] WTO website, International Trade Statistics 2011: http://www.WTO.org/english/res_e/statis_e/its2011_e/its2011_e.pdf.

Members, in turn, removed 86% of duties on imports from the EU, yet are able to keep tariffs on products sensitive to international competition.[1007]

The Framework Agreement enables SADC to not only enter into negotiations to remove tariffs but also NTBs as provided at Article 5.1(d). NTBs, in this context, which are of particular concern to most Developing Countries and SADC Members, are TBTs, SPS measures and RoO. The Framework Agreement obligates a preference granting Member (EU) to consider SADC Members' interests as notified under Article 3.2 regarding NTBs. The SADC EPA Members would be able to initiate the dispute resolution mechanism through requesting for consultations under Article 5.6 of the Framework Agreement for instances where an EU Member fails to reduce or eliminate tariffs and non-tariff barriers, particularly on products of export interest to Developing Countries and Least-Developed Countries.

SPS measures greatly affect SADC Members' market access opportunities, particularly regarding agricultural exports of interest.[1008] Chapter 5 highlighted the need to adapt to SPS standards in export markets by SADC Members for increased access to markets. Adapting to SPS international standards is not the only challenge as it was further identified that markets of interest have higher SPS standards than internationally accepted standards, for example, EU requirements are higher than those of the Organisation for Animal Health. This issue was examined in detail under chapter 4 when examining SPS Measures. The Framework Agreement attempts to address this challenge through specific S&DT rules at Article 10. The EPA contains detailed provisions on SPS, particularly regarding transparency[1009] and cooperation to assist SADC Members in complying with International Standards.

[1007] EU website, EPA Fact Sheet, Brussels, 10 October 2016: https://www.tralac.org/images/docs/10636/economic-partnership-agreement-between-the-european-union-and-the-sadc-epa-group-fact-sheet-10-october-2016.pdf (accessed 12 December 2019).
[1008] SADC website https://www.sadc.int/news-events/news/addressing-sps-issues-sadc-region/ (accessed 16 November 2020).
[1009] *SADC-EU EPA* (n 927 above). Article 64 provides at paragraph 3 that the importing Party shall inform the exporting Party of any changes in its sanitary and phytosanitary import requirements that may affect trade "falling under the scope of this Chapter".

In summation, the Framework Agreement is not particularly useful in increasing market access regarding EPAs as the SADC-EU EPA already accords SADC Members high DFQF market access as detailed above. The ability to negotiate specific products of interest has enabled SADC EPA Members to have meaningful market access. South Africa improved market access for 32 agricultural products and access to the EU wine market which includes 110 million litres duty free.[1010] It also included new market access for South-African fisheries products and improved access for exports of flowers, some dairy, fruit and fruit products.[1011] The application of the Framework Agreement, particularly Article 5 on market access, would facilitate increased tariff cuts and access for goods from SADC EPA Members or a Developing Country where no PTA exits with a Developed Country or where tariffs remain high.

The Framework Agreement is, however, particularly beneficial for SADC Members with regards to reduction of NTBs from EU Members. The new provisions provide clear rules on how Members with specific interests can engage with their EU counterparts regarding eliminating or removing NTBs under Article 5.1 (e) or assisting in technical/financial capacity to overcome these challenges under Article 9. The rules further enable Developing Countries to enter into consultations with the EU regarding NTBs which are of specific interest to them and enforce their rights under the notification and enforcement mechanism under Articles 3 and 4 of the Framework Agreement. These novel rules at Article 5 of the Framework, to this extent, are considerably more precise S&DT than that which is accorded under the current dispensation, which facilitates increased market access of SADC-EPA Member goods.

6.3.2 Protective Measures

[1010] *SADC-EU EPA* (as above) Annex 1, Part 1, Section B. Customs Duties of the EU on Products Originating in the SADC EPA States.

[1011] TRALAC website. See Update on South Africa's Trade Agreements, Presentation to the Parliamentary Portfolio Committee on Trade and Industry 27 February 2019: https://www.tralac.org/documents/news/2676-update-on-south-africas-trade-agreements-dti-presentation-to-portfolio-committee-on-trade-and-industry-27-february-2019/file.html (accessed 16 December 2019).

The Framework Agreement detailed rules on an extensive range of protective measures, namely domestic support (subsidies), public stockholding for food security purposes, anti-dumping measures and the Special Support Mechanism. The Framework Agreement incorporates/codifies most WTO declarations and decisions, which were not incorporated into WTO Agreements, particularly the SCM and streamlined notification and measures with Article 3 and 4 of the Framework Agreement on notification and enforcement under the Act. The particular section below will examine two primary protective measures which have been introduced or expanded on from the current WTO Agreements and from the SADC-EU EPA. These are provisions on SSM and subsidies.

6.3.2.1 SSM

A notable feature of the S&DT Framework Agreement is that it provides for rules related to SSMs for LDCs and Developing Countries, as elucidated in the previous chapter. This enables Countries which seek to employ tariff barriers to protect sensitive agricultural sectors which have been notified under 3.2 of the Framework Agreement from import surges and price falls. Like most of the specific provisions in the Framework Agreement, SSM is linked to the notification and reporting procedure is aligned with rules under Article 3, which means sensitive sectors should be notified on a yearly basis. Implementation follows a report at Article 3.2 of the Framework Agreement where a Member may apply SSM.

The inclusion of the provisions on SSM in the Framework Agreement redresses SADC's challenge regarding one of the identified trade objectives of sustainable food security. The envisaged SSM provision would allow SADC states to have sufficient policy space to address a number of issues, such as droughts threatening food security or natural disasters or the effects of import surges and downward price swings in the increasingly volatile agricultural markets. The Mechanism under the S&DT Framework would be available only to Developing Countries, which would have the right to impose and maintain tariffs on any Member upon notified goods of interest where there is evidence of decline in domestic price or an imminent foreseeable decline. Such action may be opposed through Article 6.10 by the Exporting Member.

Countries such as Botswana would require SSM to combat import surges in markets where small-scale farmers and Government seek to deliberately place policies on the development of domestic industry, such as the white maize market.[1012] Botswana depends heavily on food imports, white maize is no exception and is a staple food of Botswana. It was reported by Botswana Agricultural Board that white maize demand exceeds 100,000 mt per year as compared to the local production which on average is lower than 10,000 mt per year.[1013] Article 6.8 of the Framework Agreement enables a Country like Botswana to impose tariffs in such a sensitive sector where a Developed Country or any other regional partner (including a SADC Member) causes import surges. This SSM provision, therefore, allows enhanced protection than protection under the SADC-EU EPA, particularly pertaining to agricultural goods.

It is notable that the SADC-EU EPA provides for SADC Members (with the exception of South Africa) to introduce, after consultation with the EU, temporary customs duties or taxes imposed on or in connection with the exportation of goods on a limited number of additional products in exceptional circumstances. This can be done where justified for specific revenue needs or where necessary for the protection of infant industries or the environment or where essential for the prevention or relief of critical general or local shortages of foodstuffs or other products essential to ensure food security, as provided for under Article 26(2) of the EPA. This provision has elements of SSM, particularly regarding the issue of food security. The provision, however, is general and not restricted to agricultural goods and further does not detail modalities of how this is to be imposed, unlike Article 6 of the Framework Agreement. Further, Article 26(1) of the EPA is vague as it references "exceptional circumstances" as the only instance where duties may be imposed, which is not only unclear but also limits the instances where a Member would ordinarily be entitled to SSM. Import surges or price drops in agricultural products can happen frequently, which would mean the instance would not be "exceptional." Article 6 on SSM under the Framework Agreement provides much more specific detailed rules, which grant enforceable

[1012] Botswana Agricultural Marketing Board website: https://www.bamb.co.bw/grains (accessed 11 December 2019).
[1013] Botswana Agricultural Marketing Board (as above).

access to redress agricultural and food security challenges by SADC-EPA States. These rules may be utilised simultaneously with the EPA rules.

6.3.2.2 Subsidies

The Framework Agreement incorporates S&DT provisions contained throughout multiple WTO Agreements, Decisions and Declarations relating to subsidies under Article 6. There are two primary provisions on subsidies under Article 6 of the Framework Agreement; rules prohibiting the use of subsidies by Members (Article 6.3) and secondly, rights accorded to certain Developing Members which exempt them from the prohibition of applying subsidies.

Article 6.2 provides for obligations and restrictions on imposition of subsidies on all Members, particularly Developing Countries which do not currently have exemptions from certain subsidies. By incorporating this into the Draft Agreement, it is envisaged that Members, including those which are party to the SADC-EU EPA, would be able to utilise the enforcement mechanism at Article 4 where Developed Countries have applied export subsidies to products.

Enforcement provisions relating to subsidies under the Framework would be beneficial to SADC Members, particularly in the context of European and US exports of poultry products to the South African market. Application of enforcement provisions could be utilised in the instance of South Africa, regarding export subsidies. South Africa asserted that US exports of agricultural subsidies of output were at 10% and the EU 18% as quoted from an OECD report.[1014] In a Statement on Poultry by the EU Delegation to South Africa, this claim was refuted, with the EU asserting that the all export subsidies in the poultry sector had been eliminated since 2003.[1015] And further, that all agricultural export subsidies are banned in terms of all EPAs. Despite the difficulty, if South-Africa were to, hypothetically, be in

[1014] Department of Trade and Industry South Africa website. Summary of challenges facing the South African Poultry Sector, as stated by the Department of Trade and Industry: https://www.thedti.gov.za/parliament/2017/SA_Poultry_Sector.pdf (accessed 2 December 2019).
[1015] EU website, Statement on Poultry by the EU Delegation to South Africa: https://eeas.europa.eu/sites/eeas/files/201700801_statement_on_poultry.pdf (accessed 2 December 2019).

possession of evidence of export subsidies, she would be able to apply duties or measures utilising the implementation mechanism under Article 3 under a simplified process.

Secondly, it is apparent from perusal of the Framework Agreement that the SADC-EPA and WTO rules are more restrictive on Developing Countries than the Framework Agreement, which incorporates decisions and declarations adopted by Members. The EPA provides that: "The use of export subsidies on agricultural goods in the trade between the Parties shall not be allowed from the date of entry into force of this Agreement".[1016] The Framework Agreement allows more liberal rules for use of subsidies regarding goods which include marketing exports of agricultural goods, specifically handling, upgrading and other processing costs, and the costs of international transport and freight.[1017] These exemptions are provided under Articles 6.2 and 6.4 of the Framework Agreement which prescribe for exceptions as agreed in The Marrakesh Ministerial Decision[1018] and the Bali Ministerial Decision on General Services.[1019] The SADC EPA, however, limits Members by prescribing the total elimination of export subsidies for SADC EU-EPA Developing Members and LDCs alike. The Framework Agreement, therefore, would facilitate increased market access in entitling SADC-EPA Members to Subsidies, particularly in respect of items of interest to exporting Member.

The above provisions indicate that the S&DT Framework would allow increased protection and market access for SADC EPA Members. The Framework Agreement would bind EU Members to extend preferences and S&DT accorded to Developing Countries contained in the said Framework and remove restrictive provisions as they would not be in conformity with the WTO Agreement. This, thereby, would preserve SADC EPA Members' trade and developmental rights regarding use of subsidies.

[1016] *SADC-EU EPA* (n 927 above) Article 68.2.
[1017] WTO *Nairobi Decision on Export Competition* (n 418 above); Developing Countries are exempt until 2023 from Export subsidy commitments under Article 9.4 of the Agreement on Agriculture (n 25 above) paragraph 7 and 8.
[1018] World Trade Organization *The Marrakesh Ministerial Decision On Measures Concerning The Possible Negative Effects Of The Reform Programme on Least-Developed and Net Food-Importing Developing Countries* (1994) G/AG/5/Rev.10.
[1019] WTO *Bali Decision – General Services* (n 739 above).

6.3.2.3 Flexibility of Commitments

The provisions on flexibility of commitments under Article 7 of the Framework Agreement establish a number of important principles that are central to S&DT. The first significant requirement is that rules are to be *inter alia* specific and detailed and the second is that S&DT should include simplified modalities. Finally, one of the most important provisions in flexibilities, is that S&DT must be linked to a Developing Country's capacity to implement a particular WTO provision and a WTO Agreement.

An assessment of the EPA and the negotiations behind the said EPA reflect an Agreement that largely subscribes to the rules on flexibility of commitments in the Framework Agreement, particularly the rule to provide specific and detailed S&DT. The EPA contains six annexes which address Customs Duties,[1020] Agricultural Safeguards[1021] (which are a priority area in the form of sustainable food security for SADC EPA Members), and SPS priority products and sectors[1022] (which is also a trade objective of SADC EPA Members). There are also four (4) protocols which include *inter alia* a protocol which addresses Mutual Administrative Assistance in Customs Matters. The afore-mentioned protocol also provides for specific rules which detail rights and obligations regarding *inter-alia* Mutual Administrative Assistance in Customs Matters, with provisions which prescribe provisions on assistance on request (Article 3(1)) and information sharing (Article 10).

Flexibilities relevant to SADC Members have been incorporated throughout the EPA. Safeguards SADC EPA Members pushed for, to galvanise trade objectives such as diversification and industrialisation, were factors in areas such as the infant industries provision under the EPA which enables Mozambique and BELN Members to levy temporary customs duties and let their industries grow longer in isolation from market forces.[1023] Another Article which is primarily predicated on infant industry protection is Article 38(1),

[1020] *SADC-EU EPA* (n 927 above) Annex I to III.
[1021] *SADC-EU EPA* (as above) Annex IV.
[1022] *SADC-EU EPA* (as above) Annex VI.
[1023] *SADC-EU EPA* (as above) Article 26(2).

which protects the above-mentioned Members infant industries through levying customs duties on directly competitive products.

The Framework Agreement includes an S&DT provision that the EPA does not recognise or incorporate. The Framework Agreement includes a provision which mandates that obligations [of a Developing Country] are *"linked to a Developing Country's capacity to implement a particular WTO provision and a WTO Agreement"* as provided under 7 (1)(b). The equivalent to this provision in the EPA Agreement would be a provision that enables SADC EPA Member-States to notify their counterparts of the inability to carry out any commitment under the EPA and eventually not to be bound by the obligation. The EPA, however, contains no such provisions. The EPA contains flexibilities and S&DT regarding obligations on SADC EPA Members, particularly liberalisation of tariffs, cooperation on customs and trade facilitation,[1024] sustainable development,[1025] and intellectual property rights.[1026] The level of flexibility, however, is not tied to capacity of a Member in carrying out its commitments, as would be provided for in the Framework Agreement.

For the most part, the Framework Agreement and the EPA have many similarities regarding S&DT and flexibilities. The examination of the two agreements are indicative of an agreement that is "specific to the needs of Developing Countries" as prescribed at Article 7.1(d) of the Framework Agreement. The S&DT provisions are also specific and detailed, with modalities detailing how SADC EPA Members are to access or implement S&DT and S&DT measures. The only area where the agreement diverges is on the issue of linking flexibilities in the EPA to SADC EPA Members' ability to implement the particular provisions or WTO provisions. The inclusion of such a clause would ensure S&DT flexibilities in the EPA would be directly related to a SADC Member's capacity to carry out obligations. This would improve the EPA as an Agreement that integrates "the special needs and interests of the

[1024] *SADC-EU EPA* (as above). Article 41 of the one of the primary objectives it to ensure "legislation and procedures, as well as the administrative capacity of the customs authorities, fulfil the objectives of effective control and the promotion of trade facilitation".
[1025] *SADC-EU EPA* (as above) Article 11. The Article states that there is recognition of Members "working together on trade related aspects of environmental and labour policies [...]".
[1026] *SADC-EU EPA* (as above) Article 16.

SADC EPA States and the need to address their diverse levels of economic development, geographic and socio-economic concerns" as envisioned in the preamble of the EPA.

6.3.3 Technical and Financial Assistance

The Framework Agreement establishes critical S&DT rules on technical and financial assistance, particularly regarding modalities regarding request for assistance and WTO Members' obligations and rights relating to the same.

The SADC-EU EPA provides for technical and financial assistance through its text. The Agreement centralises "Development Cooperation" as the primary mode for delivering technical and financial assistance to SADC EPA Members, with Article 12 of the EPA establishing that such cooperation may take both financial and non-financial forms. The focus of the Cooperation is "to implement this Agreement and to support the SADC EPA States' trade and development strategies within the overall SADC regional integration process".[1027] Capacity building and technical assistance are prescribed for SADC EPA Members in priority areas which include key areas of interest to SADC Members such as support for the participation of the SADC EPA States in international standardisation and the development of TBT enquiry and notification points within the SADC EPA States.[1028] Article 67 provides building of technical capacity in the public and private sectors of the SADC EPA States to enable sanitary and phytosanitary control and building capacity to maintain and expand their market access opportunities.

There were four primary principles the Framework Agreement prescribes for assistance on under Article 9; they were that S&DT rules on technical or financial assistance shall: *(a) be specific and detailed; (b) include simplified modalities for application; (c) shall be specific to the needs of Developing Countries;* and *(d) be linked to a Developing Country's capacity to implement a particular WTO provision and a WTO Agreement.*[1029] Modalities for the request

[1027] *SADC-EU EPA* (as above) Article 12(1).
[1028] *SADC-EU EPA* (as above) Article 58 (2).
[1029] S&DT Legal Framework Agreement, Article 9.3.

and application of assistance are then detailed in the rest of Article 9 of the said Framework Agreement.

The EPA successfully subscribes to these principles under Article 9(a) and (c) of the S&DT Framework Agreement. The rules on Development Cooperation regarding technical and financial assistance are specific and detailed, outlining priority areas which SADC EPA Members may be assisted with in terms of various trade related assistance.[1030] The assistance is also specific to the needs of Developing Countries under the SADC-EU EPA, which were indicated and raised during negotiations, unlike the process of notification of needs and interest under Article 3.2 of the S&DT Framework Agreement. They were consequently incorporated into the SADC-EU EPA.

The first principle of the Framework Agreement, which the SADC-EU EPA does not subscribe to is that of providing for simplified modalities for access and application of assistance. The EPA provides for vague rules regarding access to assistance by Members, which have considerable shortcomings, particularly on technical assistance. The EPA details that financial assistance

> "shall be carried out within the framework of the rules and relevant procedures provided for by the Cotonou Agreement […] in particular the programming procedures of the European Development Fund".[1031]

The modalities of how assistance is requested, which parties' assistance is requested from and the purposes it is used for as well as transparency-related issues are not expressly stated or expounded on in the text of the EPA. The Framework Agreement however provided for such modalities under Articles 9.4 to 9.6. The SADC-EU EPA rather redirects the Parties to the European Development Fund (EDF) rules.[1032] The EDF has a Trade Related Facility (TRF) for SADC to strengthen implementation of existing regional trade agreements at the national level, that is, as financial support to launch projects that support regional

[1030] S&DT Legal Framework Agreement, Article 12.
[1031] *SADC-EU EPA* (n 927 above) Article 12(3).
[1032] *SADC-EU EPA* (as above) Article 12(3).

integration, trade and economic development.[1033] The SADC TRF is not specifically designated for SADC-EU EPA as it caters for all national level projects to be aligned to either the SADC Trade Protocol and/or the SADC-EU EPA.

The EU contracted amount to support regional integration, trade and economic development for the period of September 2014 to August 2019 was €31, 600,000.00, which is implemented by the SADC Secretariat.[1034] A Facility Support Unit launches a request for applications twice a year to SADC Members for funding, and they may respond to the request for funding by submitting well elaborated Country Implementation Plans, however where these do not exist, the proposals can be aligned to the general trade strategy of the SADC Member.[1035] Further, details and requirements are set out by the Facility Support Unit which SADC Members have to subscribe to in applying for funding.[1036] The above-mentioned EPA financial assistance rules, therefore, subscribe to modalities the S&DT Framework Agreement provides regarding assistance to a large extent. The elements the principle excludes, however, are the right to directly request assistance from:

> "94 *(b) a preference granting Developed Country, which a Developing Country or LDC has particular trade related interest Article 3.2,* or
> *(c) a Developing Member with a GDP difference from the requesting Member as established by the Committee on Trade and Development, which a Developing Country or LDC has particular trade related interest in […]"*

The EPA enables Members to request for assistance from the EDF, which is comprised of contributions from EU Members. The EPA, however, does not contain any provision permitting SADC-EU Members to directly request any form of assistance from a specific EU trade partner, particularly one that a SADC Member has a trading relationship with. A provision to this effect would be potentially beneficial for SADC-EPA Members. Countries

[1033] EU Website: https://ec.europa.eu/europeaid/projects/trade-related-facility-trf-southern-africa-development-community-sadc_en (accessed 18 November 2019).
[1034] EU Website https://eeas.europa.eu/delegations/botswana/46875/trade-related-facility-trf-southern-africa-development-community-sadc_de (accessed on 16 November 2020).
[1035] EU Website, Action Fiche for SADC Trade Related Facility: https://ec.europa.eu/europeaid/sites/devco/files/aap-sadc-action-fiche-20131203_en.PDF (accessed 18 December 2019).
[1036] SADC website https://www.sadc.int/news-events/news/trade-related-facility-trf/ (accessed 16 November 2020).

such as Eswatini, which has Italy as its third largest export market for Agri-food (particularly regarding its sugar industry in 2017),[1037] could request for direct technical or financial assistance with respect to adjusting to the sharp changes in the EU domestic sugar policy which have resulted in low sugar prices and returns from this market.

The only specific requests that are established under the EPA and that can be made are those relating to Administrative cooperation, which is primarily mutual on areas such as Customs administration on verification of proof of origin[1038] or verification of declarations.[1039]

Lastly, it is important to note that technical assistance under the SADC-EU EPA considerably diverges from the rules under the envisaged Framework Agreement. Unlike financial assistance, minimal detail is prescribed regarding technical assistance under the EPA. Article 58 of the EPA, which is dedicated to Capacity building and technical assistance, merely established the areas of assistance that that the Parties agree would be the focus of assistance, particularly to SADC EPA Members. The EPA, however, fails to establish modalities for request for assistance or administration of assistance; the rules are not specific and detailed. Further, similar to financial assistance rules, there are no provision allowing for direct request for assistance from a particular EU Member. Access to technical assistance is, however, a vital tool for improving supply-side constraints and adjusting to SPS standards where SADC Members have interest in EU markets (such as Botswana with the Beef market to the U.K).

It can be summated that the Framework to a considerably large extent, codifies detailed rules which are not factored into the SADC-EU EPA. And that financial assistance rules in the EPA are to a large extent progressive and in line with the Framework Agreement. However, technical assistance rules require significant expansion. The Rules on assistance in the envisaged Framework Agreement would go a considerably long way in improving and

[1037] Trading Economics website, Eswatini Exports by Country: https://tradingeconomics.com/Swaziland/exports-by-country (accessed 12 December 2019).
[1038] *SADC-EU EPA* (n 927 above) Article 38(2), Protocol 1.
[1039] *SADC-EU EPA* (as above) Article 39(2), Protocol 1.

increasing S&DT opportunities, particularly regarding access to assistance by SADC EPA Members. They would expand the scope and application of assistance in both WTO Agreements and PTAs, such as the SADC-EU EPA, enabling Developing Countries, particularly LDCs who are in need of the assistance access, to improving capacity and trade related challenges.

6.3.4 Sanitary and Phytosanitary Measures and Technical Barriers to Trade

S&DT provisions on SPS and TBT under the WTO system were identified as key areas of importance in ensuring growth in trade of Developing Countries. The S&DT Framework Agreement, therefore, consequently incorporated an Article on SPS Measures and TBT to address or improve S&DT which is insufficient under the current dispensation. SPS Measures are also raised in the context of Market Access and not only as stand-alone provisions, as challenges and insufficient S&DT in this area result in reduced export and market access opportunities.

SPS measures greatly affect SADC Members' market access opportunities, particularly regarding agricultural exports of interest. Chapter 5 highlighted the need to adapt to SPS standards of export markets by SADC Members for increased access to markets. One of SADC's trade-related objectives includes strengthening compliance with SPS measures and TBT Standards. From an examination of the EPA, this SADC Objective filtered into the SADC-EU EPA.

Chapter 5 examined whether the SADC objective of strengthening compliance with SPS measures and TBT standards were incorporated into the SADC-EU EPA. It was concluded that the EPA capacitates SADC-EPA States to better comply with international requirements and further creates structures and provisions for the facilitation of the objectives. The SADC-EU EPA establishes cooperation on SPS standards and TBTs as a cooperation priority under the SADC-EU EPA under Article 13(2). There are multiple S&DT provisions incorporated in

the EPA to this effect, which will be compared with the provisions in the S&DT Framework Agreement.

The S&DT Framework establishes two primary rules regarding SPS measures and TBT standards under Article 10. The first rule (Article 10.1) establishes for the notification of SPS and TBT Standard related needs and interests through the notification mechanism under Article 3.2. It further creates peremptory rules which mandate Developed Countries to consider the needs of the Developing Countries which have notified specific SPS and TBT related needs. The obligation to 'consider' under the Framework Agreement is a considerably higher obligation than under the current dispensation, as it requires a Developing Country to accord special regard to the special situation and undertake active measures to accord the Developing Country with special and differential treatment. The only exemption is if the preference-granting member demonstrates that it is unable to or opposes rendering such treatment through filing a notice of opposition.

The rule further mandates the Developed Country to provide a greater improvement of opportunities and terms of access through providing technical and financial assistance in respect of the notified need. The application of this rule would allow for a SADC Member to make a direct request from a particular [EU] Member under the previously examined assistance rules in the Framework Agreement.

The Second rule at Article 10.2 of the Framework Agreement establishes an important rule, which prevents a Developed Country from introducing a new SPS requirement and TBT requirement before considering Developing Countries' needs or according assistance with respect to the notified SPS or TBT need. This rule allows Developing Countries with market interest in a Developed Country the (much needed) opportunity to adjust and comply with legitimately introduced SPS measures or TBT to prevent erosion of trade preferences and market exports.

Lastly, Developed Countries are able to enforce their rights if Developing Countries introduce measures which create unnecessary obstacles to international trade as provided for by Article 2.2 of the Technical Barrier to Trade Agreement or introduce measures without considering the needs of Developing Countries or rendering assistance to notified Members.

In applying the Framework Agreement on SPS and TBT Standards to the SADC-EU EPA, it appears that there are a number of similarities and divergences. The EPA does not provide for a notification system similar to that in the Framework Agreement and consequently does not mandate the EU members to consider SADC Members SPS or TBT needs based on any information they may have provided. The EPA does provide for the promotion of "collaboration aimed at recognition of appropriate levels of protection in SPS measures"[1040] which may result in EU Members establishing relations which actively explores SPS and TBT related concerns from SADC-EPA Members. The obligation to do so, however, is not present in the EPA and, therefore, the EPA provision does not have the same effect.

The EPA also doesn't have a provision mandating for EU Members to accord assistance to SADC Members (in accordance with notified needs). There is a lesser obligation, however, to utilise assistance or 'cooperation' to strengthening SADC cooperation and regional integration on SPS measures regarding priority areas, and further, to enhance SADC EPA States' technical capacity to implement and monitor SPS measures as well as promoting greater use of international standards regarding SPS.[1041] Section 58 of the EPA prescribes for a considerable number of SPS and TBT related activities, which include *inter-alia* development of capacity,[1042] development of internal SPS and TBT harmonised regulation and standards,[1043] support for the participation of the SADC EPA States in international

[1040] *SADC-EU EPA* (as above) Article 60.
[1041] *SADC-EU EPA* (as above) Article 60.
[1042] *SADC-EU EPA* (as above) Article 58(2)(b). The Article specifically provides for "[…] (b) the development of capacities of the SADC EPA States in the fields of technical regulations, metrology, standards, accreditation and conformity assessment including through the upgrading or setting up of laboratories and other equipment".
[1043] *SADC-EU EPA* (as above) Article 58(2)(c).

standardisation,[1044] and the development of TBT enquiry and notification points within the SADC EPA States.[1045]

Importantly, it was established earlier in this chapter that compliance with SPS measures requires considerable financial resources and technical capacity. An example of the important intervention that the EPA members agreed to, is where parties agree to develop "capacities for risk analysis, harmonisation, compliance, testing, certification, residue monitoring, traceability and accreditation including through the upgrading or setting up of laboratories […] to help SADC EPA States comply with international standards".[1046] The above establishes an obligation for the EU to provide SADC Members with assistance in the said regard and, therefore, the rule to a large extent subscribes to that set out in the Framework Agreement.

With respect to Article 10.2 of the S&DT Framework Agreement, which prevents the application of new SPS measures or TBT Standards without considering notified needs or according assistance, the EPA does not have an equivalent provision. However, it does contain clauses which address imposition of new rules and transparency. The parties are to establish a mechanism for transparency under Article 63(3) and the EPA also set-up an early warning system for new EU SPS measures that may affect SADC exports under Article 64(2). The provisions work towards the same objective established under the Framework Agreement of ensuring new SPS or TBT measures do not cause loss of market access or reduction of exports of Developing Countries. The provisions are, however, fundamentally different. The Framework Agreement does prescribe peremptory provisions which impose obligations to consider particular needs and conditions of Developing Country Members and rendering SPS and TBT related assistance, in order to ensure alignment with needs of the said Members. Further, Developed Members are barred from introducing new SPS and TBT requirements without considering notified needs or requests for Assistance. The provisions are not only binding and easier to enforce but are also anticipated to allow

[1044] *SADC-EU EPA* (as above) 58(2)(d).
[1045] *SADC-EU EPA* (as above) Article 58(2)(e).
[1046] *SADC-EU EPA* (as above) Article 67(c)(vi).

meaningful S&DT and adjustments to the new requirements which may reduce or affect market-access of Developing Countries' goods, which may be reliant on a particular market.

The case of Mozambique can be used to apply the above provisions. In accordance with a national strategy on quality, the national authority has developed voluntary standards on the quality, packing, and labelling of many agricultural products. The country has reported its need of technical and financial assistance to improve its understanding of the TBT Agreement's provisions, yet it has not benefited from any form of assistance.[1047] Mozambique, under the S&DT Framework Agreement could notify its capacity related need in this regard under Article 3.2 of the Framework, particularly those relating to its agricultural products[1048] and list countries it has market interest in exporting Agricultural products to, which include Belgium, Poland, Portugal and the United Kingdom (who had some of the largest shares of Mozambique's exports in 2018).[1049]

Under the S&DT Framework Agreement, Mozambique would be able to directly request assistance in the standardisation process of its agricultural products from the above-mentioned EU Members that it has market interest in, under Article 10.1(b). Further, if there were any changes to the SPS or TBT Standards regarding agricultural labelling, the four EU Members would have to consider the specific need Mozambique has and take positive action such as delay in implementation.[1050]The EU would also have to accord assistance to prevent loss of Mozambique trade preferences in the above-regard under the same Article.

The EPA, one the other hand, would provide for capacity building and cooperation to assist Mozambique through modalities which details have not been stated. The EU Members would collectively be obligated to assist in this regard as opposed to individual members

[1047] International Trade Centre Website, Mozambique, Domestic and Foreign Market Access: http://www.intracen.org/country/mozambique/Domestic-and-Foreign-Market-Access/ (accessed 19 December 2019).
[1048] Agricultural products have traditionally been one of Mozambique's top five exports, International Trade Centre Website, Mozambique, Sectoral Diversification in Products, see International Trade Centre Website: http://www.intracen.org/country/mozambique/sector-trade-performance/ (accessed 19 December 2019).
[1049] International Trade Centre Website, Mozambique, Prospects for Market Diversification: http://www.intracen.org/layouts/CountryTemplate.aspx?pageid=47244645034&id=47244645338 (accessed 19 December 2019).
[1050] S&DT Framework Agreement, Article 10.2.

which Mozambique has a relationship with. Provisions such as Article 67 of the EPA would allow capacity development for risk analysis, harmonisation, compliance, testing and certification. The EPA however, does not provide modalities for how these needs or interest of SADC EPA Members would be recognised in order to receive assistance.

In summation, the primary difference is the obligatory requirements, which provide a positive obligation on the part of Developed Countries. The core remains identical in utilising cooperation and technical assistance to overcome SPS and TBT challenges. The peremptory nature of the Framework Agreement, however, and ability to enforce the provisions would greatly improve SADC Members and Developing Countries ability to ensure market access is preserved and improved through binding and enforceable S&DT in that area. To this extent, the EPA could significantly be improved by the introduction of the S&DT Framework Agreement to the WTO acquis.

Lastly, the Framework prescribes the obligation of assistance from both Developed Countries and emerging economies. This is a considerable strength, particularly where SADC Members may have considerable advanced emerging trade partners which are designated as 'Developing' which can accord more meaningful preferential treatment with regards to SPS measures and TBT. The Framework Agreement's scope, therefore, accommodates the current trade dynamic of strong emerging countries like Brazil, China and Singapore in playing their role in according preferential treatment, particularly where smaller Developing Countries and LDCs have challenges in market access due to SPS Standards or TBT in their respective Countries. This is a balancing factor that may be used to gain political will from Developed Countries and buy-in for the Framework Agreement. It was stated in Chapter 4 that the Framework seeks to create relevant implementable S&DT provisions, and create enforceable obligations of Developed Countries, with the counter-balance of reducing the number of eligible Members which demonstrate needs based on broad-categories applicable to Developing Countries. The Framework will enable LDCs, such as some SADC and EPA Members, to benefit from enhanced rules, and increased assistance lined directly to strategic trade industries aligned with their needs. The Framework Agreement further

prevents emerging economies from abusing S&DT by undergoing a needs test prior to utilisation of the provisions. This is anticipated to circumvent the concern of the US, as is highlighted by Davies, namely that S&DT provisions "have been 'abused' to allow 'bigger developing countries', with China foremost among them, to wiggle out of obligations and not submit to rules".[1051]

6.4 Miscellaneous - Monitoring Mechanism Rules

The Monitoring Mechanism in the S&DT Framework Agreement was developed out of a need to understand implementation challenges and deficiencies regarding S&DT, with a view to improve effectiveness, application and mindfulness for increased trade of Developing Countries. Detailed modalities were incorporated in the article, with the Mechanism operating on the basis of written inputs or submissions made by Members as well as on the basis of reports received from other WTO bodies to which submissions by Members could also be made.

The Mechanism also contains rules on the appointment of Committee Members, a section detailing the functions of the Mechanisms, which is to compile, examine and review *inter alia* submitted notifications by Developing Countries, reports filed and written inputs as provided under Article 13.3 of the Framework Agreement. The Mechanism has an output obligation of making recommendations to WTO bodies in charge of the technical substantive negotiations and to publish annual reports of S&DT. The monitoring mechanism applies to S&DT in WTO Agreements and, therefore, does not mandate any RTA such as the SADC-EU EPA to subscribe to the reporting rules. The Framework Agreement would operate as additional obligations on Members, which may be required to participate in the reporting function.

The EPA incorporates general provisions on monitoring. The provisions do not specifically prescribe the monitoring of S&DT but the application of the Agreement as a whole has not

[1051] Davies (n 631 above) 52.

established modalities for how such monitoring is to be undertaken. The general provision regarding monitoring provides that "The Parties undertake to continuously monitor the operation and impact of this Agreement through appropriate mechanisms and timing within their respective participative processes and institutions, as well as those set up under this Agreement".[1052]

Various Chapters of the EPA also establishes monitoring requirements, such as Chapter IV on Customs and Trade Facilitation. The chapter requires the Special Committee on Customs and Trade Facilitation to monitor the implementation and administration of this chapter and of Protocol I.[1053] Chapter V on TBT establishes a Trade and Development Committee on TBT measures which is to monitor and review the implementation of the chapter.[1054] Similar monitoring structures are meant to be set-up under Article 65 on SPS matters.

There are also requirements to monitor other specific trade-related matters under the EPA. This is specifically to monitor the development of economic and trade relations between the Parties, monitor and assess the impact of the cooperation provisions of this Agreement on sustainable development, and monitor and review progress on all matters covered by this Agreement at Article 101(3)(e),(g) and (g). The EPA, however, does not provide for specific review of S&DT or any particular development or preferential-treatment related provision.

There are two particular observations from the comparison of monitoring provisions in the two Agreements. Firstly, the EPA does not prescribe monitoring rules as detailed as the S&DT Framework provides. The monitoring structures do not detail the functions of how monitoring will be undertaken, frequency of reporting, and objectives. Secondly, the EPA does not make specific provision for monitoring of S&DT provisions. The Framework Agreement would serve a meaningful function of establishing monitoring standards for S&DT and development related issues in WTO Agreements and would hopefully spill-over to the RTA. By virtue of the RTAs being predicated on S&DT, it would be envisaged that they

[1052] *SADC-EU EPA* (n 927 above) Article 4.
[1053] *SADC-EU EPA* (as above) Protocol I. Concerning the Definition of the Concept of 'Originating Products' and Methods of Administrative Cooperation.
[1054] *SADC-EU EPA* (as above) Article 57(a).

would adopt similar reporting and monitoring functions to achieve effective feedback and improvement on implementation of preferential treatment. The Framework Agreement, to this end, serves as a very progressive instrument in the monitoring of S&DT. The reporting obligations under the Framework Agreement would impose additional obligations, over and above those required under the SADC-EU EPA. This would mean that SADC Members would be able to benefit from the outcomes of the Monitoring Mechanism for improved and enhanced S&DT.

6.5 Costs and Benefits of Framework Agreement for EU Members

The Framework Agreement is aligned to one of the objectives of the updated EU Aid for Trade strategy of 2017,[1055] through the notification of needs mechanism under Article 3. The objective under the strategy is "to better align EU Aid for Trade interventions with actual market-driven opportunities and constraints." [1056] The strategy further contains a new approach which speaks to this objective, which is specifically; "Enhancing AfT's catalytic role in unlocking the developmental potential of trade and investment, through a more informed and integrated delivery, with a view to increasing relevance and impact."[1057] The modalities established under Article 3 of the Framework facilitate for development of trade policies of Developing Countries, and the notifications of shortcomings and constraints. This enables Developing Countries to identify opportunities, and areas where assistance is needed for relevant and potentially market driven opportunities. It enables impactful technical and financial resources in critical areas which is a benefit to the EU, as they may not require undertaking the same process again under the other EPA Agreements.

Chapter 6 primarily focused on the application of the Framework Agreement and beneficial outcomes for Developing Countries, specifically SADC-EU EPA Members. There were a number of references to the costs that EU Members would incur from the Framework

[1055] European Commission EU Aid for Trade Progress Report 2019 Review of progress Review of progress on the implementation of the updated EU Aid for Trade Strategy of 2017.
[1056] European Commission EU Aid for Trade Progress Report 2019 (as above).
[1057] European Commission EU Aid for Trade Progress Report 2019 (as above).

Agreement, particularly obligations relating to technical and financial assistance. The chapter, however, did not identify the potential benefits the Framework Agreement would have for Developed Countries [EU EPA Members].

The potential costs and benefits for Developing Countries, which were anticipated in section 4.2.3, after application of the Framework to the EPA, are applicable to EU Members. The first cost is that EU Members would be obligated to provide increased trade preferences due to clarity of the notification system under the new Framework Agreement. It was indicated that where Developing Countries notify needs and interest, the EU would be mandated to extend trade preferences under 'non-discriminatory' rules to similarly situated or grouped SADC Members. Whilst this would result in increased S&DT for Developing Countries, it would obligate Developed Countries to S&DT, such as reduced tariffs for SADC Members, which are additional commitments under the WTO. The second cost would be the additional technical and financial commitments the Framework prescribes through implementation rules under Article 9 of the said Agreement. SADC Members would be able to make requests, over and above the assistance provided under the EPA (only to Countries which the Developing Country has a trade need or interest with) and EU Countries would be obligated to accord the assistance.

There are two potential benefits the Framework would accord to EU Members from application of the Framework. Firstly, under this Framework Agreement, EU Members would only be obligated to accord S&DT based on specific notified needs and interest of SADC Members as opposed to according preferential treatment on a wide basis. This has the potential to reduce S&DT accorded to Developing Countries under WTO negotiations and future MTS Agreements. This could potentially mean tariff cuts, however, the EU would not be obliged to accord S&DT to SADC Members across all tariff lines (as long as they are compliant to other WTO obligations) but will be made according to needs and interests. And further, technical and financial assistance would not be required in all areas relating to trade and WTO compliance but would extend only to areas relating to notified needs and interests.

Secondly, the Framework Agreement would apply graduation rules, which would be beneficial to EU Members. Emerging economies which graduate would share the cost of S&DT with EU Members. The graduation rules would also considerably reduce emerging economies' trade policy [particularly China] and their ability to negotiate favourable terms for their economies. It was established in chapter 4 of this thesis how China has significantly increased trade with Developing Countries and SADC Members over the past decades. The application of this Framework would mean shared costs (trade preferences, and technical and financial assistance) with an emerging economy which has the second-highest trade with SADC.

The Legal Framework resolves pending S&DT arguments which have lingered and remained unresolved since the Uruguay Round Agreements, specifically on differentiation, graduation, enforcement, implementation, and specific and relevant S&DT focused on Developing Countries' needs. Resolution of these issues would also be of benefit to not only Developed Countries but the entire WTO Membership. Political and economic differences between Members, clashes in trade policy, and negotiation dynamics at the WTO [single undertaking] would stand as obstacles to Membership assenting to the enactment of the Legal Framework Agreement.

6.6 Conclusion

The tested S&DT Framework Agreement, which was applied to the SADC-EU EPA in this chapter, reveals that the Framework would potentially increase meaningful S&DT rights for Developing Countries, improve access to the S&DT and facilitate easy implementation and enforcement, albeit one which also contains a number of limitations and deficiencies. The provisions in the Framework secure development trade interests for the integration of SADC-EU EPA into the MTS through binding and enforceable provisions which previously were not incorporated into WTO Agreements. This is particularly in the areas of market access (with binding obligations on Developing Countries to tariff reductions and NTBs in markets of interest and specific SPS) and market access rules. The EPA itself is a progressive

agreement with a considerable number of S&DT provisions. However, the Framework Agreement contains provisions that are far reaching, for example, in financial and technical assistance, stretching the scope of cooperation in the EPA's through binding and specific rights and obligations and modalities for carrying out assistance.

The strength of the Framework is in its notification and implementation provision, which is tied to multiple S&DT provisions where a Developing Country is able to access preferential treatment on account of demonstrating a particular need or interest. It was shown how the notification process provides much-needed dynamisms, with SADC Members accorded the opportunity to notify interests during any stage of the EPA and place their needs at the forefront and potentially derive meaningful preferential treatment. The potential flaw in the notification system, however, is in SADC Members' incompliant or inconsistent history in undertaking their notification obligations under other existing WTO Agreements, which may potentially affect the implementation of Article 3 and the Framework as a whole.

The enforcement provisions secure and solidify preferential conditions for SADC EPA Members and Developing Countries through the enforcement of S&DT rights under the Framework Agreement or any other WTO Agreement. The SADC-EU EPA contains a similar enforcement mechanism, albeit not as detailed, which is restricted to the application of the said EPA. It provides a much-needed forum, considering the examined challenges SADC Members have had and lack of participation under the DSB. S&DT rights, therefore, are able to be preserved timely, by an independent body recognised by WTO law.

The substantive rules provide much needed consistency to S&DT in the MTS. Under Market Access, the mandatory obligation on Developed Countries to reduce tariffs and NTBs of interest notified by Developing Countries and new protection measures, particularly the Special Support Mechanism, provide protection to key sensitive agricultural markets of interest to Developing Countries. This, in turn, allows SADC and Developing Countries in general to attain critical development objectives such as diversification and potential industrialisation, as the Framework Agreement provides them enough policy space through

combining the notification of interest provisions with protection mechanisms and market access opportunities under the Framework Agreement.

Lastly, the substantive rules on assistance in the Framework Agreement are far more specific than those in the EPA and accord more rights through prescribed modalities. This is notwithstanding the considerably high number of preferences the EU has granted to SADC Members. Developing Countries and SADC EPA Members would be able to simultaneously apply the assistance rules for more substantive and meaningful assistance in areas of interest, whilst applying the EPA, which indicates the dynamisms of the Framework Agreement. The substantive provisions across the EPA successfully concretises new preferential treatment into WTO law, as opposed to relying on soft-law provisions which are difficult to enforce (through the DSB) as is the practice under the current dispensation. The incorporated provisions secure rights of Developing Countries under WTO law for increased participation and integration in the MTS. They also facilitate for a predictable, enforceable and equitable MTS.

The Framework Agreement further stretches the application of substantive S&DT provisions and introduces a structure which places Developing Countries' interest and needs at the heart of use and access to S&DT. Developing Countries can access preferential treatment under the Framework Agreement simultaneously as they benefit from PTAs such as the SADC-EU EPA, increasing trade opportunities in areas of interest. The Framework Agreement further secures rights of Developing Countries under WTO law for increased participation in the trade system and increased trade opportunities.

It may therefore be concluded that the Framework Agreement redresses challenges identified in chapter 3, in the structure and substantive provisions of S&DT under the current dispensation under the MTS. It facilitates a predictable, enforceable and equitable MTS, and further, secures accessible rights of Developing Countries under WTO law, which can also be used under RTAs with relevant S&DT for Developing Countries to facilitate their increased participation and integration in the MTS and growth of their share in global trade.

The Framework Agreement ensures that S&DT entails different rules for Developing Countries at different stages of development, which has beneficial results for both Developed and Developing Countries. The Framework, therefore, established definitive rights,[1058] and establishes mechanisms to ensure that interests of Developing Countries are secured under the MTS.

[1058] Definitive rights under section 1 referred to 'precise, effective and operational' rights for Developing Countries in exercise of S&DT, or Developed Countries in granting S&DT, under WTO rules, wording adapted from paragraph 44 of the Doha Declaration.

Chapter 7: Conclusion and Recommendations

This chapter summarises the findings and outcomes which emerge from the thesis and constructs recommendations based on the said findings.

7.1 Summary of Findings and Outcomes of Study

The primary objectives established at the inception of this study was three-fold:

1) to delineate legally justifiable preferential S&DT provisions and rules under the current MTS;
2) to develop a legal Framework that is legally in-sync/compatible with RTAs, and can be applied and binding on RTAs at international law;
3) to ensure the legal Framework on S&DT retains its established purpose under WTO Law, particularly regarding creating precise, effective and operational S&DT in line with developmental objectives of Developing Countries.

A number of questions emanated from the objectives that were set out, which were based on the assumption that there is a lack of established, clear and precise S&DT terms under the MTS. It became necessary to examine the current landscape/structure of S&DT under WTO law in order to establish whether there is a legally justifiable need for a legal Framework on S&DT.

An examination of the S&DT concept and its application under WTO and other international law was undertaken in chapter 2 of the thesis. The historical and legal development of S&DT under the WTO was examined, where it emerged that S&DT developed as special measures to remedy decades of economic stagnation under colonisation and an international economic system which favoured interests that were formed during colonial rule. It also emerged that the GATT 1947 offered little development–friendly provisions for Developing Countries. The current framework of S&DT developed against this backdrop. The current

framework of S&DT consists of scattered provisions in Agreements which attempt to carry out the WTO's development objectives, which were developed post-GATT 1947. The predominant problem is not the lack of participation of Developing Countries at the inception of the GATT 1947, but rather, the deficiencies in the inclusion of the development agenda and effective S&DT provisions post GATT 1947 in the MTS, which had already been formulated.

S&DT provisions were introduced into GATT 1994 and WTO Agreements without a centralised Agreement or framework on S&DT. Further, soft law provisions were introduced where Members echoed sentiments of the development agenda of the WTO without binding commitments. A decentralised approach of establishing S&DT under various agreements was employed under the WTO system. Further, it has been established that the provisions under the current MTS consist of numerous "best endeavour" provisions which are vague or lack enforceability due to lack of specificity or clarity. This can be attributed to two potential reasons, firstly being the WTO's legal construct of drafting "incomplete" open provisions, to enable policy space for negotiations due to its multilateral nature. Or this is due to lack of commitment by Developed Countries to the development objectives under the WTO (which came after the inception of the GATT 1947).

Fast-forward to today, S&DT provisions cut across key areas such as market access, protective measures and flexibility of commitments, which all share very similar problems, primarily consisting of provisions with aspirational non-obligatory the language. The current legal dispensation or framework of S&DT is ineffective in facilitating increase in the trade of Developing Countries. This has created the need for a conceptual framework that seeks to address the challenges identified in chapter 3 through creating a codified universal Framework on S&DT under WTO law, that is legally justified under WTO rules, which takes into consideration Developing Countries' needs. The justification for the approach of utilising the form of a Framework Agreement, as opposed to amending individual Agreements, was justified in chapter 4 and the arguments are summated in the section below.

Chapter 3 examined S&DT in the current framework of S&DT under WTO law in detail by examining and interpreting WTO legal texts, which primarily comprise of WTO Agreements, Ministerial Decisions and Declarations and through interpretation of DSU decisions. The problems characterising S&DT have already generally been identified through the examination of S&DT provisions in this chapter. They are primarily based on vagueness, lack of enforceability and non-specificity of provisions. There are further instances where there are operational S&DT provisions which impose onerous and complex procedures, which Developing Countries have not utilised. Failure to understand the provisions has been cited as a reason by Developing Countries, despite the domestic protection benefits which could be reaped. Further, many S&DT provisions are not couched in the language of obligation. Many of the provisions are often constructed in aspirational character, use non-committal language, and cannot bind members despite being taken up in a treaty provision.

It was against this backdrop that the S&DT Framework Agreement was developed, ensuring that challenges and shortcomings of S&DT as identified in chapter 3 of S&DT under the current dispensation be redressed through the said Framework. In developing the Framework Agreement, structural approaches and considerations were made by examining models proposed by Developing Countries and scholars and proceeded to adopt an approach based on objectives, challenges and proposed models. The rationale for adopting to develop a S&DT Framework Agreement was that an efficient application of S&DT requires all Member-States to be bound by a central WTO Agreement and essentially, a single set of rules in a WTO which comprises of numerous legal texts. The Framework would holistically address S&DT shortcomings and challenges in existing law (and subsequent WTO law) by establishing general rules which all S&DT provisions in the MTS are to subscribe to, which are to align with the development objective under the WTO. Amending existing WTO rules would require The Agreement to also prescribe specific rules regarding structure, implementation, and core substantive minimum-standards for all future WTO Agreements.

The primary feature and heart of the S&DT Framework Agreement is Article 3, the notification and implementation Article, which is tied to multiple S&DT provisions throughout the Agreement. A Developing Country would be able to access preferential treatment if they demonstrate a particular need or interest under the said Article. This provision ensures S&DT remains meaningful and specific to a Developing Countries' needs to ensure growth in share of global trade. It also remedies the concern Developing Members have of Emerging Members unduly benefitting from their "Developing Country Status" as the Framework Agreement establishes modalities that ensure S&DT is based on justified needs. The Framework Agreement further covered rules on a number of pertinent S&DT areas which include Articles on *inter-alia* interpretation, enforcement of S&DT, market access, protective measures, technical and financial assistance, graduation and a monitoring mechanism.

The study then examined the SADC-EU EPA, which was the test which the Legal Framework (the Hypothesis) is to be applied to in order to determine whether the Framework attains the objective/outcomes anticipated. SADC-EPA Members' trade objectives were also examined and were concluded to have been incorporated into the EPA to a large extent. SADC EPA Members' trade objectives that emerged were; trade liberalisation and establishing the SADC FTA, diversification and industrialisation, sustainable food security, and attaining SPS and TBT standards. These objectives were used as indicators in the hypothesis testing in order to determine whether the Framework facilitates the attainment of the SADC Members' objectives.

Applying the Framework to the EPA, the test indicated that the S&DT Framework Agreement increased meaningful S&DT rights for Developing Countries (SADC-EPA Members in particular), improved access to the S&DT and facilitated easy implementation and enforcement. The Framework Agreement fulfils its objective. The predominant outcome from the application of the S&DT Framework Agreement to the RTA is that S&DT provisions under the envisaged Agreement for the large part facilitate for a predictable, enforceable and equitable S&DT. The Framework Agreement stretches the application of substantive

S&DT provisions, and introduces a structure which places Developing Countries interest and needs at the heart of use and access to S&DT. Developing Countries can access preferential treatment under the Framework Agreement simultaneously as they benefit from PTAs such as the SADC-EU EPA, increasing trade opportunities in areas of interest. The Framework Agreement further secures rights of Developing Countries under WTO law for increased participation in the trade system and increased trade opportunities.

7.2 Recommendations

7.2.1 Update Needs, Interest and Develop Trade Policy

Despite the positive outcomes that the S&DT Framework would have for SADC-Members and Developing Countries, there are apparent diverging political stances, economic policies and interests in the current WTO arena regarding S&DT. It is, therefore, anticipated that Agreement would either take a long time to negotiate or negotiations would fail as a result of lack of consensus [by WTO Members]. Developing Countries could lobby Developed Countries to agree to the Framework by highlighting the benefits the Framework Agreement would bring, particularly regarding limitation of S&DT to notified needs and resolution of the graduation issue. The above-notwithstanding, the determination is primarily an economic and political decision and consensus is a high standard on such a divided issue. The Framework Agreement raises a number of contentious elements on the extent of S&DT, the application of substantive provisions, and issues such as graduation.

The above being acknowledged, the Framework Agreement contains provisions which can be internally utilised by Developing Countries if Members fail to reach consensus during negotiations. The provisions would enable Developing Countries to better negotiate RTAs (particularly with Developed Countries and emerging economies). They also would be critical in capacitating Developing Countries to better negotiate under the WTO. The level of participation by SADC Members in negotiations, dispute settlement and compliance with WTO provisions has been identified under Article 6 as considerably low, with the exception of South Africa. Implementation of provisions such as Article 3 which requires all Developing

Countries to notify the CTD of specific development, financial and trade needs once every six years, and at the beginning of every trade negotiation, has positive beneficial results for SADC Members, and Developing Countries in general. It was elucidated that the benefits are two-fold namely; firstly, enhanced negotiating capacity specific to a Developing Countries' needs to increase trade-gains in substantial areas and secondly, it would greatly improve Developing Countries' trade policy, which is important in the context of SADC Members that have a considerably poor history of performance in development. This approach was motivated by UNCTAD's Trade Policy Framework for Developing Countries, which prescribes that Trade Policy review should be conducted every two, four, or six years, based on the country's share of world trade.[1059]

It is, therefore, recommended that SADC Members, and Developing Members in general, regularly identify trade needs for purposes of developing and updating their own trade policies and strategies. The Developing Members do not necessarily have to forward such trade needs to the CTD, as set-out under Article 3 of the Framework Agreement. The cost of implementation, financial and technical, would only be incurred once every six years (excluding data collection, which modalities may require long-term costs), whereas the long-term benefits from formulating relevant and informed trade-policy and negotiating for increased S&DT in specific areas could potentially transform an economy. This would result in greatly enhanced negotiating capacity through clear policy and established positions so that the Members seek specific preferences in line with their needs. This approach would not require the Framework Agreement to be adopted by Members while capacitating themselves to better take advantage of S&DT provisions in line with needs and interest.

7.2.2 Active Participation in the Committee for Trade and Development by SADC Members

The CTD has a critical function in the development and application of S&DT rules in the current WTO dispensation. The participation of Developing Countries in the development of

[1059] UNCTAD's Trade Policy Framework for Developing Countries: A Manual for Best Practices (n 697 above).

S&DT jurisprudence and its application is pivotal in the facilitation of their growth in trade. Developing Countries' input is further vital in establishing specific objectives and provisions which facilitate the aims. The CTD, however, is underutilised by Developing Countries, and especially by SADC EPA Members.

Section 4.3.5 established that the CTD's mandate is to "periodically review the special provisions in the Multilateral Trade Agreements in favour of the Least-Developed Country Members and report to the General Council for appropriate action". Chapter 3 established the function of the CTD in establishing a Monitoring Mechanism on S&DT to analyse and review the implementation of S&DT provisions.[1060] The lack or failure of Developing Countries' participation in the Monitoring Mechanism has been highlighted at the conclusion of section 3.7 of this study. This may also assist during WTO negotiations with Developing Countries forming blocks or alliances based on common interests.[1061]

It was also stated in chapter 3 that the DOHA Declaration (together with the Decision on Implementation-Related Issues and Concerns) mandates the CTD to identify which of those S&DT provisions are mandatory and to consider the legal and practical implications of making mandatory those which are currently non-binding.[1062] The CTD was also mandated with considering ways in which Developing Countries, particularly the LDCs, may be assisted to make best use of special and differential treatment.[1063] This, therefore, requires contributions from Developing Countries' representatives to the CTD on critical S&DT issues raised through this thesis.

It is recommended that SADC-Members and Developing Countries in general participate in the CTD, particularly regarding S&DT related issues and report as frequently as possible. It

[1060] WTO Monitoring Mechanism on Special and Differential Treatment (n 289 above). The Monitoring Mechanism which operates in Dedicated Sessions of the CTD is to act as a focal point within the WTO.
[1061] An example of this is the "core group" which was particularly active in this regard in voicing widespread concerns in the developing world about the launch of a new rule-making exercise regarding trade facilitation. The group, however, did take positions on other areas which were not limited to trade facilitation. The group's regular Members included Bangladesh, Botswana, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Namibia, Nepal, Nigeria, the Philippines, Rwanda, Tanzania, Trinidad & Tobago, Uganda, Venezuela, Zambia and Zimbabwe.
[1062] WTO Website, Special and Differential Treatment Provisions: https://www.WTO.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, (accessed 21 February 2020).
[1063] WTO Special and Differential Treatment Provisions (as above).

has been apparent that the ascertainment of Developing Countries' needs are pivotal to trade gains in areas of interest to Developing Countries. The CTD plays a critical role in the development of S&DT provisions and facilitating trade gains. The costs incurred would primarily be of a financial and technical nature, in participating and providing necessary capacitation to delegated representatives and a budget to attend CTD. The benefits, however, outweigh the costs as an increased participation of Developing Countries will contribute to developing a robust and accommodative MTS, which increasingly incorporates Developing Countries' trade interests. This will truly make the MTS facilitate one of its objectives of ensuring the growth in trade of Developing Countries.

7.2.3 Trade Needs and Interest in RTA's and Negotiations – Focus for Developed Countries

Chapter 3 of this study indicated how S&DT has not been specific to the needs and interests of Developing Countries. Further, section 4.3.4 highlighted how PTAs (such as AGOA) apply restrictive S&DT, allowing in-quota quantities and how it does not include areas of particular interest to Developing Countries such as on agricultural products. S&DT under the current dispensation is not focused on areas of relevance, which is misaligned with the objectives and spirit under paragraph 44 of the Doha Declaration.

It is recommended that Developed Countries, in trade negotiations and RTAs with Developing Countries, concentrate S&DT in areas relating to the needs and interests of Developing Countries. This approach can be adopted even without the Framework Agreement entering into force and this exists in multiple RTAs, including the examined SADC-EU EPA. This would result in impactful and meaningful preferential treatment which has the potential to increase trade.

This approach may have more negative impacts on Developing Countries in the short term, with Developing Countries potentially extending trade preferences and market access in sensitive areas or industries which they may not be willing to open. The potential long-term

benefit, however, may be growth in the trade of Developing Countries which could reduce dependence on Developed Countries. Another benefit is asymmetric reciprocal reduction in tariffs on the part of Developing Countries if they experience growth in trade, which would benefit the whole WTO membership. Reduction of tariffs by the largest group of WTO Members [Developing Countries] would be a significant victory for the WTO, in line with its objectives contained in the preamble of the WTO Agreement, which calls for substantial reduction of tariffs and TBT. This would also be in line with the SADC Protocol on trade as established under Chapter 4, which seeks to reduce tariff-bindings of its Members.

7.3 Activating the Framework: Next Step

The first and most important step in setting in motion, or activating the S&DT Framework Agreement is developing negotiating capacity of SADC Members, and Developing Countries in general. Whilst the Framework Agreement may face strong opposition and contention from Developed Countries, a skilled, and politically invested block of Developing Countries (which already outnumber Developed Countries) would be able to turn the tide on S&DT in the MTS. The current form of preferential treatment under the WTO is indicative of the negotiation dynamics, political strength of Developing Countries and the inability of Developing Countries to successfully lobby for the inclusion of effective and operational S&DT.

The WTO is a trade negotiating forum, SADC Members and Developing Countries need to participate more and negotiate more effectively with their trading partners. This means more skilled human resources, in the form of trade lawyers, economists and skilled negotiators and institutional capacity, such as customs and national standard authorities. The paradox, however, is that many Developing Countries, particularly LDCs, rely on Developed Countries to assist in capacitating these areas through S&DT. SADC Members require the political will, and prioritisation of these areas with resources to support them, to negotiate for more balanced trade rules, and to lobby to make S&DT operational, efficient and relevant to their trade needs.

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ANNEXURE A

This annexure details the consolidated S&DT Legal Framework Agreement as follows

AGREEMENT ON SPECIAL AND DIFFERENTIAL TREATMENT

Annex 1: Broad-based Recognition of a Particular Need

Preamble

Members,

Recalling the Agreement Establishing the WTO, that there is need for positive efforts designed to ensure that Developing Countries, and especially the Least-Developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development;

Recognising the applicability of the basic principles of GATT 1994, and reaffirming Members' commitment to substantial reduction of tariffs and other barriers to trade;

Recalling Paragraph 3(c) of the Enabling Clause, that special and differential treatment;

> *"…shall in the case of such treatment accorded by developed contracting parties to Developing Countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of Developing Countries";*

Reaffirming the principles contained in paragraph 44 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1), in the Decision adopted by the General Council on 1 August 2004, and at paragraph 35 of the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC) to strengthen special and differential treatment provisions and make them more precise, effective and operational;

Desiring to clarify and improve relevant aspects of Articles XVIII, XXVIII bis, XXXVI:8 *of the GATT 1994 regarding Trade and Development relating to Developing Countries and Least-Developed Countries;*

Desiring to interpret Special and Differential Treatment rules and establish operational modalities for improved implementation of existing and future Agreements and WTO rules;

Desiring to establish a monitoring mechanism on S&DT to improve the application of Special and Differential Treatment;

Hereby agree as follows:

Part I: Definitions and Interpretation

Article 1: Definition of Terms

In this Agreement and WTO Agreements, unless the context otherwise requires:

"commensurate" in respect of the needs of economic development and other WTO law means different needs of Developing Countries and Least Developing Countries according to their levels of development and particular circumstances.

"Graduation" means a change in classification of a Member from Least-Developed Country to a Developing Country, or from a Developing Country to a Developed Country, in accordance with Article 12 of this Agreement.

"needs" of Developing Countries and Least-Developed Countries means development, financial and trade needs, established by broad-based recognition of a particular need in accordance with the WTO Agreement or in multilateral instruments adopted by international organisations, as set out in Annex 1 of this Agreement.

"'positive efforts" under WTO law means specific exceptions from the general rules to address special concerns which are to enhance the 'economic development' of developing-country Members and Least Developing Countries.

"targeted assistance" means financial or technical trade-related programmes to support Developing Countries and Least Developed Countries to build trade capacity in a particular area, or address specified trade related constraints.

Article 2: Interpretation

2.4 Members obligated to 'consider' any measures or action under Special and Differential Treatment provisions in any WTO Agreement, shall:

(a) accord special regard to the special situation of a Developing Country or Least-Developed Country; and

(b) undertake active measures to accord the Developing Country member or Least-Developed Country with special and differential treatment,

unless the obligated Member is unable to render such preferential treatment or is opposed to rendering the treatment, in which case the obligated Member shall file a notification of opposition with the CTD under article 3.10 of this Agreement.

2.5 Members obligated to 'explore' any measures for purposes of according another Member Special and Differential Treatment under any WTO Agreement, shall undertake a fact finding process where constructive measures or remedies are to be actively applied by a developed or Developing Country member where available.

2.6 Where special and differential treatment provisions provide that a Member "must" and "shall" undertake any action, the Member shall be obligated to accord special differential treatment in accordance with the needs of a particular Developing Country member or Least-Developed Country, in accordance with Article 3.2 of this Agreement."

Part II – General Rules on Special and Differential Treatment

Article 3: Notification and Implementation of Special and Differential Treatment

3.6 Special and Differential treatment in all WTO Agreements shall be designed, or modified, to respond positively to specific development, financial and trade needs of Developing Countries and Least-Developed Country Members, as identified through notification under Article 3.2.

3.7 All Developing Countries and Least-Developed Country Members shall notify the CTD of specific development, financial and trade needs every six years, or upon any change in national trade policy, and at the beginning of every trade negotiation if there is any change in national trade policy, by lodging a notification containing:

(f) a general summary of the description of the need as set out at Annex 1 of this Agreement;

(g) a detailed description of the specific need;

(h) a trade or economic report highlighting development related concerns, containing facts and data justifying specific needs;

(i) the extent of assistance, support or flexibility required;

(j) any supporting documents to justify the above, and

the CTD shall immediately publish the lodged report at Article 3.2, which shall be accessible by all Members.

3.8 A Member shall notify the CTD of specific Special and Differential Treatment, which it grants, or seeks to utilise, by lodging a report under Article 3.2, at least three months prior to:

(g) entering into a Preferential Trade Agreement, Free Trade Agreement or Regional Trade Agreement;

(h) receiving preferential market access;

(i) applying any protective measure;

(j) undertaking any flexibility on commitments to any WTO rule;

(k) receiving any technical or financial assistance;

(l) applying any domestic policy which derogates from any WTO rules; and

(g) seeking any other Special and Differential Treatment provision under a WTO Agreement,

with the exception of an LDC which may lodge a report under Article 3.2 any time before entering into any arrangement under this Article.

3.9 The application of Article 3.3 shall not prejudge the substance and the timing of the notification required under Article XXIV of the GATT 1994, Article V of the GATS or the Enabling Clause, or Paragraph 1 of the Transparency Mechanism for Regional Trade Agreements, nor affect Members' rights and obligations under WTO Agreements in any way.

3.10 The report in Article 3.3 shall contain the following details:

(f) a detailed description of the specific development, financial and trade need notified under Article 3.2;

(g) a trade or economic report highlighting development related concerns, containing facts and data justifying specific needs;

(h) supporting documents;

(i) a specific proposed action plan, detailing the extent of preferential treatment to be accorded, and the time-periods proposed for granting of Special and Differential Treatment;

(j) details of potential prejudice which any other Member may be subjected to.

3.6 The CTD shall immediately upon receipt publish the lodged report under Article 3.3, which shall be made accessible by all Members at least within a week of receipt.

3.11 The notifying Member may enter into or undertake any arrangement listed at Article 3.3(a) to (g), if no request for consultation has been lodged by another Member within one month from the date of publication of the lodging of the report under Article 3.3, and nothing prevents a Member from entering into an arrangement listed at Article 3.3(a) to (f) sooner than one month if provided for under another WTO Agreement.

3.12 A Member opposed to the proposed action by a Developing Country or Least-Developed Country under Article 3.3 may request for consultation within one month from the date of publication of the report under Article 3.4, to clarify the facts of the situation and to arrive at a mutually agreed solution.

3.13 The opposing Member must provide the reporting Developing Country or Least-Developed Country Member with a statement detailing:

(d) their legal reason(s) for opposition of the arrangement;

(e) economic and social reports, containing facts and data justifying the opposition to the specific arrangement, in relation to the needs; and

(f) any supplementary documents or evidence supporting their opposition.

3.14 Upon failure to reach a mutually agreed solution within one month of receipt of a statement under Article 3.9, or upon refusal or inability to render Special and Differential Treatment, the Member opposed to the proposed action by a Developing Country or Least-Developed Country under Article 3.3 may lodge a notification of opposition to the CTD within five days, detailing:

(f) reason(s) for opposition of the Special and Differential Treatment;

(g) details of potential prejudice, if any;

(h) an economic and social report, detailing potential implications of the preferential treatment on the opposing Member;

(i) details and evidence of inability to render Special and Differential Treatment, if so claimed;

(j) any other documents in support of (a) to (d) above,

failing which, the preference right holder may enter into or undertake any arrangement listed at Article 3.3(a) to (f).

3.11 Upon receipt of the notification of opposition by a WTO Member under Article 3.10, the CTD through its Review Panel composed under Article 11.4 shall analyse the documents lodged by both Members, and the CTD shall:

(f) undertake an objective examination of

(i) the proposed justification for preferential treatment;

(ii) the developmental, financial and trade need; and

(iii) the measure or arrangement preferential treatment, together with the action plan of the arrangement or measure,

(g) balance developmental needs of the notifying Member, which shall be given particular preference, with the prejudice to be suffered of an opposing Member, whilst considering incidental factors which may include economic, social, historical and geographical considerations;

(h) where possible, propose a remedial payment, or action to redress, while approving the action at paragraph 3.3;

(i) make a determination and approve the action at paragraph 3.3(a) to (f), or disapprove the action; and

(j) publish a report containing details which include (a) to (d), which shall be accessible by all Members within three months of receipt of the notification of opposition.

3.12 If any Member is opposed to the CTD decision at Article 3.11, they may refer the matter to the Dispute Settlement Body ("DSB") within thirty days of the decision, for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

3.13 A Developing Country Member experiencing difficulties in notifying needs under Article 3.2 or in lodging a report under Article 3.3 shall not be excluded from

receiving preferences under this Agreement if they have notified the CTD of such difficulties before expiry of the notification timelines, and provide evidence of:

(c) capacity related challenges; or
(d) lack or failure to receive technical or financial assistance, and

the Developing Country may enter into an arrangement under this Agreement by notifying under Article 3.2 and submitting a report under Article 3.3 before such arrangement is entered into.

Article 4: Enforcement of Special and Differential Treatment

4.5 Whenever a Member has reason to believe that another Member:

(e) refuses or fails to accord such Member with special and differential treatment;
(f) fails to consider any development, financial and trade need it has lodged with the CTD under Article 3.2;
(g) has caused, or will cause potential prejudice through the imposition of a special and differential treatment which is not notified under this Agreement or any other WTO Agreement; or
(h) violates any special and differential treatment provision under any WTO Agreement,

such Member may request consultations with such other Member in order to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.6 A request for consultations under Article 4.1 shall include a statement of available evidence from all parties with regard to the existence and nature of the request for consultation, and defence, and

(c) a Member may request for an extension of consultations for a period up to 90 (ninety) days; and

(d) the other Member may accord or reject the request for extension of consultations.

4.7 If no mutually agreed solution has been reached within 30 days of consultations, any Member party to such consultations may refer the matter to the CTD through its Review Panel composed under Article 11.4, where both Members are to lodge with the CTD:

(d) a statement based on a WTO provisions;

(e) an economic and social report, detailing potential implications of the preferential treatment on the opposing Member; and

(f) any other document or evidence in support of (a) and (b).

4.8 Upon receipt of the notification of referral under Article 4.3, the CTD shall analyse the documents lodged by Members, and the CTD shall:

(f) undertake an objective examination of

(i) the proposed justification for preferential treatment;

(ii) the developmental, financial and trade need; and

(iii) the measure or arrangement preferential treatment, together with the action plan of the arrangement or measure,

(g) balance developmental needs of the notifying Member, which shall be given particular preference, with the prejudice to be suffered of an opposing Member, whilst considering incidental factors which may include economic, social, historical and geographical considerations;

(h) make a determination on whether a Member is entitled to preferential treatment, or has infringed a right to special and differential treatment, or

whether the Member has refused or fails to accord the right holder with preferential treatment;

(i) make a determination on any other rights regarding special and differential treatment; and

(j) publish a report which includes details in (a) to (d), which shall be accessible by all Members within three months of receipt of the notification of opposition.

4.5 A Member shall be obligated to abide by the decision made by the CTD under Article 4.4, subject to a decision made by the DSB.

4.6 If any party is opposed to the CTD decision under Article 4.4, it may refer the matter to the DSB within 30 days of the decision, for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.7 A Member obligated to undertake a measure or any action, in accordance with a decision of the CTD under this Article shall notify the complaining Member and the CTD within ninety (90) days of the decision, and at the end of the period prescribed in the decision

(a) of any measure or action it has taken to comply with the decision; and

(b) of its request to end the application of appropriate measures by the complaining Member, in accordance with the CTD's decision.

4.8 A Member party to proceedings under this Article, which is dissatisfied with action undertaken under Article 4.7, may within thirty (30) days of the date of notification of the said Article, request in writing to the CTD for a decision on compliance, and if the CTD rules that any measure or action taken to comply

(a) is not in conformity with the provisions of this Agreement or its decision, the CTD shall determine whether the complaining Member may continue to apply appropriate measures, or whether any specific action or measure shall be undertaken;

(b) is in conformity with the provisions of this Agreement or its decision, the appropriate measures or action shall be terminated, and

the CTD may make any ruling with regards to financial compensation based on impact on the economy of a Member which is party to the proceedings caused by non-compliance of a decision.

Part III – Specific Rules on Special and Differential Treatment

Article 5: Market access

5.1 Members are to enter into negotiations to reduce or eliminate

(a) tariffs;

(b) tariff peaks;

(c) high tariffs;

(d) tariff escalation; and

(e) non-tariff barriers,

particularly on products of export interest to Developing Countries and Least-Developed Countries.

5.2 Negotiations under Article 5.1 shall take fully into account the special needs and interests of Developing Country Members and Least-Developed Country Members, including through less than full reciprocity in reduction commitments, and:

(d) Developed Members, and Developing Country Members in a position to do so, shall provide duty-free and quota-free market access for products originating from Least-Developed Countries;

(e) Developing Countries and Least-Developed Countries which have notified the CTD of a particular need, and sensitive products, as notified under Article 3.2

may use tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and

(f) all other relevant circumstances, including the fiscal, developmental, strategic and other needs of the contracting parties concerned, particularly Developing Countries as notified under Article 3.2.

5.3 Developing Country and Least-Developed Countries may submit a list of goods of interest once every six years, or upon change in national policy regarding goods of interest, to the CTD, simultaneously when submitting their needs under Article 3.2, and Developed country Members, in implementing their commitments on market access shall:

(c) take fully into account the particular needs and conditions of Developing Country Members; and

(d) provide a greater improvement of opportunities and terms of access through reduced tariffs and non-tariff barriers for products of particular interest to these Members.

5.11 Tariff reductions by Members will be made through a tiered formula that takes into account their different tariff structures of Developed, Developing and Least-Developed Country Members, and:

(e) Tariff reductions will be made from bound rates;

(f) Each Member, other than Least-Developed Countries, will make a contribution to tariff reduction;

(g) Special and Differential Treatment provisions for Developing Members will be an integral part of all elements;

(h) There shall be deeper cuts in higher tariffs, with flexibilities for sensitive products notified by Developing Countries at Article 3.2,

and there shall be substantial improvements in market access for all products.

5.12 All Developing Countries or Least-Developed Countries which notify the CTD of a need under Article 3.2 shall be entitled to special and differential treatment under Article XVIII (A) (B) (c) and (d) of the GATT 1994, and shall be entitled to disregard rules on notification therein, provided:

(c) the Developing Country or Least-Developed Countries notifies the CTD under Article 3.3 of this Agreement of a specific measure, or modification or withdraw concessions under the appropriate Schedule under the GATT 1994; and

(d) that the member shall inform any Member that has substantial interest therein at the time of notifying the CTD, and

any Member which has substantial interest therein may seek recourse under Article 3.6.

5.13 A Developing Member and Least-Developed Member may enforce its rights under Article 4 by requesting for consultations, and lodging the matter with the CTD, where a preference-granting Member:

(c) fails to consider any development, financial and trade need lodged with the CTD under Article 3.2 during negotiations under Article 5.1; or

(d) fails to reduce or eliminate tariffs and non-tariff barriers particularly on products of export interest to Developing Countries and Least-Developed Members in accordance with Article 5.1.

5.14 The CTD may conduct studies and avail reports to Members regarding Least-Developed Countries and their needs, and the reports shall be considered in negotiations under Article 5.1.

5.15 Developed Country Members and Developing Country Members declaring themselves in a position to do so, shall ensure that preferential rules of origin applicable to imports from Developing Country Members and Least-Developed Country Members are transparent and simple, and contribute to facilitating market access.

5.16 When applying an ad valorem percentage criterion to determine substantial transformation, preference-granting Members shall develop or build on their individual rules of origin arrangements applicable to imports from Least-Developed Countries, allowing the use of non-originating materials up to 75% of the final value of the product, or an equivalent threshold in case another calculation method is used, to the extent it is appropriate.

5.17 A Developing Country or Least-Developed Country may request for technical or financial assistance to participate effectively in the negotiations under Article 5.1 through capacity building, and be accorded such assistance as set out under Article 9.

Article 6: Protective measures

Domestic Support

6.3 Special and differential treatment remains an integral component of domestic support, and the needs and conditions of Developing Countries, particularly Least-Developed Country Members, shall be considered regarding reduction commitments by Developing Countries.

6.4 WTO Members shall not apply any form of export subsidies, with the exception of:

(a) *Developing Country Members which shall only benefit from the application of provisions of Article 9.4 of the Agreement on Agriculture until the end of 2023; and*

(b) *Least-Developed Countries and net food-importing Developing Countries listed in the Decision on WTO List of Net Food-Importing Developing Countries for the Purposes of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, G/AG/5/Rev.10, which shall only benefit from the application of provisions of Article 9.4 of the Agreement on Agriculture until the end of 2030, however they shall not apply any other form of export subsidies.*

6.3 *Nothing in this Agreement can be construed to give any Member the right to provide, directly or indirectly, export subsidies in excess of the commitments specified in Members' Schedules.*

6.4 *Members agree that the Green Box list of "general services" in Annex 2 of the Agreement on Agriculture is expanded to include:*

(a) *spending related to land reform;*

(b) *water management;*

(c) *rural livelihood security; and*

(d) *other purposes related to development and reducing poverty,*

for Developing Countries and Least Developed Countries only.

Public Stockholding for Food Security Purposes

6.5 *Developing Countries and Least-Developed Country Members may derogate from commitments under Articles 6.3 and 7.2 (b) of the Agreement on Agriculture, in*

relation to support provided for traditional staple food crops in pursuance of public stockholding programmes for food security, provided that they:

(e) notify the Committee on Agriculture that it is exceeding or is at risk of exceeding either or both of its Aggregate Measurement of Support limits (the Member's Bound Total AMS or the de minimis level) as result of its programmes mentioned above;

(f) have fulfilled and continue to fulfil its domestic support notification requirements under the Agreement on Agriculture in accordance with document G/AG/2 of 30 June 1995, as specified in the Annex;

(g) have provided, and continue to provide once every six years, and upon change in national trade policy additional information by completing the template contained in the Annex, for each public stockholding programme that it maintains for food security purposes; and

(h) provide any additional relevant statistical information described in the Statistical Appendix to the Annex as soon as possible after it becomes available, as well as any information updating or correcting any information earlier submitted.

6.6 Members shall not challenge or refer a matter to the DSB regarding breaches of domestic support commitments by Developing Country Members or Least-Developed Countries, under Annex 2 of the Agreement on Agriculture provided:

(a) there was a need as established under Article 3.2; and

(b) the CTD undertakes an analysis of the measure in accordance with Article 3.11 to examine whether the measure subscribes to Annex 2, where requested by any Member.

Anti-Dumping Measures

6.7 With regarding to Article 15 of the Anti-Dumping Agreement, Developed country Members shall consider the special situations of Developing Country Members when considering the application of anti-dumping measures under the Anti-Dumping Agreement, and shall:

(d) not apply anti-dumping measures where a constructive remedy is available; and

(e) shall apply for consultations under Article 3.6 of this Agreement if the goods are in relation to an interest notified under Article 3.2; and

(f) may apply for expedited determination by the CTD under Article 3.8, which shall be provided by the CTD within a month.

Special Support Mechanism

6.9 Developing Countries and Least-Developed Countries may utilise Special Support Mechanism under this Article, by employing tariff barriers to protect sensitive sectors which have been notified under 3.2, from import surges and price falls, regarding the Agreement on Agriculture.

6.9 Developing Country and Least-Developed Country Members shall lodge a report under Article 3.2 of this Agreement, with additional evidence of decline in domestic price or an imminent foreseeable decline, and when applying the Special Support Mechanism under Article 6.8, and:

(e) the Member shall only employ a Special Support measure on a specified product, as notified by identifying a particular tariff classification;

(f) the criteria regarding use of Special Support Services shall be limited to food security, livelihood security and rural development needs;

(g) the application of the measure shall be for a maximum of eight (8) months, with the possibility of re-application of the measure following a review after notification to the CTD by submitting a report under Article 3.2; and

(h) The measure shall not be applied to more than 2.5% of tariff lines in any 12-month period.

6.10 A Member opposed to the proposed Special Support Measure by a Member under Article 6.8 may request for consultations under Article 3.4, to clarify the facts of the situation and to arrive at a mutually agreed solution, and follow the subsequent implementation mechanism under Article 3 of this Agreement.

Enforcement

6.11 A Developing Country and Least-Developed Country Member may enforce its rights under Article 4, where a preference granting Member:

(c) fails to consider any development, financial and trade need lodged with the CTD under Article 3.2 during negotiations regarding any protective measure under the WTO Agreements; or

(d) fails to reduce or eliminate domestic support as obligated under any WTO Agreement."

Article 7: Flexibility of commitments

7.1 S&DT provisions in all WTO Agreements that provide for flexibility of commitments shall:

(a) be specific and detailed;

(b) include simplified modalities for application;

(c) include enforcement provisions;

(d) be specific to the needs of Developing Countries; and

(e) be linked to a Developing Country's capacity to implement a particular WTO provision and a WTO Agreement.

7.3 All Developing Countries or Least-Developed Countries entitled to special and differential treatment under a particular WTO Agreement shall notify the CTD of a specific need under Article 3.2 and may enforce its rights under Article 4, where a preference-granting Member refuses or fails to:

(c) consider any development, financial and trade need lodged with the CTD under Article 3.2; or

(d) accord special and differential treatment to Developing Countries and particularly Least-Developed Countries.

Article 8: Transitional Periods for Developing and Least-Developed Country Members

8.1 Standard and differential treatment provisions in all WTO Agreements that provide for transitional time provisions shall:

(a) be specific and detailed;

(b) include simplified modalities for application;

(c) shall be specific to the needs of Developing Countries; and

(d) be linked to a Developing Country's capacity to implement a particular WTO provision and a WTO Agreement.

8.2 The extent and the timing of implementation of transitional provisions of WTO Agreement shall be related to the implementation capacities of Developing and Least-Developed Countries.

8.3 All WTO Agreements to be negotiated shall contain three categories of provisions related to the implementation of transitional provisions:

Category A

(a) A Category that contains provisions that a Developing Country Member or a Least-Developed Country Member designates for implementation upon entry

into force of the particular Agreement, or in the case of a Least-Developed Country Member within a particular period of time after entry into force;

Category B

(b) A Category which contains provisions that a Developing Country Member or a Least-Developed Country Member designates for implementation on a date after a transitional period of time following the entry into force of the particular Agreement; and

Category C

(c) A- Category containing provisions that a Developing Country Member or a Least-Developed Country Member designates for implementation on a date after a transitional period of time following the entry into force of a particular Agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building, as provided for in Article 9 of the Agreement,

and each Developing Country and Least-Developed Country Member shall self-designate, on an individual basis, the provisions it is including under each of the Categories.

8.4 Upon entry into force of a particular Agreement, each Developing Country and Least-Developed Country Member shall implement its respective Category commitments as provided for at Article 8.3 of this Agreement, and those commitments designated under the respective Agreement will thereby be made an integral part of the particular Agreement.

8.5 A Least-Developed Country shall notify the CTD of the provisions it has designated in Category A for up to a period of time as stated at Article 8(3)(a) after entry into force of this Agreement, and each Least-Developed Countries' commitments

designated under Category A will thereby be made an integral part of a particular Agreement, and:

(a) for transparency purposes, notifications as provided under Article 8(3)(c) submitted shall include information on the assistance and support for capacity building that the Member requires in order to implement; and

(b) information on assistance and support for capacity building shall be submitted to the CTD to provide for transparency, as prescribed by the particular Agreement.

8.6 A Developing Country and Least Developing Country may request an extension of a transitional time provision by notifying the CTD under the modalities set-out at Article 3.3 of this Agreement.

Article 9: Technical and Financial assistance

9.1 Assistance and support for capacity building shall be provided to help Developing Countries and Least-Developed Counties implement all the provisions of this WTO Agreement, in accordance with the nature and scope of the Agreement, which shall include:

(a) technical assistance; and

(b) financial assistance.

9.2 Where a Developing Country or Least-Developed Country lacks, or continues to lack, the necessary capacity to undertake or carry out a provision under a WTO Agreement, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired;

(a) as may be determined by the CTD after the Member has lodged a report for exemption from the provision, containing information under Article 3.3; and

(b) a Member opposed to the proposed Special Support Measure by another Member at Article 6.8 may request consultations under Article 3.4, to clarify the facts of the situation and to arrive at a mutually agreed solution, and follow the subsequent implementation mechanism under Article 3 of this Agreement.

9.3 Special and & Differential Treatment provisions in all WTO Agreements that provide for technical or financial assistance shall:

(a) be specific and detailed;

(b) include simplified modalities for application;

(c) be specific to the needs of Developing Countries; and

(e) be linked to a Developing Country's capacity to implement a particular WTO provision and a WTO Agreement.

9.4 A Developing Country and a Least-Developed Country may request technical or financial assistance from;

(a) the CTD;

(b) a preference-granting Developed Country, which a Developing Country or Least-Developed Country has particular trade related interest in under Article 3.2; or

(c) a Developing Member with a GDP per capita difference from the requesting Member as established by the CTD, which a Developing Country or LDC has particular trade related interest in under Article 3.2;

and the Member may request for assistance in accordance Article 3.3 of this Agreement.

9.5 Developed Countries, and where possible Developing Countries, shall provide technical and financial assistance to other Developing Countries and Least-

Developed Countries as requested at Article 9.4 of this Agreement in accordance with a particular WTO Agreement, and:

(a) the CTD shall establish a fund where Donor-Members shall equitably contribute to the fund on an annual basis, in amounts linked to their respective GDP per capita;

(b) use of the funds shall be allocated equitably upon assessment and determination of a need by the CTD at Article 3.11 of this Agreement, with preference given to Least-Developed Countries;

(c) over and above the contribution to the fund at (a), a Donor-Member may individually directly provide technical or financial assistance to a Developing Country or Least-Developed Country; and

(d) the formula regarding contributions shall be published by the General Council on a bi-annual basis, together with the minimum GDP per capita required for Members to contribute to the fund under (b).

9.6 To provide transparency to Developing Countries and Least-Developed Countries on the provision of assistance and support for capacity building for implementation of a particular Agreement, each donor Member assisting Developing Country Members and Least-Developed Country Members with the implementation of this Agreement shall submit to the CTD, at entry into force of this Agreement and annually thereafter, the following information on its assistance and support for capacity building that was disbursed in the preceding 12 months and, where available, that is committed in the next 12 months:

(a) a description of the assistance and support for capacity building;

(b) the status and amount committed and disbursed;

(c) the procedure for disbursement of assistance and support;

(d) the beneficiary Member or, where applicable, the region; and

(e) the implementing agency in the Member providing assistance and support.

9.7 Technical and Financial assistance requirements by Developing Countries and Least-Developed Countries shall be considered in all negotiations, and Developing Countries and Least-Developed Countries may request the CTD to assist in:

(a) conducting studies and capacity-building measures to assist to participate effectively in the negotiations by making a request to the CTD with supporting documents under Article 3.29(a)(b)(c) and (d) of this Agreement; and

(b) requesting a particular need from a Developed.

9.8 Targeted assistance and support should be provided to the Least-Developed Countries so as to help them build sustainable capacity to implement their commitments, given the special needs of Least-Developed Countries.

Article 10: SPS and TBT Provisions

10.1 Developing Countries and Least-Developed Countries may submit their needs under Article 3.2 relating to compliance with Sanitary and Phytosanitary requirements, and Technical Barriers to Trade of a particular Developed Country, and the Developed country Members, in implementing their commitments on market access shall;

(c) take fully into account the particular needs and conditions of Developing Country Members; and

(d) provide a greater improvement of opportunities and terms of access through providing technical and financial assistance under Article 9.5(c) to a Member with a notified need.

10.2 A Developed Country and Developing Country Members in a position to do so shall not introduce a new Sanitary and Phytosanitary requirement or Technical Barriers to Trade requirement before undertaking commitments under Article 10.1(a) and (b).

10.3 A Developing Country and Least-Developed Country may enforce its rights under Article 4, where a SPS or TBT regulation by a Developed Country:

(c) creates an unnecessary obstacle to international trade as provided for by Article 2.2 of the Technical Barrier to Trade Agreement; or

(d) introduces a new Sanitary and Phytosanitary requirement and Technical Barriers to Trade requirement before undertaking commitments under Article 10.1(a) and (b).”

Part IV - The Committee on Trade and Development

Article 11: Functions of the Committee on Trade and Development

11.1 Nothing in this Agreement can be construed to derogate from the Mandate of the CTD and powers conferred at Article IV(7) of the Agreement Establishing the WTO.

11.2 The CTD shall serve as a focal point for the consideration and coordination of work on development in the WTO, and as part of its functions, the CTD shall:

(j) periodically review the special provisions in the Multilateral Trade Agreements in favour of Developing Countries, and in particular Least-Developed Country Members, and report to the General Council for appropriate action;

(k) make determinations regarding special and differential treatment, particularly relating to rights and obligations and arrangements and measures under this Agreement, and any other WTO law through the Review Panel which shall be composed under Article 11(4) of this Agreement;

(l) provide analysis of special and differential treatment issues;

(m) undertake studies of special and differential treatment with a specific scope and objective under WTO Agreements;

(n) publish and disseminate information regarding special and differential treatment to Members through the WTO Secretariat;

(o) enforce special and differential treatment through determinations by the Review Panel;

(p) coordinate and operate the monitoring mechanism for special and differential treatment; and

(q) analyse and make determinations on graduation of a Member.

11.3 The CTD shall establish a Review Panel which shall;

(a) make determinations regarding special and differential treatment, particularly with regards to Members' rights and obligations, and measures and arrangements thereto; and

(b) publish a report containing details of the determination.

11.4 A Review Panel shall be composed of three panellists with one representative each from a Developed Country Member, a Developing Country Member, and a Least Developed Country Member.

11.5 Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

11.6 Where a matter primarily requires an economic determination, the panel may comprise of five members with;

(i) three panellists with a backgrounds in economics, particularly international economics or international trade law, with one representative each from a Developed Member, a Developing Member, and a Least Developed Country Member;

(ii) two panellists with a background in law, particularly international trade law, one from a Developed Country Member, and another from either a Developing Member or a Least Developed Country Member.

11.7 Citizens of Members whose governments are parties to consultations regarding a matter referred to the CTD under Article 3.11 or 4.4 of this Agreement shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise."

"***Part V – Miscellaneous***

Article 12: Graduation

12.1 A Member shall graduate from classification of a Least-Developed Country to a Developing Country, or from a Developing Country to a Developed Country by:

(a) the prospective-graduate Member lodging a review of its classification with the CTD Council, in the format prescribed under Article 12.2 of this Agreement; or
(b) any other Member lodging a review of the classification of another Member with the CTD Council, in the format prescribed under Article 12.2 of this Agreement.

12.2 A review of graduation of classification to the CTD of a Member under Article 12.1 shall contain the following, in relation to the prospective-graduate Member:

(a) a statement of the Member instituting the review under Article 12.1;
(b) GDP per capita;
(c) Human Development Index by the United Nations;
(d) World Bank Country Classification by income level;
(e) share of global trade of Member (import and export);
(f) World Bank data on poverty and growth of economy;
(g) vulnerability of economy;

(h) data on industrial structure and competitiveness;

(j) data on agriculture;

(k) negotiation capacity at WTO;

(l) infrastructure report;

(m) any other any other document or evidence in support of (a) to (l) or other information in support of the application.

12.3 A prospective-graduate Member may oppose review proceedings brought against it under Article 12.1(b) for graduation, by lodging a Statement of Opposition, accompanied by documents which contain information in Article 12.3(b) to (m), to the CTD within 60 days from the application under Article 12.1(b).

12.4 A Member classified as a Least-Developed Country shall graduate to the category of a Developing Country upon determination by the CTD through an objective assessment of:

(a) considerations under Article 12.2(a) to (m);

(b) the Member categorisation as;

(i) a Least-Developed Country by the Committee for Development Policy, of the United Nations Economic and Social Council; or

(ii) a low-income, or lower-middle income Country by the World Bank.

12.5 A Member classified as a Developing Country shall graduate to the category of Developed Country upon determination by the CTD through an objective assessment of:

(a) considerations under Article 12.2(a) to (m); and

(b) the Member's categorisation as;

(i) a "high income" country by the World Bank; or

(ii) a Member that accounts for no less than 0.5 per cent of global merchandise trade (imports and exports).

12.6 A Member may not lodge a review of classification under Article 12.1(b) of a particular prospective-graduate Member within two years of the prospective-graduate Member undertaking a review under Article 12.1.

12.7 If any Member is opposed to the determination the CTD makes under Article 12.1, it may refer the matter to the DSB within 30 days of the decision, for the immediate establishment of a Panel, unless the DSB decides by consensus not to establish a Panel.

12.7 Upon graduation of a Member, the prospective-graduate Member shall be entitled to the continued use of special and differential treatment for a period of one year from the decision of the decision of the CTD under Article 12.4 and 12.5 if it is not referred to the DSB, or one year from the date the DSB's decision is adopted.

Article 13: Monitoring Mechanism

13.1 A monitoring mechanism for special and differential treatment under the WTO shall be coordinated and operated by the CTD through the Monitoring Mechanism Sub-Committee, which shall serve the following functions:

(e) analyse special and differential treatment provisions;
(f) review all aspects of implementation of special and differential treatment;
(g) preparing annual reports; and
(h) make recommendations, where the report at (c) identifies a problem in special and differential treatment.

13.2 The monitoring mechanism Sub-Committee shall comprise of one representative from each Member, who shall;

(a) be a well-qualified governmental and/or non-governmental individual;

(b) in the case of a representative from a Developing Country or Least Developed Country Member, shall be responsible for submitting that Member's notification of specific development, financial and trade every six years, or upon any change in national trade policy, and at the beginning of every trade negotiation if there is any change in national trade policy; and

(c) make or submit written inputs and submissions from their respective Members regarding special and differential treatment.

13.3 The monitoring mechanism shall compile, examine and review information from:

(a) submitted notifications by Developing Countries and Least-Developed Country Members under Article 3.2 to the CTD;

(b) reports filed under Article 3.3 to the CTD;

(c) reports by the Review CTD under Article 3.11;

(d) written inputs and submissions made by Developing Members and Least-Developed Country Members, particularly on implementation of special and differential treatment;

(e) reports received from other WTO bodies to which submissions by Members could also be made; and

(f) any other document or submission made in relation to special and differential treatment.

13.4 The monitoring mechanism shall make recommendations to the relevant WTO body in charge of the technical substantive negotiations;

(a) for the initiation of negotiations which contain special and differential treatment; and

(b) during negotiations regarding special and differential treatment.

13.5 The monitoring mechanism shall publish an annual report, which detail shall include:

(a) statistics and data on use of special and differential treatment;

(b) review all aspects of implementation of special and differential treatment; and

(c) recommendations on improved use of and enforcement of special and differential treatment.

Part VI - Dispute Settlement

Article 14: Dispute Settlement

The scope of this thesis does not provide for Dispute settlement (for brevity). However, it is acknowledged that this is a critical area that is required for S&DT. The provisions regarding S&DT and dispute settlement would be expected to draw focus on technical and financial assistance of Developing Countries and Least-Developed Countries.

Annex 1: Broad-based Recognition of a Particular Need

The list below shall constitute broad-based needs a Developing Country a Least-Developed Country Member may have;

1. Financial Support to implement requirements of WTO Agreement;

2. Technical capacity implement requirements of WTO Agreement;

3. Food security;

4. Rural development;

5. Diversification of economy;

6. Assistance to negotiate under the GATT;

7. Need to maintain tariffs for revenue purposes;

8. Assistance to develop domestic policy;

9. Assistance to enforce special and differential treatment provision;

10 Assistance with undertaking trade related study;

11. Assistance complying with SPS and TBT requirements;

12. Enforcement of protective measure.