SPECIAL AND DIFFERENTIAL TREATMENT IN THE WTO: ITS CONTENT AND COMPETENCE FOR FACILITATION OF DEVELOPMENT*

Abstract
Trade has inherent economic virtue, which is thought to be an important mechanism for the development of the world. The World Trade Organisation (WTO) tries to introduce a new era of global economic cooperation through a fairer and more open multilateral trading system for the benefit and welfare of the people of its Members. Considering these facts, this trading system strives to introduce a principle where the conduct of international trade is based on cooperation rather than competition. The simple reason is that participating trading members are unequal and there cannot be any fair competition among unequal competition under identical conditions. Therefore, the Agreements of the WTO recognize the link between trade and development and contain special provisions for developing countries to combat the growing global economic challenges. These Agreements contain provisions which give developing countries special rights. These are called 'Special and Differential Treatment' (SDT) provisions. Special and differential treatments for developing countries allow justifiable deviation from obliging the basic principle of WTO i.e. the Most Favored Nation's (MFN) treatment. Research and discourse on SDT shows two types of purposes are seen for SDT directed at developing countries: to help development and to help the international system by easing the integration of developing countries into it. This paper will give most emphasis on the development agendas of developing countries because the purpose of SDT as to help developing countries integrate into the trading system is based on an assumption that an effective regulatory system is itself an important tool for development, and as such need not be considered a separate purpose.

Key words: *World Trade Organisation, International Economic Law, Development, SDT*

1. Introduction

The World Trade Organization (WTO) is the only international organization dealing with the greatest economic challenges facing the world today.[1] The aim of this organization is to create an international system that not only maximizes global growth but also to achieve a greater measure of equity between nations.[2] Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.[3] This multilateral trading system constitutes an international trading community that purports to engage in trade relationship for the economic well being of its community and its people. For the running of this mammoth system, the WTO initiates numerous trade agreements relating to goods, services, intellectual properties, civil aircraft, telecommunications and many others.[4] These agreements are the legal ground rules for global growing trade and commerce. Essentially they are contracts, guaranteeing member countries important trade rights. They also bind governments to keep their trade policies within agreed limits to everybody's benefit. As the goal of the WTO is to liberalize trade among its members by entering into reciprocal and mutually advantageous arrangements, these agreements are

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1 WTO, (2009), 'Global Problems, Global Solutions: Toward Better Global Governance',http://www.wto.org/english/res_e/booksp_e/public_forum09_e.pdfaccessed on 28/02/2016

2 P. V. D. Bossche and WTO, 'Understanding the WTO: What is the World Trade Organization', http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htmaccessed on 28/02/2016

3WTO, 'The Multilateral Trading System-Past, Present and Future', http://www.wto.org/english/res_e/doload_e/inbr_e.pdf accessed on 02/03/2016 or,
A. Panagariya, 'Core WTO Agreements: Trade in Goods and Services and Intellectual Property', http://www.columbia.edu/~ap2231/Policy%20Papers/wto-overview.doc accessed on 02/03/2016

4WTO, 'WTO in brief: The WTO Agreements', http://www.wto.org/english/docs_e/legal_e/04-wto.pdf accessed on 28/02/2016

negotiated and signed by the government of its member states.[5] Therefore, all of the members of the WTO must comply with these agreements regardless of whether they are developing countries or developed countries.[6] However, it is difficult as a practical matter to apply WTO rules in the same way to all member countries that vary in their development stage. Consequently, developing countries are prone to seek preferential and special trade discipline. They argue that these treatments are necessary for them to achieve their fundamental economic goals. As above half of the member among 153 members of the WTO is developing or least developing country, it takes into consideration the demand of developing countries.[7] For this, the WTO launches various policies and approaches depending on the degree of development and this is embodied in the notion of 'Special and Differential Treatment'.[8] This paper focuses on the current multilateral trade negotiations.[9] It analyses the conceptual framework of SDT vis-à-vis developing countries' main concerns towards trade liberalisation and the implications of arriving at renewed SDT provisions in the Doha trade negotiations.

2. History of Special and Differential Treatment: Under the GATT and WTO Regime

The World Trade Organization came into force in 1995 after successful ending of long lasting Uruguay Round. Considered one of the youngest of the international organizations, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT) established in the wake of the Second World War.[10] So while the WTO is still young, the multilateral trading system that was originally set up under GATT is well over 50 years old. In the absence of an international organization for trade, countries turned, from the early fifties, to the existing multilateral international institution for trade, the GATT 1947, to handle problems concerning their trade relations.[11] Until the Uruguay Round, when the trade agenda was confined to trade in goods, SDT was conceived as a development tool. It was not included in the specific provisions for developing countries in the original version of GATT 1947.[12] The preamble emphasises that on the basis of mutuality and reciprocity trade barriers in international trade were to be removed and discrimination was to be abolished. Of the originally 23 signatory states of GATT, 11 can be considered as developing countries and there have been references to 'countries in the early stages of development' and their potential need to restrict imports or intervene in their economies since the first GATT agreement.[13] To achieve a fair and clear idea about the special and differential treatment under the GATT and WTO regime, four phases can

[5]WTO, 'Sixty Year of Multilateral Trading System: Achievement and Challenges', http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr07-2d_e.pdf accessed on 29/02/2016

[6]J.H.H. Weiler,(2002), 'The Nature of WTO Obligations', www.jeanmonnetprogram.org/archive/papers/02/020101.rtf accessed on 27/02/2016

[7]I. F. Fergusson, 'World Trade Organization Negotiations: The Doha Development Agenda', http://fas.org/sgp/crs/misc/RL32060.pdf accessed on 26/02/2016

[8] B. Hoekman, A. Mattoo and P.A. English, 'Handbook On: Development, Trade and the WTO', http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/08/19/000160016_20040819140633/Rendered/PDF/297990018213149971x.pdfaccessed on 28/02/2016

[9] P. Conconi and C. Perroni, 'Special and Differential Treatment of Developing Countries in the WTO', Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2014/60 2014

[10] K. Anderson, 'The WTO Agenda for the New Millennium', https://www.adelaide.edu.au/cies/papers/sp9901.pdf accessed on 26/02/2016

[11]J. Dean, S. Desai, and J. Riedel, (1994),'Trade Policy Reform in Developing Countries since 1985',http://elibrary.worldbank.org/doi/pdf/10.1596/0-8213-3102-7accessed on 28/02/2016 and A. U. Santos-Paulino, (2005), 'Trade Liberalisation and Economic Performance: Theory and Evidence for Developing Countries. World Economy',http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9701.2005.00707.x accessed on 01/03/2016

[12] S. Chan, 'Beyond Special and Differential Treatment: Key Trends of Importance to East Asian Regionalism', 28 *Chinese Taiwan Y.B. Int'l L. & Aff.* 1 2010

[13] T. Fritz, (2005), 'Special and Differential Treatment for Developing Countries', http://germanwatch.org/tw/sdt05e.pdfaccessed on 02/03/2016

usefully be distinguished. The first phase is from the creation of the GATT in 1948 to the beginning of the Tokyo Round in 1973. The second phase is the Tokyo Round itself from 1973 to 1979. The third phase is from the end of the Tokyo Round to the end of the Uruguay Round that is from 1979 to 1995. The fourth phase is from the end of the Uruguay Round until the present.[14] After entry into force in January 1948, the first session of GATT was held from February to March in Havana, Cuba. The secretariat of the Interim Commission for the ITO, which served as the ad hoc secretariat of GATT, moved from Lake Placid, New York, to Geneva. The Contracting Parties held their second session in Geneva from August to September. After the fourth session held in 1956, a notable landmark regarding the special and differential treatment held at Ministerial level in 1957.[15]GATT published Trends in International Trade in October known as the 'Haberler Report' in honour of Professor Gottfried Haberler, the chairman of the panel of eminent economists. It provided initial guidelines for the work of GATT.[16] This report confirmed the view that developing country export earnings were insufficient to meet development needs and focused primarily on developed country trade barriers as a significant part of the problem, although the report also criticized some developing country trade barriers. On the institutional front, the shift in development thinking initiated by the Prebisch-Singer thesis was enshrined in the United Nations Conference on Trade and Development (UNCTAD), established in 1964.[17] Influenced by the founding of UNCTAD, in 1964 a new Part IV dealing with trade and development and encompassing Articles XXXVI to XXXVIII was introduced into GATT. Article XXXVI introduced for the first time the principle of non-reciprocity into the trade regime. That means the contracting parties no longer expected the developing countries to grant comparable consideration for trade facilitation accorded to them. Moreover, Part VI demanded – non-binding – facilitation of market access for products that are of crucial export interest to these countries. This also concerned the so-called tariff escalation that is customs duties which "differentiate unreasonably between such products in their primary and in their processed forms" (Article XXXVII paragraph 1(a).[18]

By the time of the second phase in the evolution of this debate (Tokyo Round, 1973-1979), the pendulum in trade policy discussions had started to swing away from import substitution and towards favouring greater export orientation. In this phase, a new framework was established to define and codify key legal rights and obligations of developing countries under the GATT. The 1979 Decision on 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', also known as the Enabling Clause, provided permanent legal cover for the Generalized System of Preferences (GSP), for SDT provisions under GATT Agreements, for certain aspects of Regional or Global Preferential Agreements among developing countries, and for special treatment for least-developed countries.[19]In the

[14] WTO: Economic and Research Department, (2004), 'Special and Differential Treatment of the WTO: When, Why and How'. http://www.wto.org/english/res_e/reser_e/ersd200403_e.doc accessed on 26/02/2016

[15] C. Michalopoulos, (2009), 'The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization',http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2388 accessed on 01/02/2016

[16] GATT, (1947), '40TH Years chronology of events and achievements', www.wto.org/gatt_docs/.../91320038.pdf accessed on 02/03/2016 or C. H. Joon, (2003), 'Kicking Away the Ladder: The 'Real' History of Free Trade. Foreign Policy in Focus Special Report', http://www.ilocarib.org.tt/trade/documents/economic_policies/SRtrade2003.pdf accessed on 01/03/2016

[17] J. Toye and R.Toye, 'The Origins and Interpretation of the Prebisch-Singer Thesis',http://johntoyedotnet.files.wordpress.com/2012/03/theoriginsandinterpretationoftheprebischsingerthesis 2003.pdf accessed on 25/02/2016

[18]T. Fritz, (2005),'Special and Differential Treatment for Developing Countries',http://germanwatch.org/tw/sdt05e.pdfaccessed on 29/02/2016

[19] WTO, 'The GATT years: from Havana to Marrakesh', http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htmaccessed on 28/02/2016

third phase, the immense political changes during the 1980s also left their mark on special treatment. The effects are visible above all in the Uruguay Round of GATT, concluded in 1995 with the establishing of the WTO. By the end of this period in 1995, when the Uruguay Round was completed, developing countries had assumed a much higher level of commitments within the system than ever before. All multilateral WTO Agreements apply equally and are equally binding on all WTO Members. The provisions of these agreements represent an inseparable package of rights and discipline which have to be considered in conjunction.[20] This single undertaking of the Uruguay Round meant that all WTO members had to accept all agreements in sharp distinction to the code approach of the Tokyo Round. This alone meant an important range of new developing country commitments within the system. Many developing countries significantly increased their tariff bindings, especially in agriculture. In addition, new agreements in services and intellectual property applied to all through the single undertaking. The fourth phase began with a significant challenge for developing countries as they prepared to absorb their new Uruguay Round obligations legislatively and administratively, although in many instances developing countries were accorded phase-in periods for the assumption of new obligations. In the Doha Declaration, ministers agreed that all special and differential treatment provisions should be reviewed, in order to strengthen them and make them more precise, effective and operational.[21] Numerous proposals were made by developing and least-developed countries. Most proposals came from the African Group and the group of least-developed countries. They usually identify parts of an agreement and suggest new wording to introduce new SDT provisions for developing countries or to strengthen existing ones. They relate to most WTO agreements, including the General Agreement on Trade in Services (GATS), the GATT and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[22]

3. Special and Differential Treatment: Definition and Overview

The term 'Special and Differential Treatment' (SDT) has a narrow meaning in the WTO. It describes preferential provisions that apply only to two groups of members: developing countries (DCs) and the least developed (LDCs).[23] This treatment should be non-reciprocal. Measures that have been recognized as SDT are granted unilaterally to developing countries from developed countries. Reciprocity, which is the fundamental principle of the WTO, does not apply to SDT measures. Furthermore, SDT should apply in a non-discriminatory manner among developing countries, irrespective of the level or per capita income or membership in certain international organization. The WTO Agreements contain special provisions which give developing countries special rights and which give developed countries the possibility to treat developing countries more favourably than other WTO Members. These special provisions include, for example, longer time periods for implementing Agreements and commitments or measures to increase trading opportunities for developing countries. There are various levels of SDT which are still being implemented. Developing countries should enjoy privileged access to the markets of their trading partners, particularly the developed countries. Developing countries should have the right to restrict imports to a greater degree than developed countries.

[20]M. Nahtigal, 'Learning from Doha: Can "Development" Be Operationalised in International Economic Law?' (2009, ASIL Proceedings)

[21]WTO: Trade and Development Committee, 'Special and differential treatment provisions: The DOHA Mandate', http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htmaccessed on 28/02/2016 and R. W. Staiger (2009), 'What Can Developing Countries Achieve in the WTO', http://www.ssc.wisc.edu/~rstaigerve /developing_wto_slides_princeton_final_printaccessed on 27/02/2016

[22]*ibid*

[23]The Danish Institute for International Studies &The Food and Resource Economics Institute, (2005), 'Special and Differential Treatment and Differentiation between Developing Countries in the WTO', http://curis.ku.dk/ws/files/8065189/SDTpolicystudy.pdfaccessed on 02/02/2016

Developing countries should be allowed additional freedom to subsidize exports. Developing countries should be allowed flexibility in respect of the application of certain WTO rules, or to postpone the application of rules. These are the most advance level of SDT treatment.[24]

The WTO classifies S&DT measures into six categories: to promote market access for developing countries; to safeguard interests of developing countries; flexibilities; transitional periods; provision of technical assistance; and flexibilities for Least Developed Countries. This is highly unsatisfactory because it mixes purposes and tools, and some of the definitions are redundant, because the last three are merely tools to achieve or rephrasing of the first three.[25] The purpose of SDT is to give developing countries a greater priority in this process, thus to allow them to give more priority to their own needs and less (not no) priority to those of others. This does not mean that development or poverty reduction should be the explicit aim of the WTO. Rather, SDT should be seen as the way of reconciling to increase world welfare through trade and development. If the WTO members now accept that the organization should aim for universal membership, in order to ensure that the benefits of certainty and predictability apply to all trade by its members, then both the possibility that some countries are permanently 'different' and the certainty that some will not share the same approach to all rules imply that the WTO must either limit its rules to those which can benefit and be accepted by all members or allow permanent derogations for countries with different economies or different approaches to economic pool.[26]

4. Special and Differential Treatment: Main Legal Provisions in GATT and WTO

Trade is not the only means of promoting development or reducing poverty. Therefore, while developed countries concerned about assisting developing countries will want to ensure that the trading system does not obstruct development, they need not use the trading system actively to promote development.[27] In the WTO legal regime, SDT has various functions. Among them are provisions providing developing countries with preferential market access in developing countries, and provisions allowing for a modulation of commitments and provisions of technical assistance and other support. There are nearly 155 provisions relating to SDT spread across the existing WTO Agreements.[28]First of all, the Marrakesh Agreement Establishing the World Trade Organization recognizes and refers to sustainable economic development as one of the objectives of the WTO.[29] It also specifies that international trade should benefit the economic development of developing and least-developed countries. It states that the Parties to this agreement are recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand,

[24]B.S.Chimni,'Developing Countries and the GATT/WTO Legal System: Some Observations', http://www.law.umn.edu/uploads/pL/nW/pLnWjeTT0mev12du94vxjQ/wto-chimni.pdfaccessed on 25/02/2016

[25]S. Page, 'Evolving Special and Differential Treatment in the Multilateral Trading System', http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4679.pdf accessed on 28/02/2016

[26] S. Page and P. Kleen, (2005),'Special and Differential Treatment of Developing Countries in the World Trade Organization, onhttp://www.worldfuturecouncil.org/fileadmin/user_upload/papers/40725_Gl_Dev_Stud_2.pdfaccessed on 29/02/2016

[27]*ibid or,*
ECOSOC,(2008), 'Achieving Sustainable Development and Promoting Development Cooperation', Accessed http://www.un.org/en/ecosoc/docs/pdfs/fina_08-45773.pdf accessed on 01/02/2016

[28] M. Tortora, (2003),'Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet', http://unctad.org/Sections/comdip/docs/webcdpbkgd16_en.pdf accessed on 28/02/2016

[29]A.Yanai, 'Institute of Development Economics: Rethinking Special and Differential Treatment', www.ide.go.jp/English/.../435.pdfaccessed on 29/02/2016

and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[30]Article XVIII and part VI of the GATT and so called Enabling Clause are particularly fundamental provisions. It states that;

> If any contracting party grants or maintains any subsidy, including any form of income or price support, indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.[31]

Article XVIII refers to the recognition of the position of developing countries and their need for derogations from some trade measures with respect to the GATT Articles, including the support of Infant Industries and remedying Balance of Payments problems. The second portion of this Article covers the export subsidies. For balancing the export subsidies, it recognizes that the granting by a contracting party of a subsidy on the export of any product may have harmful effects on other contracting parties; both importing and exporting may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.[32] For achieving this goal, the parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.[33]

[30] GATT, 'Agreement Establishing the World Trade Organization', http://www.wto.org/english/docs_e/legal_e/04-wto.pdfaccessed on 02/02/2016or A. C. Azeani, (2011), 'The WTO and Development Obligations', Anthem Press, UK and USA, or WTO, 'WTO Analytical Index: Guide to WTO Law and Practice', Cambridge University Press, Second Edition.

[31]WTO: Committee of Trade and Development,(2000), 'Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions',www.wto.org/english/tratop_e/.../w77_e.docaccessed on 26/02/2016

[32]GATT, 'Interpretation and Application of Article XVIII', http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art18_e.pdfaccessed on 27/02/2016

[33] E. Kessie, 'Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements' WTO Seminar on Special and Differential Treatment for Developing Countries, held in Geneva on 7 March 2000

It seems that Article XVIII must be read in conjunction with the Decision on Safeguard action for Development Purposes, the Declaration on Trade Measures Taken for Balance-of-payments Purposes, the Understanding on the Balance-of Payments Provisions of the GATT 1994. It gives developing countries the right to restrict imports if doing so would promote the establishment or maintenance of a particular industry, or assist in cases of balance-of-payments difficulties.[34] The Enabling Clause officially called the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' was adopted under GATT in 1979 and enables developed members to give differential and more favourable treatment to developing countries. Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES decide as follows:

1. 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.
2. The provisions of paragraph 1 apply to the following
   a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,
   b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
   c) 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, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;
   *d)*Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.[35]

The Enabling Clause is the WTO legal basis for the Generalized System of Preferences (GSP). Under the GSP, developed countries offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries. Preference-giving countries unilaterally determine which countries and which products are included in their schemes.

Part VI of GATT provides that anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. Article IV of the GATS aim to increase the participation of developing countries in world trade.[36] It refers, among other things, to strengthening the domestic services competitiveness of developing countries through access to technology and improving their access to information networks.

[34]*ibid*
[35]WTO: Legal TESTS, (1979), 'Differential and more favourable treatment reciprocity and fuller participation of developing countries', http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htmaccessed on 01/02/2016
[36]WTO, 'Agreement on Implementation of Article VI of The General Agreement On Tariffs And Trade 1994', http://www.wto.org/english/docs_e/legal_e/19-adp.pdfaccessed on 25/02/2016

Article XII allows developing countries and countries in transition to restrict trade in services for reasons of balance-of-payment difficulties.[37] Article 66 of the TRIPS Agreement provides least-developed countries with a longer time-frame to implement all the provisions of the TRIPS Agreement and encourages technology transfer. Article 67 refers to the provisions of technical assistance. Among 155 provisions of WTO relating to the SDT the WTO secretariat classified them into six broad categories. They are:

(a) Provisions aimed at increasing the trade opportunities of developing country Members; These provisions all consist of action to be taken by Members in order to increase the trade opportunities available to developing countries;
(b) Provisions under which WTO Members should safeguard the interest of developing country Members; These provisions concern either actions to be taken by Members; or action be avoided by Members, so as to safeguard the interest of developing country Members;
(c) Provisions of flexibility of commitments, of action, and use of policy instrument in rules areas for developing countries; These provision relate to actions developing countries may undertake through exemption from discipline or commitments otherwise applying to Member in general, a reduced level of commitments developing countries may choose to undertake when compared to Member in general and procedural flexibilities (e.g., simpler notification requirements, simpler procedural requirements in trade defence instruments, less frequent trade policy review, etc.)
(d) Provisions of transitional time periods; These provisions relate to time bound exemptions from discipline otherwise generally applicable;
(e) Provisions of technical assistance and other measures of support;
(f) Provisions relating to LDC Members; These provisions, whose applicability is limited exclusively to the LDCs all fall under one above five type of provisions.[38]

Provisions for SDT have been introduced into WTO (and GATT) agreements in the past without the need for a framework. The issues which are most important according to the criteria discussed here and those which have attracted most interest on the part of developing country negotiators have been in the specific negotiating areas: special treatment in all the areas of agriculture; differential cuts and special access in non-agriculture; individual needs and possibly the introduction of new safeguards in services, minimizing the costs and maximizing the benefits of Trade Facilitation.

5. A Legal Framework for S&D Treatment: Doha Round and Current Trends

The Doha mandate was an attempt by developing countries to push some of the 155 SDT provisions closer to their original expectation, by strengthening them and making them more effective and operational, if needed be, by turning some best endeavor language into firm obligations. On 1 February 2002, the Trade Negotiations Committee agreed that the mandate

[37] *ibid, p.11*

[38] M.Tortora, (2003),'Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet', http://unctad.org/sections/comdip/docs/webcdpbkgd16_en.pdfaccessed on 28/02/2016 or, C. Michalopoulos, 'Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries, www.wto.int/french/tratop_f/devel_f/sem01_f/costa_e.docaccessed on 28/02/2016or,
or WTO,(2ooo), 'Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions https://www.wto.org/english/tratop_e/devel_e/w77_e.docaccessed on 02/02/2016

from paragraph 44 of the Doha Ministerial Declaration should be carried out by the Committee on Trade and Development (CTD) in Special Sessions. The declaration,

> We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.[39]

Developed countries have accepted in the aid context as well as in SDT that developing countries need or deserve special assistance, even if this imposes some cost. The basic principle of SDT, therefore, does not need justification, but increasing it, where there are costs to the developed countries, may need the same debate as increasing aid budgets. The WTO agreements contain special provisions which give developing countries special rights.[40] These special provisions include, for example, longer time periods for implementing agreements and commitments or measures to increase trading opportunities for developing countries. In the Doha Declaration, member governments agree that all special and differential treatment provisions should be reviewed with a view to strengthening them and making them more precise. The discussions were being conducted largely in the Committee on Trade and Development. Paragraph 12 of the Declaration on Implementation-related Issues also assigned to the Committee for Trade and Development three tasks regarding special treatment:

> (i) to identify those special and differential treatment 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 special and differential treatment 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;
> (ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and
> (iii) to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules.

[39]WTO, 'Doha WTO Ministerial 2001: Ministerial Declaration', http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htmaccessed on 25/02/2016

[40] R. Newfarmer, ' Trade, Doha, Development: A New Window into Issues' https://openknowledge.worldbank.org/bitstream/handle/10986/7135/396500PAPER0Tr10082136437501PUBLIC1.pdf?sequence=1&isAllowed=yaccessed on 29/02/2016

So far, the conflicts among the Members concerned both procedural issues and substance issued of special treatment. The procedural issues arose from conflicting interpretations of the Doha mandate and concerned above all the status of the work of the Committee on Trade and Development. In the opinion of many developing countries, strengthening of special treatment demanded in the Doha mandate implies efficient modification of the WTO agreements which are not subject to trade-offs with sector. For this reasons in the Hong Kong Ministerial Declaration it established that Decision adopted by the General Council on 1 August 2004 to the TNC, negotiating bodies and other WTO bodies concerned to redouble their efforts to find appropriate solutions as a priority to outstanding implementation-related issues. It takes note of the work undertaken by the Director-General in his consultative process on all outstanding implementation issues under paragraph 12(b) of the Doha Ministerial Declaration, including on issues related to the extension of the protection of geographical indications provided for in Article 23 of the TRIPS Agreement to products other than wines and spirits and those related to the relationship between the TRIPS Agreement and the Convention on Biological Diversity. We request the Director-General, without prejudice to the positions of Members, to intensify his consultative process on all outstanding implementation issues under paragraph 12(b), if need be by appointing Chairpersons of concerned WTO bodies as his Friends and/or by holding dedicated consultations. The Director-General shall report to each regular meeting of the TNC and the General Council. The Council shall review progress and take any appropriate action no later than 31 July 2006.

But it appears that for the time being the debate has cooled over whether cross-cutting issue, such as the principle and objectives of SDT, eligibility and differentiate treatment, are parts of Doha Mandate. Much as the new focus on agreements-specific proposals is what developing countries hoped for, actual examination of the text is revealing that the proposal addresses many cross-cutting problems. As such it may be worth considering whether small textual change in specific WTO agreements can address the broader development needs that have motivated developing countries to bring forward a new text. If that proposal is to make SDT more needs of developing countries in a targeted and enforceable way, this may imply narrowing their scope and level of ambition. However, it may also imply that cross-cutting agreements pose problems for the effective treatment of developing countries in the WTO. In this case such issues must be handled with care.[41]

6. Special and Differential treatment: Scope of Developing Countries

Although the developing countries receive less attention, the work program for LDCs and small vulnerable economics are also active areas of negotiation at the WTO. Special and differential treatment is justified in cases where the following criteria apply. There is a single uniform policy inappropriate for all WTO members; broad groups of States share similar characteristics and it is possible to identify variations in the scope or implementation of WTO rules that are appropriate to the circumstances of each broad group. If every country is different, the only place to introduce modulation into WTO commitments is in the national schedules.[42]The second criteria may be focused on the developing countries increasing active participation in the regular activities of the WTO, including taking initiatives in the disputes procedures to

[41] W. Corrales-Leal, 'Special and Differential Treatment for Small and Vulnerable Countries Based on the Situational Approach',http://www.ictsd.org/downloads/2009/02/special-and-differential-treatment-for-small-and-vulnerable-countries-based-on-the-situational-approach.pdf accessed on 27/02/2016

[42]R. H. Wade, 'What Strategies Are Viable for Developing Countries Today?: The World Trade Organization and the Shrinking of 'Development Space'', *Review of International Political Economy*, Vol. 10, No. 4, Tenth Anniversary Issue (Nov., 2003), pp. 621-644

restrain unilateral actions by developed countries, but also to protect individual country interests against other developing countries. There are two fundamental ways in which developing and least developed countries have accepted differential obligations under the WTO agreements: (a) they enjoy freedom to undertake policies which limit access to their markets or provide support to domestic producers or exporters in ways which are not allowed to other members--all of which can be viewed as exemptions from WTO disciplines to take into account particular developing country circumstances; (b) they are provided with more time in meeting obligations or commitments under the agreements. In some cases, more favourable treatment involves a combination of (a) and (b).

By following the GATT (1994) Article XXXVI and the 'Enabling Clause', a developing country can exempt from WTO disciplines regarding market access provisions. By this many developing countries have not bound tariffs on their industrial products to the same extent as developed countries or have agreed to bind at substantially higher than applied levels. Similar provisions for non-reciprocity are included in GATS, Article XIX: 2 which states that 'There shall be appropriate flexibility for individual developing countries Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation. A way in which developing countries have greater flexibility in providing protection to domestic industry is through the provisions of GATT Article XVIII, which give developing countries the freedom to: (a) be able to grant the tariff protection required for the establishment of a particular industry and (b) apply quantitative restrictions for balance of payments purposes. Since the establishment of WTO, there have been very few instances in which these provisions have been actually invoked. The final way in which special and differential treatment is provided in the WTO is through the provision of extension in the time frame over which certain obligations under the agreements are to be implemented by developing and least developed countries. Flexibility in transition times is provided in practically all the WTO Agreements, with the exception of the Agreement on Anti-Dumping Procedures and on Pre-shipment Inspection. Time extensions are provided for a variety of obligations assumed especially under the TBT, SPS and TRIPS agreements.

7. Problem Regarding SDT

Numerous discussions have been held about the problems of SDT. Some of them criticized the ambiguity of the definition of developing countries which determine eligible countries for SDT.[43] The is no clear and agreed definition of developing countries given by the WTO in spite of a weaker approach to define developing countries initiated by the World Bank a few years ago. Developing country status under the WTO system had been based on the principle of self-declaration.[44]The other problem is that large areas of "new" trade policy are without any legally enforceable SDT. In the same vein, many developing countries see a problem with the lack of "hard law".[45]The legal basis of SDT is not clear either. The development process of SDT showed us that the codification of the principles was not intended to set up legal norm; rather it was the result of political compromise between developed and developing countries. Regarding the Enabling Clause as a legal basis of SDT is still ambiguous. To solve this problem, many researchers suggested that a differentiation among the developing countries has to be set up as soon as possible. In order to make SDT more operational, it should be re-emphasized that differentiation among developing countries is necessary. 'Common but

[43] A Yanai, 'Rethinking Special and Differential Treatment in the WTO' http://www.ide.go.jp/English/Publish/Download/Dp/pdf/435.pdf

[44] *ibid*

[45] C. Stevens, 'If One Size Doesn't Fit All, What Does: Rethinking Special and Differential Treatment in the World Trade Organization' *IDS Bulletin Volume* 34 No 2 2003

differentiated responsibility' principle in International Environmental Law may apply here to differentiate among the developing countries. Besides, there are no agreed measures of 'level of development'. Different political priorities would determine what weight should be given to different indicators. It would be very difficult to establish indicators of a country's ability and institutional capacity to undertake commitments, or to agree as to who should make such an assessment. Even if indicators could be agreed upon, the fact that SDT represents a balance between a country's needs and the damage to others from relaxing an agreed rule means that the boundary must be negotiated. If countries attempt to define criteria, the choice of criteria will be influenced by their knowledge of where they will fall. The most fundamental development criterion for SDT is that, in the area being negotiated, a "one size fits all" approach would not necessarily be appropriate. Almost all WTO members adopt this principle to a greater or lesser extent in their domestic economic policy. Many countries have differential economic policies to favour peripheral regions or disadvantaged social groups. This is in recognition of the political, if not the economic, necessity to treat some areas/groups differently from others. Such considerations apply *a fortiori* at the global level.[46]

8. Assessment of SDT and recommendation: Is WTO Doing Enough?

This review of the provisions in the GATT and WTO shows that in the last fifty years, developing countries succeeded in establishing the principle that the trade rules applying to them and to the LDCs will be in many ways different from those which apply to other WTO members.[47] While increasing their commitments regarding various aspects of their participation in the international trading system, they ensured that this participation is guided by the principle of special and differential treatment, which itself was amplified in a number of ways, especially regarding the provision of technical assistance and additional transitional periods for the implementation of their WTO commitment.[48] Various recommendations are apt for the betterment of SDT measures and more helpful for developing countries.

- Some countries, developed and developing, see a need for a framework to give legal standing to SDT across WTO rules. Let there be an agreed view of development as an objective, outside or above the specific aims of individual trade agreements. At least some interest of developing countries should remain outside the normal flow of trade negotiation.
- There are proposals to make both trade preferences and technical assistance to trade both bound in the same way as other obligations under the WTO. These proposals suggest that developing countries have interest within the institutions; strengthening their ability to use such institution is seen an essential part of development.
- Some countries will have a measurable negative outcome from any significant liberalisation of trade because their losses from preference erosion will be greater than their gains from other parts of the agreements. These countries need non-repayable support in order to be able to make the investments in physical and human infrastructure and in productive capacity to permit alternative production, adapted to the new trading

[46] Dr. A. Singh, 'Elements for a New Paradigm On Special and Differential Treatment: Special and Differential Treatment, The Multilateral Trading System and Economic Development in the 21st Century', http://www.networkideas.org/feathm/aug2003/SDT.pdfaccessed on 29/02/2016

[47]B. Hoekman, 'More Favourable Treatment for Developing Countries: Ways Forward' http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1126812419270/17.MoreFavorable.pdfaccessed on 28/02/2016

[48] C. Stevens, 'The Future of Special and Differential Treatment (SDT) for Developing Countries in the WTO' IDS Working Paper 163, September 2003 https://www.ids.ac.uk/files/dmfile/Wp163.pdfaccessed on 27/02/2016

conditions. The increase in world welfare suggests that there is scope to direct funding to them.

- Notification Process would be no more onerous than the similar requirement for regions, but would confirm that preferences are part of the WTO system, not independent of it. Temporary binding could also be used in other types of agreement, for example, if countries wanted to offer special access to developing countries on services. Combined with clarifying the obligations on transparency and non-discrimination, whether through interpretation or modification of the existing rules, this could improve the consistency of preferences with the WTO system. Developed countries could also make existing SDT work well by publicizing it. Finally, donor countries in the WTO should give much higher priority to the question of simplifying and harmonizing rules of origin – both preferential and non-preferential.
- Where SDT provisions are binding, the normal WTO mechanisms, complaints from damaged countries and dispute settlement, are the formal control. As long as some SDT is not binding, and as long as some developing countries believe that they do not have the capacity to monitor developed countries' performance, there may be a need to supplement these, for example, by finding an equivalent to the Trade Policy Review Mechanism that could assess overall outcomes.
- Many of the proposals for a 'monitoring mechanism' are proposals for developed or developing countries to check whether the other 'side' is performing 'properly', that developed countries are treating as binding all the unbinding provisions of SDT or that developing countries are using all their opportunities in the trading system and turning into replicas of the developed.

SDT cannot be a substitute for national or international development strategies. But development is important and should not be hindered by the WTO. If possible, the WTO should promote it, but the WTO is a trade organisation. It functions by negotiation, and works best by offering a way for different interests and different approaches to operate without conflict, not by trying to achieve an agreed purpose. This is in some ways closer to the regulatory approaches of the GATT than to the exhortatory expression of the Development Round.[49] But it does not mean that the WTO should be neutral about development. It can encourage reforms and rules that promote development and a more coherent international system could assist countries for whom adjustment is difficult. SDT can be argued for on the basis of development need or self-interest.

9. Conclusion

The current SDT debate in the WTO has old and new elements. The old element springs largely from the post-Uruguay Round situation, where developing countries assumed a wide array of additional policy obligations under the WTO as result of the single undertaking. The quest for changes to these provisions through the implementation debate and the post-Doha SDT exercise has so far yielded few results. There are a number of reasons for this, relating both to the manner in which the issues have been approached and the degree of willingness of Members to make legal changes to provisions outside a negotiating framework. A more analytical approach to a sub-set of proposals on the table that carry real implications for the development prospects of developing countries might yield a more fruitful outcome. This "backlog" of SDT issues cannot be ignored where existing provisions can be shown to hamper development. The new element in the SDT debate relates to negotiations under the Doha mandate. Here, there is

[49] A. Singh, 'Special and Differential Treatment, The Multilateral Trading System and Economic Development in the 21st Century', *MRPA Paper* no 24653, August 2010.

easier opportunity to be innovative in the design of SDT provisions to ensure that they are adequately "customized" and respond to a clear and systematic formulation of the national economic interest. It would be regrettable if dissension around the old SDT agenda were allowed to obscure the search for constructive approaches in the current negotiations. Developing countries should assume WTO obligations to reflect an appreciation of the adjustment costs of change as well as administrative and infrastructural capacity needs that might be associated with implementation. But such flexibility should not be a blank cheque, as implied by some proposals in the post-Doha SDT exercise. Neither should SDT be a blunt or mechanical instrument made available on uniform terms to all developing countries. Reliance on discretionary decision-making by WTO Members as to the terms and conditions of access to SDT on the part of individual Members should also be avoided.