SPECIAL AND DIFFERENTIAL TREATMENT (SDT) IN THE WTO AGREEMENTS: A RULE-BASED APPROACH

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Abstract

Members of the World Trade Organization (WTO) hold varying opinions regarding the status of developing countries as WTO members and Special and Differential Treatment (SDT), which reflects various perspectives on what constitutes fair treatment in the WTO. These discrepancies have now became more noticeable, which presents a problem for the organization. The definition of a developing country member, graduation, the efficacy of SDT, and technical support and capacity building have all been complicated topics explored in SDT discussions. Some of the WTO develop country members have suggested modifying the definition of developing country in regard to the Special and Differential Treatment (SDT) in the WTO agreements using a political and economic perspective. As the forum for negotiating agreements aimed at reducing barriers to international trade and ensuring a level playing field for all, the World Trade Organization (WTO) must be able to contribute to economic growth and development regardless of a country member's constitutional or socioeconomic structure, as well as foster peaceful cooperation among nations. The initiative of these members must, of course, be supported by the WTO, which role as the guarantor of the multilateral trading system, and as a bulwark against all forms of protectionism, while recognizing the developmental needs, as well as, the full WTO rights and obligations of members. The WTO can also, among other things, encourage all WTO members participating in plurilateral and multilateral initiatives to take a new approach to SDT in ongoing and future negotiations. Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law. By reviewing all laws and regulations that are connected to the status of developing countries as WTO members and Special and Differential Treatment (SDT), the author employs a "rule-based approach" in this article as set forth in article 31 of the Vienna Convention on the Law of Treaties, to analyze and respond to the question of what constitutes a member from a developing country as a beneficiary of SDT in order to achieve the goal of the World Trade Organization (WTO) which primary purpose is to open trade for the benefit of all.

Keywords : World Trade Organization (WTO), Multilateral Agreements, Special and Differential Treatment (SDT), Developing Country, Rule-Based Approach.

I. Background

There is no official WTO classification for developing and developed members; rather, WTO members self-identify as either developing or developed. Members are entitled to SDT, or more lenient and favorable terms in WTO agreements, such as longer timetables to implement legal commitments, if they have developing-country status.

SDT provisions are a common feature of WTO agreements, including the General Agreement on Tariffs and Trade (GATT) and the goods-related agreements, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS).

Discussions about which WTO members should benefit from developing country member status in future legal commitments have gained prominence particularly since 2019 in the past few years. Certain members challenge self-designation, arguing, in particular, that it is not appropriate for emerging economies to claim developing-member status and benefit from flexibilities that should be limited to members in earlier stages of development.

The United States (US) has been especially vocal in asserting that self-declaration damages the negotiating function of the WTO because developed countries are then reluctant to make concessions to smaller economies if large emerging ones also benefit from such flexibilities. Other members, such as the the European Union (EU), Canada and Japan, have also called for changes to the existing approach. The EU, for example, argues that "it is not sustainable that two thirds of the membership including some of the world's most significant economies claim Special and Differential Treatment" (European Commission, 2021).

In November 2019, the United States (US) proposed what it saw as criteria for determining which members could not avail themselves of SDT in current or future WTO negotiations. According to the proposal, a member would not be granted SDT flexibilities if, for instance, it is a G20 member, an OECD member or acceding member, or if it accounts for more than 0.5% of global merchandise trade.

Most developing country members, however, oppose forgoing the right to self-designate their development status. Consequently, they are against fixed criteria defining whether they should be treated as a developing or a developed member and therefore entitled to SDT. Moreover, they argue that discussions should instead focus on strengthening SDT provisions and making them more effective. They also argue that SDT is a treaty embedded right (China et al., 2019). In

recent years, however, some WTO members, including Brazil, Korea and Chinese Taipei, have announced that they would not seek SDT flexibilities in future WTO agreements.[1]

In line with the US proposal, many suggest that objective parameters and criteria should be adopted to clearly define which members should benefit from SDT in future WTO agreements.

It may be noted that a Decision was taken at the Bali Ministerial Conference in December 2013 to establish a Monitoring Mechanism on SDT (WT/MIN(13)/45 – WT/L/920). According to the Decision, the Monitoring Mechanism - which operates in Dedicated Sessions of the Committee of Trade and Development (CTD) - is to act as a focal point within the WTO to analyse and review the implementation of SDT provisions. The monitoring of special and differential provisions in the Mechanism is 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. To date, no written submissions from Members have been made.[2]

The issue of developing-country status matters for the entire WTO membership; if we leave the issue unaddressed, such concerns will be an obstacle to advancing negotiations in the WTO, impacting its relevance and compromising its credibility.

The WTO has operated as an international organization that prioritizes the activities not only of regulating and managing global trade but also creating and defending the law, such as investigation, arbitration, and judication, based on the global trade rules it has established.

To achieve one of the WTO's objectives, which is to resolve disagreements among its members over how to interpret and implement the agreements, It is necessary to conduct research using a statutory approach that studies and discusses, especially in terms of Special and Differential Treatment (SDT) provisions that have been implemented to date by beneficiary countries and then provide answers to the objections raised by the US regarding the use of SDT by developing countries.

II. Research Methodology[3]

[1] https://www.g20-insights.org/policy_briefs/trade-and-development-in-the-wto-toward-a-constructive-approach-to-the-issue-of-development-status-and-special-and-differential-treatment/ accessed on October 15, 2022, 20.15 p.m

[2] WT/COMTD/W/258, 2 March 2021, Committee on Trade and Development, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/W258.pdf&Open=True accessed on November 1, 2022, 20.00 p.m

[3] http://repository.uib.ac.id/1076/6/S_1451040_chapter3.pdf , accessed on November, 19, 2022, 22.15 p.m

II.1. Type of Research

While composing this article the author uses a normative legal research is referred to be a study of documents that uses a qualitative approach of data analysis and depends on secondary data sources including rules, court rulings, books, legal theories, and doctrines.

Because normative legal research includes an interpretation of hermeneutic nature, which is described as the process of transforming something unknown into something known and understood, the author in this study uses normative legal research to examine the data.

Normative legal study is also conceptual because it examines the law as a norm as well as how it functions in society's norms and regulations. Normative research comes in seven different flavors, including:

1. Positive Law Inventory Research.

   Through the use of critical-analytical and logical-systematic methods, this study pinpoints positive law.

2. Legal Principles Research.

   In this study, articles that include the rule of law are chosen, clarified, and then analyzed using legal concepts before being rebuilt.

3. Clinical Law Research

   By gathering positive legislation in abstrct, the aim of this study is to ascertain the legal prerequisites for a case in contra. Legal standards are the major premise of this kind of research, while the case's facts are the minor premise.

4. Legal Research on Regulation Structures.

   The collection of all regulations as a research subject is the initial step in this study. Second, to define the object in light of the regulation's timeline. The final phase is to build the research based on the basic understanding of the legal system, which is the third step after analyzing the fundamental knowledge of a legal system.

5. Legal Research on the Synchronization of Regulation.

   The regulation's synchronization can be examined either vertically or horizontally. The regulation will be evaluated based on its hierarchy if the synchronization of the regulation is reviewed vertically. When rules are synchronized and examined

horizontally, the research's goal is to identify the regulations' advantages and disadvantages. Researchers may offer recommendations for potential ammandements to the regulations in this area.

6. Legal History Research.

   The purpose of the study is to understand how various legal disciplines evolved. This kind of research tries to expose historical legal truths in connection to contemporary legal facts.

7. Comparative Law Research.

   The study seeks to compare the legal systems or regulations of various states.

Using the seven types of normative research mentioned above as a guide, the researcher chooses clinical law research because it aims to establish the legal requirements of a contentious issue, in this case, objections to the uncertainty of the treaty term regarding the development status of WTO member countries as the beneficiaries of the SDT provision.

II.2. Type of Data

Doctrinal method is another name for a normative research methodology. The normative legal research approach, also known as qualitative legal research, is typically referred to as a study of documents that employ secondary data as their source, such as court rulings, doctrines, rules, legal theory, or government papers, books, reports, and journals.

The author of this article draws on secondary data for this study, which includes of primary, secondary, and tertiary legal sources. The data used in this investigation includes the following details:

1. Legislation, official documents, or minutes used in the creation of laws and regulations are examples of primary legal sources. The following WTO agreements were utilized by the author:

SPECIAL AND DIFFERENTIAL TREATMENT (SDT) PROVISIONS IN WTO AGREEMENTS
MULTILATERAL AGREEMENTS ON TRADE IN GOODS
1. General Agreement on Tariffs and Trade (GATT) 1994

2. Understanding on the Balance-of-Payments (BoP) Provisions of the General Agreement on Tariffs and Trade 1994
3. Agreement on Agriculture (AoA)
4. Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)
5. Agreement on Technical Barriers to Trade (TBT)
6. Agreement on Trade-Related Investment Measures (TRIMs)
7. Agreement on Implementation of Article VI of the GATT 1994
8. Agreement on Implementation of Article VII of the GATT 1994
9. Agreement on Import Licensing Procedures
10. Agreement on Subsidies and Countervailing Measures
11. Agreement on Safeguards
12. Agreement on Trade Facilitation (TFA)
13. General Agreement on Trade in Services (GATS)
14. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)
15. Understanding on Rules and Procedures Governing the Settlement of Disputes

PLURILATERAL TRADE AGREEMENTS

Agreement on Government Procurement (GPA)

MINISTERIAL, GENERAL COUNCIL AND OTHER RELEVANT DECISIONS PROVIDING SPECIAL AND DIFFERENTIAL TREATMENT (SDT) TO DEVELOPING AND LEAST DEVELOPED COUNTRIES

1. Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries - Decision of 28 November 1979 (Enabling Clause - L/4903)
2. Decision on Measures in Favour of Least Developed Countries (15 December 1993)
3. Decision on texts relating to minimum values and imports by sole agents, sole distributors and sole concessionaires (15 december 1993)
4. Decision on measures concerning the possible negative effects of the reform programme on least developed and net food-importing developing countries (15 december 1993)
5. Preferential Tariff Treatment for Least Developed Countries – Decision on Waiver – 15 June 1999 (WT/L/304)
6. Accession of Least Developed Countries – Decision of 10 December 2002 (WT/L/508)
7. The implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540 and WT/L/540/Corr.1) - Decision of 30 August 2003

8. Modalities for the Special Treatment for Least Developed Country Members in the Negotiations on Trade in Services – Adopted by the Special Session of the Council for Trade in Services on 3 September 2003 (TN/S/13)

9. Amendment of the TRIPS Agreement (WT/L/641) – Decision of 6 December 2005

10. Other Decisions in Favour of Least Developed Countries – Annex F of the Hong Kong Ministerial Declaration adopted on 18 December 2005 (WT/MIN(05)/DEC)

11. Transparency Mechanism For Regional Trade Agreements – Decision of 14 December 2006 (Wt/L/671)

12. Transparency mechanism for preferential trade arrangements – decision of 14 december 2010 (wt/l/806)

13. Preferential Treatment to Services and Service Suppliers of Least Developed Countries - Decision of 17 December 2011 (WT/L/847)

14. Accession of Least Developed Countries - Decision of 25 July 2012 (WT/L/508/Add.1)

15. Extension of the Transition Period under Article 66.1 for Least Developed Country Members - Decision of the Council for TRIPS of 11 June 2013 (IP/C/64)

16. General Services - Ministerial Decision of 7 December 2013 (WT/MIN(13)/37 - WT/L/912)

17. Public Stockholding for Food Security Purposes - Ministerial Decision of 7 December 2013 (WT/MIN(13)/38 - WT/L/913)

18. Understanding on Tariff Rate Quota Administration Provisions of Agricultural Products, as defined in Article 2 of the Agreement on Agriculture - Ministerial Decision of 7 December 2013 (WT/MIN(13)/39 - WT/L/914)

19. Cotton – Ministerial Decision of 7 December 2013 (WT/MIN(13)/41 - WT/L/916)

20. Preferential Rules of Origin for Least Developed Countries – Ministerial Decision of 7 December 2013 (WT/MIN(13)/42 – WT/L/917)

21. Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least Developed Countries – Ministerial Decision of 7 December 2013 (WT/MIN(13)/43 - WT/L/918)

22. Duty-Free and Quota-Free Market Access for Least Developed Countries – Ministerial Decision of 7 December 2013 (WT/MIN(13)/44 - WT/L/919)

23. Public Stockholding for Food Security Purposes – Decision of 27 November 2014 (WT/L/939)

24. Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products – Decision of the Council for TRIPS of 6 November 2015 (IP/C/73)

25. Least Developed Country Members – Obligations under Article 70.8 and Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products – Decision of 30 November 2015 (WT/L/971)

26. Public Stockholding for Food Security Purposes – Ministerial Decision of 19 December 2015 (WT/MIN(15)/44 - WT/L/979)
27. Export Competition – Ministerial Decision of 19 December 2015 (WT/MIN/(15)/45 - WT/L/980)
28. Cotton - Ministerial Decision of 19 December 2015 (WT/MIN(15)/46 - WT/L/981)
29. Preferential Rules of Origin for Least Developed Countries – Ministerial Decision of 19 December 2015 (WT/MIN(15)/47 - WT/L/917/Add.1)
30. Implementation of Preferential Treatment in favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade – Ministerial Decision of 19 December 2015 (WT/MIN(15)/48 - WT/L/982)
31. Fisheries Subsidies – Ministerial Decision of 13 December 2017 (WT/MIN(17)/64-WT/L/1031)

2. Secondary legal documents are those that provide explanations for the primary legal materials already in existence. They also enable academics to conduct further research and gain a deeper grasp of the subject. Journals, books, reports, and online resources make up secondary legal sources.
3. Tertiary legal publications, such Black's Law Dictionary, the English Dictionary, Wikipedia, and encyclopedias, explain the primary and secondary legal texts.

II.3 Data Collection Technique

Each and every data point included in this research, which is normative legal research, is secondary data. The author in this article therefore mostly use the library research method. The research process entails gathering all relevant information on Special and Differential Treatment (SDT) in WTO Agremeents and Decisions from legal documents, academic journals, books, websites, and dictionaries.

II.4. Data Analysis Method

Data analysis comes in two flavors: qualitative and quantitative methodologies. The method of inquiry known as qualitative research is used in a variety of academic fields, usually the social sciences but also in market research and other situations. This approach is an introspective type of research that depends on the researcher's interpretation of carefully monitored observation. Instead of testing a hypothesis, qualitative research frequently aims to provide an answer to a query. In contrast to inquiries about "how many" or "how much," which are addressed by quantitative methods, these approaches seek to provide answers to concerns concerning the "what,"

"how," or "why" of a phenomenon. Instead of creating "test conditions," qualitative researchers look at social processes that are already underway or analyze documents or artifacts that are involved in, or have an impact on, the processes they are studying.

The qualitative approach is the author's method of choice for this study, which analyzes legislative legislation and international law to the implementation of SDT in WTO agreements and Decisions using rules, books, journals, and other materials.

The steps to analyze data are conducted based on the following procedure :

1. Data Collection

   Assembling information and documentation on the implementation of SDT concerning the developmental status of WTO country members and WTO agreements and decisions that are relevant to the issue.

2. Data Classification

   Classifying all of the collected data, in this regard, the contents of WTO agreements and decisions relevant to the issue of SDT implementation concerning WTO country members' developmental status into the arguments, explanations of expert, and the legal bases.

3. Conclusion

   To find the answers to the research questions, all the data gathered during the study will be assembled and examined. How to get a conclusion about AIRAC (Answers, Issues, Rules, Analysis, and Conclusion).

III. Special and Differential Treatment (SDT) in the WTO Agreements: A Rule - Based Approach

III..1. Background[4]

The use of Special and Differential Treatment (SDT) in the World Trade Organisation (WTO) has attracted a great deal of academic attention and it is widely debated whether SDT is a development tool (aimed at addressing the problems of developing countries) or a trade tool (to support the integration of developing countries into the trading system). Furthermore, the

[4] Aniekan Ukpe & Sangeeta Khorana, "Special and Differential Treatment in the WTO: Framing Differential Treatment to achieve (real) development", https://www.emerald.com/insight/1477-0024.htm accessed on November 1, 08.45 a.m

accessibility of SDT by members at[5] different levels of development is long overdue for reconsideration. This article aims to achieve one of the WTO's goals, which is to resolve disputes among its members regarding how to interpret and apply the agreement by using a statutory approach. It studies and discusses the agreement, particularly in terms of the Special and Differential Treatment (SDT) provisions that have been implemented thus far by beneficiary countries, and then offers responses to the concerns voiced by the US regarding the use of SDT by developing countries.

Traditionally, SDT was designed to help developing countries to develop their economies through exports and to enable them to pursue policy options that they considered appropriate for development. Discussions have, however, continued to rage in the academic and policy domains on how best to streamline SDT to align with developing countries' national economic development strategies and invariably, better respond to their development needs. The focus has since changed and the justification for SDT is now to support developing countries to overcome problems faced in implementing trade commitments. Furthermore, there is growing dissent against the "one size fits all" principle of SDT, including calls to introduce a higher level of differentiation between developing countries. The objection has been underscored by former US Trade Representative, Robert Zoellick and former EU Commissioner for External Trade, Peter Mandelson. They both expressed concerns on the need to ensure the "right degree of differentiation" for a robust SDT regime that addresses the needs of developing countries in the WTO. The Trump administration has explicitly sought changes to the flexibilities provided and has claimed that SDT reflects an outdated dichotomy between developed and developing countries, such that the need for countries to "self-declare" their developing country status amplifies the problem. While there is a lack of support for SDT as a growth-promoting strategy, there is also an emerging need for further research that explicitly tackles the challenges that it presents. Past WTO Rounds, inextricably linked SDT negotiations to introducing differentiation between developing countries, suggesting that an ambitious SDT regime can be achieved as a trade-off for differentiation amongst beneficiaries. While developing countries on their part made no pretext about the rejection of the principle of differentiation, SDT continues to be couched in a vague and faded language without specific

[5] https://www.emerald.com/insight/content/doi/10.1108/JITLP-08-2020-0052/full/html accessed on October 19, 2022, 14.25 p.m

objectives and measures. In effect, SDT talks at the multilateral level have remained deadlocked for over two decades.

This article will discuss the rule-based approach that will be used to answer US objections regarding the unclear definition of developing countries as SDT beneficiaries in international trade. The structure of the article is as follows:

1. Section 1 explained the background of this article, namely the existence of US objections regarding the unclear definition of developing countries as SDT beneficiaries in international trade.
2. Section 2 explains the research methodology used to compile this article, which includes the type of research, type of data, data collection technique, and data analysis method.
3. Section 3 explained the Special and Differential Treatment (SDT) in WTO Agreements, including SDT issues and approaches to differentiation, as well as the reform proposal as the basis for the selection of the approach method in this article's discussion.
4. Section 4 reviews the SDT implementation in WTO agreements using a rule-based approach as set forth in Article 31 of the Vienna Convention on the Law of Treaties as well as giving recommendations to the WTO Ministerial Conference on the monitoring of SDT implementation;
5. Section 5 offers conclusions.

III..2. Special and Differential Treatment (SDT) Issues

III.2.1. The definition of "Developing Country"[6]

[6] https://www.emerald.com/insight/content/doi/10.1108/JITLP-08-2020-0052/full/pdf?title=special-and-differential-treatment-in-the-wto-framing-differential-treatment-to-achieve-real-development accessed on November 2, 2022, 10.30 a.m

The present categorisation of developing countries at the WTO applies to a wide range of countries that, in reality, are disparate in terms of their level of development. The category of LDCs, created by the UN in 1971 and adopted by the WTO, is the only formal categorisation reflecting the least developed amongst the developing countries. Under the Enabling Clause deeper flexibilities such as longer transition periods to implement disciplines and deeper preferences in the context of preferential trade programmes, are accorded to the LDCs.

The concept of "developing countries" can be traced to the provision of GATT where Article XVIII of GATT 1947 gave developing countries the right to protect infant industries and use trade restrictions for balance-of-payments purposes. Articles XXXVI, XXXVII and XXXVIII of GATT 1994 subsequently recognised the special needs of developing countries and exempted them from making reciprocal concessions during trade negotiations.

Article XVIII(1) provides that:

> [t]he contracting parties recognise that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development.

Paragraph 4(a) of the Article explains its purpose as being to allow a contracting party, whose economy "can only support low standards of living and is in the early stages of development", to be free to deviate temporarily from the provisions of the other Articles of the GATT under prior defined circumstances. This is, perhaps, the closest that the GATT/ WTO system has come to defining "developing countries". Reading Paragraphs 1 and 4(a) of Article XVIII together, highlights the two criteria to support the identification of a developing country. The first is "low standard of living" and the second is "in the early stage of development". Cue, however, raises questions on how low the standards of living should be and at what stage of development can a country qualify to be in an "early stage of development". Annex I to the GATT provides an insight in respect of both criteria. By "low standards of living", it urges members to consider the normal position of

that economy rather than the exceptional circumstances such as those that may result from the temporary existence of exceptionally favourable conditions. In the case of "early stage of development", Annex I explains that the phrase is not meant to apply only to contracting parties that have just started on the process of economic development, but applies to contracting parties whose economies are undergoing industrialisation to reduce their dependence on primary products' production.

The explanation in Annex I on how to identify a developing country, however, falls short of establishing any objective criteria to guide an attempt to draw up a list of "developing countries". The language used in attempting a definition lacks any legal precision and is, at best, a guide in which the phrases of "low standards of living" and "in the early stage of development" should be interpreted. Citing Ceylon-Article XVIII Applications, illustrates the arbitrariness that underlies such criteria in defining "developing countries". In this case, Ceylon had applied to the GATT Working Party under Article XVIII to seek exemption for a period of 10 years to impose quantitative restrictions on the importation of specified petroleum products if at any time this should prove necessary to ensure the development and operation of the domestic, petroleum refinery. In examining Ceylon's application, the GATT Panel had to first consider whether Ceylon was eligible under paragraph 4(a) of Article XVIII. Going by the criteria of "low standards of living", the Panel found that the gross national product (GNP) per capita for Ceylon in 1955 was US$128. This was higher than the GNP per capita of countries such as Burma and India, but lower than that of Greece, Cuba and the Dominican Republic and very substantially lower than the GNP per capita of industrialised countries in Western Europe. To examine the criteria and decide whether Ceylon was "in the early stage of development", the Panel based its consideration on the share of manufacturing, mining and construction in the country's GNP. This share (including mining, a primary industry) was found to be about 10%, a figure lower than that of Burma and Greece and substantially lower than that of developed industrial countries. Cui considers the Panel's preference for GNP per capita over the gross domestic product (GDP) per capita or other

national income indicators, in the determination of both “low standards of living” and “in the early stage of development” as arbitrary. This is given that the Panel provided no reasons for the preference. Cui made the same point in respect to the Panel’s inclusion of mining in the calculation of the share of certain industries relative to the GNP. He opines that albeit, the Panel’s choice was seemingly arbitrary it was justified because there was no provision in GATT Article XVIII to govern such issues. Nevertheless, the use of socioeconomic indicators to categorise countries by their level of economic development is widespread. The World Bank and the Organisation of Economic and Cooperation Development (OECD) use economic criteria such as GNP per capita; vulnerability index; social criteria such as human development indexes and institutional criteria such as governance and freedom index. However, these indicators generally fail to specifically address trade-related concerns of developing countries. Also, the very fact that they seek to measure broad development issues for which the WTO has no mandate makes them unsuited for the WTO.

III.2.2. Self Designation for Qualification

Self-designation is a means for developing countries to qualify for SDT at the WTO. Rolland acknowledges that WTO members self-designate in a bid to secure the benefits of various SDT provisions. She, however, notes that the claim is not consistent with reality. In reality, while individual countries are at liberty to self-designate, such self designation is subject to scrutiny by other WTO members. Any member that challenges a claim by another to developing country status bears the burden of disproving the claim as opposed to any expectation on the claimant to prove its claim. Nevertheless, accepted practice suggests that the self-designating country/claimant may bear the burden of demonstrating that it meets the requirements to benefit from the SDT.

Implicit in the practice of self-designation is that a country at a different level of development can claim the status of a developing country and, once claimed, that country is entitled to SDT, irrespective of its capacity or level of development. The problem with such an across-the-board approach is that it fails to respond to actual development needs and in some cases even creates unfair competition between developing countries for trade opportunities. For instance, a small country, like Gambia with a GDP per capita as low as US$528 in 2014 has to compete with a large developing country like Mexico with a GDP per capita of almost US$10,000 in 2015. Of course, Gambia is already prejudiced from the onset, in terms of the level of its resources and capacity and does not stand a chance to favourably compete with Mexico. This underscores the point that the WTO must ensure a level playing field, not just between developed and developing countries, but also between developing countries.

III..3.Approaches to Differentiation and Proposals for reform.

The ability to develop countries to implement and benefit from the implementation of WTO rules and disciplines varies, depending on factors such as their institutional capacity, income, size and level of development. This underscores the need for differentiation between countries to appropriately determine which rules should apply to which countries at any point in time. This raises the following questions: – which developing countries can benefit from implementing a specific rule such that the benefits exceed implementation costs? Which country requires SDT before it is able to implement such rules? The rationale for these questions is that some developing

countries do not have the capacity to implement the rules even if these were beneficial. They would require some support to be able to implement the rules and reap associated benefits. Differentiation, thus, becomes important to sort developing countries effectively to achieve development. The WTO specifically recognizes and differentiates between developing countries. Indeed, efforts to differentiate between developing countries for the purpose of determining SDT eligibility are consistent with the letter and spirit of WTO law . It remains, however, that "objective criteria", which should serve as the basis for such differentiation across WTO agreements are yet to be clearly articulated.

III.3.1. Country – Based Approach

Country-Based Approaches tend to group countries at a similar development level and context for the purpose of SDT application. The grouping could either be based on geographical or socio-economic criteria. The rationale for the geographical approach is that huge diversities exist in respect of the development and trade needs of countries in the same regional grouping. For instance, the development situation and trade needs of Sub-Saharan countries such as the Gambia, South Africa and Kenya, depicts huge variance that would require differential treatment to achieve the objective of SDT in the WTO. Albeit, we earlier questioned the propriety of using socioeconomic indicators to categorise countries at the WTO, using them to determine countries' eligibility for SDT holds huge prospects for successfully reforming SDT in the WTO.

Hoekman and Paugam and Novel suggest what is a hybrid (of the country-based approach and a rules-based approach) which identifies an "LDC+" group that would be required to comply with the "core" WTO principles of non-discrimination, prohibition of quantitative restrictions, tariffs binding and transparency. They argue that some WTO disciplines may generate significant implementation costs and prove unsuited to particular developing countries' circumstances, especially for low-income countries. Thus, it is important to ensure that countries have the scale needed for benefits to exceed implementation costs before implementing a rule in issue. This approach would require redefining the existing three-fold country classification at the WTO. Hoekman et al., suggest that stricter economic-based criteria would be required to regroup countries along the lines of income levels and institutional capacities such that only low-income and small economies should qualify for SDT.

III.3.2. Rule – Based Approach

The rules-based approach aims to define objective criteria for SDT eligibility on an agreement-by-agreement basis. Stevens suggests that such an approach is based on the premise that eligible countries must share a set of differences that are directly related to the rules for which SDT is proposed. Hoekman et al. propose that the rules-based approach involves country-based criteria that are applied on an agreement-by-agreement basis to determine whether (when) agreements should be implemented. Essentially, countries that exhibit similar "differences" in respect to a particular rule for which SDT is required, must be accorded such SDT. However, whether the same group of countries receives SDT in respect of another rule is an entirely independent consideration.

IV. A Rule-Based Approach to the Review of Special and Differential Treatment (SDT) Implementation in WTO Agreements.

IV.1. The Special and Differential Treatment (SDT) in WTO Agreements and Ministerial, General Council and other relevant Decisions providing Special and Differential Treatment (SDT) to Developing and Least Developed Countries

There are no WTO definitions of "developed" and "developing" countries. Members announce for themselves whether they are "developed" or "developing" countries. However, other members can challenge the decision of a member to make use of provisions available to developing countries.

That a WTO member announces itself as a developing country does not automatically mean that it will benefit from the unilateral preference schemes of some of the developed country members such as the Generalized System of Preferences (GSP). In practice, it is the preference giving country which decides the list of developing countries that will benefit from the preferences.[7]

There is no WTO definition for developing country terminology in the WTO Agreements that contains SDT provisions. Arrangements regarding Special and Differential Treatment (SDT) are found in the WTO agreement as follows:

[7] https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm accessed on November 1, 2022, 20.00 p.m

Table.1.SPECIAL AND DIFFERENTIAL TREATMENT (SDT) PROVISIONS IN WTO AGREEMENTS[8]		
MULTILATERAL AGREEMENTS ON TRADE IN GOODS		
General Agreement on Tariffs and Trade (GATT) 1994		
The General Agreement on Tariffs and Trade (GATT) 1994 contains a total of 25 special and differential provisions. These provisions which are contained in Articles XVIII, XXXVI, XXXVII and XXXVIII of the GATT 1994, fall under the following three categories	Provisions aimed at increasing the trade opportunities of developing country Members	Eight provisions (Articles XXXVI.2, XXXVI.3, XXXVI.4, XXXVI.5, XXXVII.1(a), XXXVII.4, XXXVIII.2(c),(e))
	Flexibility of commitments, of action, and use of policy instruments	Four provisions (Articles XXXVI.8, XVIII.7(a), XVIII.8, XVIII.13)
	Provisions under which WTO Members should safeguard the interests of developing country Members	13 provisions (Articles XXXVI.6, XXXVI.7, XXXVI.9, XXXVII.1(b),(c), XXXVII.2, XXXVII.3, XXXVII.5, XXXVIII.1, XXXVIII.2(a),(b),(d),(f))
Understanding on the Balance-of-Payments (BoP) Provisions of the General Agreement on Tariffs and Trade 1994		
The Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 contains two SDT provisions falling under the following categories.	Flexibility of commitments, of action. and use of policy instruments	One provision (Paragraph 8)
	Technical assistance	One provision (Paragraph 12)
Agreement on Agriculture (AoA)		
The Agreement on Agriculture contains 13 SDT provisions. The SDT provisions of the Agreement fall under four categories	Provisions aimed at increasing trade opportunities of developing country Members	One provision (Preamble to the Agreement).
	Transitional time-periods	One provision (Article 15.2)
	Flexibility of commitments, of action,	Nine provisions (Article 6.2; Article 6.4; Article 9.2(b)(iv);

[8] WT/COMTD/W/258, 2 March 2021, Committee on Trade and Development https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/W258.pdf&Open=True accessed on November 1, 2022, 20.00 p.m

	and use of policy instruments	Article 9.4; Article 12.2; Article 15.1; Annex 2, paragraph 3 and footnote 5; Domestic food aid: Annex 2, paragraph 4, footnotes 5 and 6; Annex 5, Section B).
	Provisions relating to LDC Members	Three provisions (Article 15.2, Article 16.115 and Article 16.216)
Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)		
The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) contains six specific SDT provisions which fall under three broad categories	Provisions under which WTO Members should safeguard the interests of developing country Members	Two provisions (Article 10.1 and 10.4)
	Transitional time-periods	Two provisions (Article 10.2 and 10.3)
	Technical assistance	Two provisions (Article 9.1.and 9.2)
Agreement on Technical Barriers to Trade (TBT)		
The Agreement on Technical Barriers to Trade (TBT Agreement) contains a total of twenty-five provisions relating to technical assistance and/or SDT, the majority of them contained in Articles 11 and 12.	Provisions aimed at increasing trade opportunities of developing country Members	Three provisions (Preamble (8 th recital) to the Agreement; Article 10.6 and Article 12.6).
	Provisions under which WTO Members should safeguard the interests of developing country Members	Ten provisions (Preamble (9 th Recital) to the Agreement; Article 2.12; Article 5.9; Article 12.1; Article 12.2; Article 12.3; Article 12.5; Article 12.9; Article 12.10 and Article 14.4)
	Flexibility of commitments, of action, and use of policy instruments	Two provisions (Article 10.5 and Article 12.4)
	Transitional time-periods	One provision (Article 12.8).
	Technical assistance	Nine provisions (Article 11.1; Article 11.2; Article 11.3; Article 11.4; Article 11.5; Article 11.6; Article 11.7; Article 11.8 and Article 12.7).
	Provisions relating to LDC Members	Three provisions (Article 11.8; Article 12.7 and Article 12.8).
Agreement on Trade-Related Investment Measures (TRIMs)		

There are three SDT provisions in the Agreement on Trade-Related Investment Measures (TRIMs Agreement), which fall into three separate categories.	Flexibility of commitments, of action, and use of policy instruments	One provision (Article 4)
	Transitional time-periods	Two provisions (Article 5.2 and 5.3)
	Provisions relating to LDC Members	One (Article 5.2)
Agreement on Implementation of Article VI of the GATT 1994		
Provisions under which WTO Members should safeguard the interests of developing country Members.	One provision (Article 15).	
Agreement on Implementation of Article VII of the GATT 1994		
The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (GATT) 1994 contains eight provisions for SDT which fall under the following headings	Provisions under which WTO Members should safeguard the interests of developing country Members	One provision (Annex III:5)
	Flexibility of commitments, of action, and use of policy instruments	Two provisions (Annex III:3 and Annex III:4).
	Transitional time-periods	Four provisions (Article 20.1; Article 20.2; Annex III:1; and Annex III:2).
	Technical assistance	One Provision (Article 20.3)
Agreement on Import Licensing Procedures		
The Agreement on Import Licensing Procedures includes four SDT provisions, which can be classified as follows	Provisions under which WTO Members should safeguard the interests of developing country Members	Three provisions (Article 1.2; Article 3.5 (a)(iv); Article 3.5(j))
	Transitional time-periods	One provision (Article 2.2, footnote 5)
Agreement on Subsidies and Countervailing Measures		
The Agreement on Subsidies and Countervailing Measures (SCM Agreement) contains	Provisions under which WTO Members should safeguard the interests of developing country Members	Two provisions (Articles 27.1 and 27.15)

16 SDT provisions which fall under three categories	Flexibility of commitments, of action, and use of policy instruments	Ten provisions (Article 27.2 (a) and Annex VII, Articles 27.4; 27.6; 27.7; 27.8; 27.9; 27.10; 27.11; 27.12 and 27.13). It should be noted that Article 27.2(a) is applicable to a subset of developing countries, listed in Annex VII, and not developing countries as a whole.
	Transitional time-periods	Seven provisions (Articles 27.2 (b), 27.3; 27.4; 27.14; 27.5; 27.6; and 27.11).
		In addition to these provisions applicable to developing countries, or a sub-group thereof, are the provisions of Article 29 which apply to Members in the process of transformation from a centrally-planned into a market, free-enterprise economy
Agreement on Safeguards		
The Agreement on Safeguards contains two SDT provisions:	Provisions under which WTO Members should safeguard the interests of developing country Members	One provision (Article 9.1 and Footnote 2)
	Flexibility of commitments, of action, and use of policy instruments	One provision (Article 9.2).
Agreement on Trade Facilitation (TFA)		
The Agreement on Trade Facilitation (TFA), which entered into force on 22 February 2017, contains special and differential treatment provisions that diverge from the S&D architecture of other WTO Agreements in several respects. Rather than falling within one particular type of S&D provision,	Flexibility of commitments, of action, and use of policy instruments	Three articles (Articles 13, 18 and 20)
	Transitional time-periods	Seven articles (Articles 13, 14, 15, 16, 17, 18 and 19)
	Technical assistance	Seven articles (Articles 13, 14, 16, 17, 19, 21, and 22)
	Provisions relating to LDC Members	Nine articles (Articles 13, 14, 15, 16, 17, 18, 19, 20 and 21)

as listed in paragraph 1.5, most S&D rules of the TFA touch upon several areas. In addition to capturing S&D in distinct provisions, the TFA establishes processes by which eligible Members may obtain additional flexibilities.		
General Agreement on Trade in Services (GATS)		
Under the typology developed for considering SDT, it can be said that the GATS contains 13 SDT provisions dealing with developing country-related issues. Their classification can be broken down as follows	Provisions aimed at increasing trade opportunities of developing country Members	Three provisions (Preamble, Article IV:1; Article IV:2)
	Provisions under which WTO Members should safeguard the interests of developing country Members	Four provisions (Preamble, Article XII:1; Article XV:1; Article XIX:3)
	Flexibility of commitments, of action, and use of policy instruments	Four provisions (Article III:4; Article V:3; Article XIX:2; and Section 5(g) of the Annex on Telecommunications).
	Technical assistance	Two provisions (Article XXV:2 and Section 6 of the Annex on Telecommunication)
	Provisions relating to least developed country Members	Two Provisions (Article IV:3; Article XIX:3)
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)		
The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and related instruments contain six SDT provisions and five Decisions. The six provisions fall under the following categories	Transitional time-periods	Two provisions (Article 65.2 and 65.4)
	Technical assistance	One provision (Article 67)

	Provisions relating to LDC Members	Three provisions (part of the Preamble to the Agreement; Article 66.1 and 66.2); and three related Decisions, namely TRIPS Council Decision of 6 November 2015 on the Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for LDC Members for Certain Obligations with respect to Pharmaceutical Products (IP/C/73) 136; General Council Decision of 30 November 2015 on LDC Members Obligations under Article 70.8 and Article 70.9 of the TRIPS Agreement with respect to Pharmaceutical Products (WT/L/971) 137; and TRIPS Council Decision of 11 June 2013 on the Extension of the Transition Period under Article 66.1 for Least Developed Country Members (IP/C/64). The following two Decisions include provisions in favour of LDCs: General Council Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540 and Corr.1) and General Council Decision of 6 December 2005 on the Amendment of the TRIPS Agreement (WT/L/641). See the references in Section 7 of this document.
Understanding on Rules and Procedures Governing the Settlement of Disputes		
The Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU) contains 11 provisions relating to SDT, which can be classified as follows	Provisions under which WTO Members should safeguard the interests of developing country Members	Seven provisions (Article 4.10, Article 8.10*, Article 12.10*, Article 12.11*, Article 21.2*, Article 21.7*, and Article 21.8*).
	Flexibility of commitments, of action, or use of policy instruments	One provision (Article 3.12)

	Technical assistance	One provision (Article 27.2)
	Provisions relating to LDC Members	Two provisions (Article 24.1 and Article 24.2)
PLURILATERAL TRADE AGREEMENTS		
Agreement on Government Procurement (GPA)		
The revised (2012) Agreement on Government Procurement contains ten SDT provisions falling under four categories	Provisions under which WTO Members should safeguard the interests of developing country Members	Three provisions (Article V.1; Article V.2; and Article V.10)
	Flexibility of commitments, of action, and use of policy instruments	Six provisions (Article V.3; Article V.4; Article V.5; Article V.6; Article V.7; and Article V.9).
	Technical assistance	One provision (Article V.8)
	Provisions relating to LDC Members	Two provisions (Article V.1 (a) and Article V.4 (a))

Table.2.MINISTERIAL, GENERAL COUNCIL AND OTHER RELEVANT DECISIONS PROVIDING SPECIAL AND DIFFERENTIAL TREATMENT (SDT) TO DEVELOPING AND LEAST DEVELOPED COUNTRIES[9]

1. Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries - Decision of 28 November 1979 (Enabling Clause - L/4903)
2. Decision on Measures in Favour of Least Developed Countries (15 December 1993)
3. Decision on texts relating to minimum values and imports by sole agents, sole distributors and sole concessionaires (15 december 1993)
4. Decision on measures concerning the possible negative effects of the reform programme on least developed and net food-importing developing countries (15 december 1993)
5. Preferential Tariff Treatment for Least Developed Countries – Decision on Waiver – 15 June 1999 (WT/L/304)
6. Accession of Least Developed Countries – Decision of 10 December 2002 (WT/L/508)
7. The implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540 and WT/L/540/Corr.1) - Decision of 30 August 2003

[9] https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/W258.pdf&Open=True ibid.

8. Modalities for the Special Treatment for Least Developed Country Members in the Negotiations on Trade in Services – Adopted by the Special Session of the Council for Trade in Services on 3 September 2003 (TN/S/13)

9. Amendment of the TRIPS Agreement (WT/L/641) – Decision of 6 December 2005

10. Other Decisions in Favour of Least Developed Countries – Annex F of the Hong Kong Ministerial Declaration adopted on 18 December 2005 (WT/MIN(05)/DEC)

11. Transparency Mechanism For Regional Trade Agreements – Decision of 14 December 2006 (Wt/L/671)

12. Transparency mechanism for preferential trade arrangements – decision of 14 december 2010 (wt/l/806)

13. Preferential Treatment to Services and Service Suppliers of Least Developed Countries - Decision of 17 December 2011 (WT/L/847)

14. Accession of Least Developed Countries - Decision of 25 July 2012 (WT/L/508/Add.1)

15. Extension of the Transition Period under Article 66.1 for Least Developed Country Members - Decision of the Council for TRIPS of 11 June 2013 (IP/C/64)

16. General Services - Ministerial Decision of 7 December 2013 (WT/MIN(13)/37 - WT/L/912)

17. Public Stockholding for Food Security Purposes - Ministerial Decision of 7 December 2013 (WT/MIN(13)/38 - WT/L/913)

18. Understanding on Tariff Rate Quota Administration Provisions of Agricultural Products, as defined in Article 2 of the Agreement on Agriculture - Ministerial Decision of 7 December 2013 (WT/MIN(13)/39 - WT/L/914)

19. Cotton – Ministerial Decision of 7 December 2013 (WT/MIN(13)/41 - WT/L/916)

20. Preferential Rules of Origin for Least Developed Countries – Ministerial Decision of 7 December 2013 (WT/MIN(13)/42 – WT/L/917)

21. Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least Developed Countries – Ministerial Decision of 7 December 2013 (WT/MIN(13)/43 - WT/L/918)

22. Duty-Free and Quota-Free Market Access for Least Developed Countries – Ministerial Decision of 7 December 2013 (WT/MIN(13)/44 - WT/L/919)

23. Public Stockholding for Food Security Purposes – Decision of 27 November 2014 (WT/L/939)

24. Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products – Decision of the Council for TRIPS of 6 November 2015 (IP/C/73)

25. Least Developed Country Members – Obligations under Article 70.8 and Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products – Decision of 30 November 2015 (WT/L/971)

26. Public Stockholding for Food Security Purposes – Ministerial Decision of 19 December 2015 (WT/MIN(15)/44 - WT/L/979)

27. Export Competition – Ministerial Decision of 19 December 2015 (WT/MIN/(15)/45 - WT/L/980)

28. Cotton - Ministerial Decision of 19 December 2015 (WT/MIN(15)/46 - WT/L/981)

29. Preferential Rules of Origin for Least Developed Countries – Ministerial Decision of 19 December 2015 (WT/MIN(15)/47 - WT/L/917/Add.1)

30. Implementation of Preferential Treatment in favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade – Ministerial Decision of 19 December 2015 (WT/MIN(15)/48 - WT/L/982)

31. Fisheries Subsidies – Ministerial Decision of 13 December 2017 (WT/MIN(17)/64-WT/L/1031)

Table.3. SPECIAL AND DIFFERENTIAL TREATMENT (SDT) - RELATED AGREEMENTS WHICH CONTAIN THE PHRASE "LESS/LEAST-DEVELOP AND DEVELOPING COUNTRY"

GATT 1994	Contain the phrase "Less-Develop and Developing Country" in Explanatory Notes paragraph (a), [10] article XVIII:B [11], and article XXXVII but made no formal definition and distinction between less developed and developing countries.
Understanding on Balance of Payments of GATT 1994 (BoP)	Contain the phrase "Least-Develop and Developing Country" in paragraph 8 and 12[12] but made no formal definition and distinction between least developed and developing countries.
Agreement on Agriculture (AoA)	Contains the phrase "Developing Country" in article 6 paragraph 2 and define developing countries as low-income or resource-poor (agricultural) producers[13]
Agreement on Sanitary and Phytosanitary Measures (SPS)	Contain the phrase "Developing Country" in article 14, article 15 and article 16 [14] but made no formal definition about developing countries in any way.
Agreement on Technical Barriers to Trade (TBT)	Contain the phrase "Least-Develop and Developing Country" in article 12 paragraph 12.1, 12.2, 12.3, 12,4, 12.5, 12.6, 12.7, 12.8, 12.9, and 12.10[15] but made no formal definition and distinction between least developed and developing countries.

[10] https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm accessed on October 12, 2022, 9.30 a.m

[11] https://www.wto.org/english/res_e/booksp_e/agrmntseries2_gatt_e.pdf accessed on October 12, 2022, 9.30 a.m

[12] https://www.wto.org/english/docs_e/legal_e/09-bops_e.htm accessed on October 12, 2022, 9.30 a.m

[13] https://www.wto.org/english/tratop_e/agric_e/ag_intro01_intro_e.htm accessed on October 12, 2022, 9.30 a.m

[14] https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm accessed on October 12, 2022, 9.30 a.m

[15] https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#articleXII accessed on October 12, 2022, 9.30 a.m

Agreement on Trade-Related Investment Measures (TRIMs)	Contain the phrase "Developing Country" in article 4 but do not define developing countries in any way.[16]
Agreement on Customs Valuation	Contain the phrase "Developing Country" in article 20 paragraph (1) and (2), annex III paragraph (1) , (2), (3), (4) and (5)[17] but do not define developing countries in any way.
Agreement on Subsidies and Countervailing Measures (ASCM)	Contain the phrase "Developing Country" in article 27 paragraph 27.1, 27.2 sub paragraph (a) and (b), paragraph 27.3, 27.4, 27.5, 27.6, 27.7, 27.8, 27.9, 27.10, 27.11, 27.12, 27.13, 27.14 and 27.15. The ASCM Agreement in annex VII make a definition about the phrase "Least Develop Country" as designated by the United Nations which are Members of the WTO. And the definition of phrase "Developing Country" which are Members of the WTO when GNP per capita has reached $1,000 per annum : Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe[18]
Agreement on Safeguards	Contain the phrase "Developing Country" but do not define developing countries in any way.[19]
General Agreement on Trade in Services (GATS)	Contain the phrase "Developing Country" in article XIX but do not define developing countries in any way.[20]
Understanding on Rules and Procedures Governing the the Settlement of Disputes (DSU)	Contain the phrase "Least-Develop and Developing Country" in article 12 paragraph (10) and (11), article 24 paragraph (1) and (2) [21] but made no formal definition and distinction between least developed and developing countries.
Agreement on Government Procurement (GPA)	Contain the phrase "Developing Country" and "Least Developed Countries"[22] in article V but made no formal definition and distinction between least developed and developing countries.

[16] https://www.wto.org/english/docs_e/legal_e/18-trims.pdf accessed on October 12, 2022, 9.30 a.m

[17] https://www.wto.org/english/docs_e/legal_e/20-val.pdf accessed on October 12, 2022, 9.30 a.m

[18] https://www.wto.org/english/docs_e/legal_e/24-scm.pdf accessed on October 12, 2022, 9.30 a.m

[19] https://www.wto.org/english/tratop_e/safeg_e/safeint.htm accessed on October 12, 2022, 9.30 a.m

[20] https://www.wto.org/english/tratop_e/safeg_e/safeint.htm accessed on October 12, 2022, 9.30 a.m

[21] https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed on October 12, 2022, 9.30 a.m

[22] https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf accessed on October 12, 2022, 9.30 a.m

Agreement on Trade Facilitation (TFA)	Contain the phrase "Least-Develop and Developing Country" in article 12, article 13 paragraph (1) and article 14[23] paragraph (2) establish provisions regarding the determination of the phrase "Least-Develop and Developing Country" shall be self-designated, on an individual basis.[24]
Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)	Contain the phrase "Developing Country and "Least-Developed Country" in article 65 paragraph 2 and 4 and article 66 [25] but made no formal definition and distinction between least developed and developing countries

Table.4.THE DEFINITION OF THE PHRASE" LEAST-DEVELOP AND DEVELOPING COUNTRY" FOUND IN THE WTO AGREEMENTS

Article 6 paragraph 2 Agreement on Agriculture (AoA)	Contains the phrase "Developing Country" in article 6 paragraph 2 and define developing countries as low-income or resource-poor (agricultural) producers
Agreement on Subsidies and Countervailing Measures (ASCM)	The SCM Agreement in annex VII make a definition about the phrase "Least Develop Country" as designated by the United Nations which are Members of the WTO. And the definition of phrase "Developing Country" which are Members of the WTO when GNP per capita has reached $1,000 per annum : Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines,
Agreement on Trade Facilitation (TFA)	Contain the phrase "Least-Develop and Developing Country" in article 12, article 13 paragraph (1) and article 14[26] paragraph (2) establish provisions regarding the determination of the phrase "Least-Develop and Developing Country" shall be self-designated, on an individual basis.[27]

According to the provision of article 6 paragraph 2 Agreement on Agriculture (AoA), Annex VII Agreement on Subsidies and Countervailing Measures (SCM Agreement), and article 12, article 13 paragraph (1) and article 14 paragraph (2) Agreement on Trade Facilitation (TFA) (Table.4), the "developing country" means:

1. The country with low-income or resource-poor (agricultural) producers;
2. Members of the WTO which GNP per capita has reached $1,000 per annum (Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana,

[23] https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm#art1 accessed on October 12, 2022, 9.30 a.m

[24] https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm#art1 accessed on October 12, 2022, 9.30 a.m

[25] https://www.wto.org/english/docs_e/legal_e/27-trips.pdf accessed on October 12, 2022, 9.30 a.m

[26] https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm#art1 accessed on October 12, 2022, 9.30 a.m

[27] https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm#art1 accessed on October 12, 2022, 9.30 a.m

Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe); and

3. The development status shall be self-designated, on an individual basis.

Whereas the phrase "least developed country" in Annex VII of the SCM Agreement refers to the country as designated by the United Nations, which is a member of the WTO and the development status shall be self-designated, on an individual basis.

According to Table 1 to Table.3, there is no consensus on what constitutes a developing country in the WTO agreements that contain SDT provisions. The lack of terminology, inconsistency, or ambiguity in "developing country" terminology can and does have a profound effect on how to present the facts in international trade dispute settlement. Terminology consistency is crucial because it will make it easier to gather great data and carefully interpret it but then fail to effectively share this information with those who need to understand what the data means.[28]

IV.2. General rule of Treaty Interpretation[29]

Article 31 of the Vienna Convention on the Law of Treaties stipulates the general rule of interpretation as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

[28] https://www.justice.gov/archives/ncfs/page/file/641361/download National Commission On Forensic Science Inconsistent Terminology accessed on October 12, 2022, 9.30 a.m

[29] https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2018_04585.PDF accessed on November 12, 2022, 9.30 a.m

According to Article 31 of the Vienna Convention on the Law of Treaties, a treaty shall be construed in good faith in accordance with the following principles:

a. The ordinary meaning of the terms of the treaty itself in their context.

In December 2002, India questioned the legality of the GSP adopted by the European Communities and, in particular, the tariff preferences it granted to specified developing countries that combated drug production and trafficking (―Drug Arrangements‖) and that upheld labor and environmental standards determined by the E.C. India had been a beneficiary of preferential treatment from the E.C. until the adoption of the E.C.'s GSP scheme in December 2001. This scheme designated Pakistan as a recipient of a special arrangement in exchange for combating drug production and trafficking, but excluded India, and thus, the GSP threatened to put Indian goods at a competitive disadvantage in the E.C. market. Additionally, it was not at all clear that the Drug Arrangements, environmental protection requirement, or labor standards specification bore any relation to the economic development needs of LDCs. India challenged the E.C.'s GSP in relation to Enabling Clause paragraph 2(a), which authorizes GSP schemes, paragraph 3(a), which stipulates that GSPs must not create undue difficulties for the trade of a contracting party that is not the recipient of the preference, and paragraph 3(c), which requires that the GSP must be designed ―to respond positively to the development, financial and trade needs of developing countries.

The AB first held that the ―object and purpose of the Enabling Clause was to promote the economic development of WTO Members who were developing countries. While the GATT Article I:1 imposes the obligation of most-favored nation treatment upon all WTO Members, the Enabling Clause operates as a legal exception to that obligation. Furthermore, Members have an international legal right within the WTO system to grant preferential treatment to LDCs; indeed, developed Members are encouraged to provide this preferential treatment. The AB noted that preferential treatment to LDCs is facially inconsistent with the MFN obligation of GATT Article I:1, but that the treatment can nonetheless be legally justified by virtue of the Enabling Clause. Thus, in order for preferential

treatment to be legal under the WTO, the treatment must comply with the Enabling Clause's requirements.[30]

b. In light of the treaty's object and purpose

In EC – Tariff Preferences, the Appellate Body looked to the preamble of the WTO Agreement to determine the instrument's object and purpose. This is consistent with Panel and AB reports that have looked to the GATT's preamble, with the limitation on teleological interpretation that it must be mindful of the ends sought by the treaty as well as the means to achieving the ends. As to subsequent state practice, the weight of authority is that only unanimous practice by all WTO Member States qualifies as an interpretative element.[31]

c. With regard to subsequent agreements and state practice on the same subject matter.

As with the International Court of Justice (—ICJ‖), there is no rule of stare decisis in the WTO dispute settlement system, and no WTO Panel or Appellate Body is formally bound by past reports. However, also like the ICJ, WTO dispute settlement entities look to past DSB reports as an interpretative element. The Appellate Body, in U.S. – Shrimp (Article 21.5–Malaysia), affirmed that past DSB reports are relevant to a Panel or Appellate Body —as a tool for its own reasoning. The Panel in India – Patents (EC) stated that while Panels are not bound by previous panel or Appellate Body decisions, they will take into account the conclusions and reasoning of past decisions because of the DSU's goal of providing predictability to the multilateral trading system and avoiding inconsistent DSB rulings.

The WTO AB and Panels have, when necessary, looked to agreements outside of the WTO-proper in interpreting the standards of WTO law. The Appellate Body in U.S. – Shrimp sought recourse to the Convention on International Trade in Endangered Species to determine whether the species of sea turtles in question fell within the meaning of the term —exhaustible natural

[30] https://www.corteidh.or.cr/tablas/r29841.pdf accessed on November 12, 2022, 12.30 p.m

[31] https://www.corteidh.or.cr/tablas/r29841.pdf ibid.

resources‖ as it appears in GATT Article XX(g). In a later stage of the same dispute, the Appellate Body used non-WTO international agreements to ascertain evidence of practice that may or may not be consistent with obligations arising from a Covered Agreement. In yet another dispute, the Appellate Body sought recourse to multilateral instruments in order to ascertain a factual state of affairs.[32]

IV.3. The review of Special and Differential Treatment (SDT) Implementation in WTO Agreements : A Rule- Based Approach

In this article, the author used Article 31 of the Vienna Convention on the Law of Treaties, which refers to the ordinary meaning of the treaty's terms in their context, particularly to the provisions of Article 6 Paragraph 2 of the Agreement on Agriculture (AoA), Annex VII of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and Articles 12, 13, and 14 Paragraph 2 of the Agreement on Trade Facilitation (TFA) (Table 4) as a basis for the United States' (US) objection from November 2019 and what it considered to be standards for determining which members couldn't use SDT in existing or future WTO agreements; therefore, in this article, what is meant by "developing country" is:

1. The country with low-income or resource-poor (agricultural) producers;
2. Members of the WTO which GNP per capita has reached $1,000 per annum (Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe); and
3. The development status shall be self-designated, on an individual basis.

Whereas the phrase "least developed country" in Annex VII of the SCM Agreement refers to the country as designated by the United Nations, which is a member of the WTO and the development status shall be self-designated, on an individual basis.

IV.4. The role of the WTO Ministerial Conference in the Monitoring Mechanism on Special and Differential Treatment (SDT)

[32] https://www.corteidh.or.cr/tablas/r29841.pdf ibid.

The topmost decision-making body of the WTO is the Ministerial Conference, which usually meets every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements.[33]

Until 2022, the WTO Ministerial Conference held 12 meetings and adopted decisions / declaration concerning special and differential treatment for least-developed and developing countries.[34]

The Ministers in Doha, at the 4th WTO Ministerial Conference mandated the Committee on Trade and Development to examine these special and differential treatment provisions. The Bali Ministerial Conference in December 2013 established a mechanism to review and analyse the implementation of special and differential treatment provisions.[35]

The mechanism, which will take place in Dedicated Sessions of the CTD, will provide members with an opportunity to analyse and review all aspects of the implementation of SDT provisions contained in multilateral WTO agreements, Ministerial and General Council Decisions — with the possibility to make recommendations to the relevant WTO bodies — aimed at either improving the implementation of reviewed provisions, or improving the provisions themselves through re-negotiations.[36]

The WTO Ministerial Conference is required to analyze, review, and make recommendations with regard to the assessment of the application of the SDT provisions found in multilateral WTO agreements, whether it results from implementation or from the provision itself, in order to facilitate the integration of developing and less-developed country. This is in accordance with WTO Ministerial

[33] https://www.wto.org/english/thewto_e/minist_e/minist_e.htm accessed on October 23, 20.00 p.m

[34] https://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf accessed on October 27, 19.00 p.m

[35] https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm accessed on October 27, 19.00 p.m

[36] https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm accessed on October 27, 19.00 p.m

Conference Decision No. WT/MIN(13)/45 WT/L/920 on the Monitoring Mechanism on Special and Differential Treatment.

Functions/Terms of Reference of the Mechanism as follows:

1. The mechanism shall act as a focal point within the WTO to analyse and review the implementation of SDT provisions.The Mechanism will complement, not replace, other relevant review mechanisms and/or processes in other bodies of the WTO.
2. The Mechanism shall review all aspects of implementation of SDT provisions with a view to facilitating integration of developing and least-developed Members into the multilateral trading system. Where the review of implementation of an SDT provision under this Mechanism identifies a problem, the Mechanism may consider whether it results from implementation, or from the provision itself.
3. In carrying out its functions, the Mechanism will not alter, or in any manner affect, Members' rights and obligations under WTO Agreements, Ministerial or General Council Decisions, or interpret their legal nature. However, the Mechanism is not precluded from making recommendations to the relevant WTO bodies for initiating negotiations on the SDT provisions that have been reviewed under the Mechanism.
4. The Mechanism can, as appropriate, make recommendations to the relevant WTO body that propose:
    - the consideration of actions to improve the implementation of a special and differential provision;
    - or the initiation of negotiations aiming at improving the special and differential provision(s) that have been reviewed under the Mechanism.
5. Such recommendations will inform the work of the relevant body, but not define or limit its final determination.
6. The relevant body should consider a recommendation from the Mechanism at the earliest opportunity. The status of recommendations emerging from the

Mechanism shall be included in the annual report of the Committee on Trade and Development to the General Council.[37]

The author advises that the WTO Ministerial Conference take the following actions in response to US complaints about the developmental status of the WTO country members in place of the rule-based approach set forth in Article 31 of the Vienna Convention on the Law of Treaties:

1. The WTO Ministerial Conference has an obligation to analyze, review, and make recommendations concerning SDT implementation in accordance with WTO Ministerial Conference Decision No. WT/MIN(13)/45 WT/L/920 on the Monitoring Mechanism on Special and Differential Treatment (SDT).
2. Until there is a modification or revocation, the articles' determination of WTO members' developmental state (Table.4) continues to be valid as long as the articles are still in effect.
3. The dynamics of SDT implementation must be taken into account at the WTO Ministerial Conference because they cannot be compared to the dynamics of SDT implementation at the time of the GATT/WTO's inception due to the substantive natures of the terms' ability to change and advance over time.

V. Conclusion

Objections from developed countries to countries that are referred to as "developing countries" and are eligible for SDT are a dynamic in the world of international trade.

The response of several developing countries to the objection that they will no longer use SDT in the implementation of their international trade shows a commitment from WTO member countries that the implementation of international trade must be carried out without discrimination.

Until now, there has been no definite definition in WTO Agreements concerning the developmental status of WTO member countries both as mentioned in Table 1 to Table 3 except for what has been explicitly stated in the article 6 paragraph 2 Agreement on Agriculture (AoA), Annex VII Agreement on Subsidies and Countervailing Measures (SCM Agreement), and article

[37] https://www.wto.org/english/thewto_e/minist_e/mc9_e/bali_texts_combined_e.pdf accessed on October 12, 2022, 9.30 a.m

12, article 13 paragraph (1) and article 14 paragraph (2) Agreement on Trade Facilitation (TFA) (Table.4).

Terminology used to describe "developing countries" can and often does have a significant impact on how the facts are presented in international trade dispute resolution. It will be simpler to collect excellent data and properly analyse it if there is consistency in terminology, but it will be more difficult to transmit this knowledge with those who need to comprehend what the data means.

Therefore, until there is a modification or revocation, the articles' determination of WTO members' developmental state (Table.4) continues to be valid as long as the articles are still in effect (Table.4).

The WTO must be able to accommodate the dynamics development of SDT implementation because the development of SDT implementation during the formation of the GATT/WTO certainly cannot be equated with the development of SDT implementation at this time.

The living and dynamic meaning of treaty phrases in light of current issues facing the international community. The general rules of treaty interpretation as set forth in Article 31 of the Vienna Convention on the Law of Treaties must be taken into consideration when interpreting phrases from agreements made decades ago. That same object and purpose may also have a long-term goal, allowing terms' substantive natures to change and advance through time.

As the topmost decision-making body of the WTO, the WTO Ministerial Conference has an obligation to analyze, review, and make recommendations concerning SDT implementation in accordance with WTO Ministerial Conference Decision No. WT/MIN(13)/45 WT/L/920 on the Monitoring Mechanism on Special and Differential Treatment (SDT), not only for the benefit of the beneficiary countries, but also for the advancement of fair trade on a global scale.

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