



**UNIVERSITY OF  
KWAZULU-NATAL**

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**Special and Differential Treatment Provisions  
within the World Trade Organization:  
The Pursuit of Development for Developing Countries**

by  
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**A thesis submitted in fulfilment of the requirements for the degree of  
MASTER OF LAWS**

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## DECLARATION

I, **Karabo Hiine**, hereby declare that the contents of this thesis, except where referenced otherwise, represents my own work that has not been previously submitted for examination at the University of KwaZulu-Natal or any other university. Furthermore, it represents my own opinions and not necessarily those of the University of KwaZulu-Natal, Howard College Campus. This work is therefore made available for photocopying and for inter-library loan.

Candidate:

Date: 15 December 2017

A handwritten signature in black ink, consisting of a stylized 'K' followed by the name 'Hiine' in a cursive script.

Karabo Hiine

212560187

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A special thank you to Mrs C Stevens for the opportunity to learn under your wise counsel as a supervisor.

To my family and friends, I hope I have made you proud.

*'I did the things that made the pots to be found' – Anonymous.*

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## LIST OF ABBREVIATIONS

AfT	Aid for Trade
AGOA	Africa Growth and Opportunity Act
CBS	Citrus Black Spot
DDA	Doha Development Agenda
EU	European Union
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
IMF	International Monetary Fund
ITO	International Trade Organisation
MFN	Most Favoured Nation
NT	National Treatment
SDT	Special and Differential Treatment
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WTO	World Trade Organization

## KEYWORDS

Special and differential treatment; developing countries; developed countries; World Trade Organization; trade liberalisation; reciprocity; development; technical assistance; multilateral system; United Nations Conference on Trade and Development; Committee on Trade and Development; globalisation, Aid for Trade.

# CHAPTER ONE: INTRODUCTION

## 1.1 BACKGROUND AND OUTLINE OF THE RESEARCH PROBLEM

Participating in trade and accessing the markets of developed countries, in particular, has been of the utmost importance for developing countries. The General Agreement on Tariffs and Trade (GATT) set the platform for trade policies to ensure this. The idea of governing international trade started with the formation of the International Trade Organisation (ITO), which was established with the intention of working in conformity with the World Bank and the International Monetary Fund (IMF).<sup>1</sup> While the World Bank and the IMF were fully established, the ITO failed at encouraging free trade between nations, and it imposed a fundamentally flawed developmental model.<sup>2</sup> The GATT was therefore consequently established to fill the gaps left behind by the ITO. The GATT is an agreement rather than an organisation which dealt specifically with trade in goods and the reduction of trade tariffs internationally to help create a free trade environment.<sup>3</sup> So one of the main objectives of GATT was to assist nations to discuss and agree on international trade activities.

After years of rounds of negotiations, the formation of the World Trade Organization (WTO) was intended to address those issues that the GATT was unable to address. The WTO has a central purpose to provide a ‘forum for negotiating agreements aimed at reducing obstacles to international trade’.<sup>4</sup> Free trade and growth in trade has the greatest potential to eradicate poverty and promote development. Moreover, Hoekman suggests that the more countries liberalise trade, the more they benefit in terms of economic growth and development.<sup>5</sup> This is essentially the argument preferred by the WTO as its central purpose is to open trade for the aid of all and deal with the rules of trade between states at an international level.<sup>6</sup> Essentially,

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<sup>1</sup> M Trebilcock & R Howse *The Regulation of International Trade* Routledge. (2005) 23.

<sup>2</sup> Top Ten Reasons to Oppose the IMF. Available on <http://www.globalexchange.org/sites/default/files/IMFTopTen.pdf> (Accessed 20 March 2016).

<sup>3</sup> Development: Trade and Development Committee. Special and Differential Treatment Provisions. Available at [https://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_special\\_diferential\\_provisions\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/dev_special_diferential_provisions_e.htm) (Accessed 12 February 2012).

<sup>4</sup> R Wilkinson *Whats Wrong with The WTO and How To Fix It*. Cambridge: Polity (2014) 9.

<sup>5</sup> B Hoekman *More Favourable and Differential Treatment of Developing Countries: Towards A New Approach in the World Trade Organization* World Bank Policy Research Working Paper 3107 (2003) 1.

<sup>6</sup> What is the WTO? Available at [https://ww.wto.org/english/thewto\\_e/whatis\\_e/whatois\\_e.htm](https://ww.wto.org/english/thewto_e/whatis_e/whatois_e.htm) (Accessed 1 February 2017).

the WTO provides for its members a means to discuss trade agreements and deal with trade problems. According to Dugard, the object of this particular institution is to ‘provide the common institutional framework for the conduct of trade relations among its members in matters relating to the agreements and associated legal instruments included in the annexes to this agreement’.<sup>7</sup>

In addition, the principles of the WTO include lengthy and complex agreements which cover a variety of activities ranging from ‘agriculture, textiles and clothing to banking, government purchases, intellectual property and much more’.<sup>8</sup> The foundation of the multilateral trading system therefore results from the principles of various agreements under the WTO.<sup>9</sup> The WTO embodies a principle that requires equal treatment of all and to promote trade without discrimination. These principles are referred to as the Most Favoured Nation and the National Treatment Principle, both of which are provisions of the GATT.<sup>10</sup> They generally apply whenever member states are trading with each other. However, developing countries are sometimes exempt from compliance with these principles, which is commonly known as the Generalised System of Preferences (GSPs). The GSP has been criticised as it is a purely voluntary initiative and it applies the discretion of developed countries.<sup>11</sup> GSP was, however, a clear deviation from Article I of the GATT, which prohibits discrimination; and in order for compliance with GSP to occur, it was imperative to waive Article 1 of the GATT (as stated earlier).

Furthermore, the important objectives of the WTO are to implement and promote a new world trade system in a manner that benefits every country; to ensure that developing countries can enjoy the advantages of the world trade system as international trade expands; to increase the transparency and decision-making processes; to resolve trade disputes; to provide a forum for negotiating and monitoring further trade liberalisation; and to cooperate with other major international economic institutions involved with global economic management.<sup>12</sup> As such, these objectives aim to further the major aim of the WTO. which is to reduce and/or remove barriers on trade. It achieves this by holding a series of negotiations known as ‘rounds’ (as with

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<sup>7</sup> J Dugard *International Law*. 4<sup>th</sup> Edition. Juta & Co Ltd (2011) 445.

<sup>8</sup> S Lester et al *World Trade Law: Text, Materials and Commentary*. Emerald Group Publishing Ltd (2012) 9.

<sup>9</sup> *Ibid.*

<sup>10</sup> General Agreement on Tariffs and Trade 1947.

<sup>11</sup> Lichtenbaum “Special Treatment” versus “Equal Participation”: Striking a balance in the Doha negotiations’ 2002 (17) *American University International Law Review* (Am. U. Int’l L. Rev.) 1015.

<sup>12</sup> Article XXXVI Principles and objectives of WTO. Available at [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art36\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art36_e.pdf) (Accessed 29 January 2017).

the GATT) in which most member states participate. It is within this context, and finding a means to address the needs of developing countries (which comprise the majority of the WTO members) that the Special and Differential Treatment (SDT) principle evolved through the Pre- and Post-Uruguay Round. The significance of the Post-Uruguay Round on SDT provisions was that the agreements explicitly specify to what extent developing countries as well as developed countries should meet their obligations.<sup>13</sup>

Since addressing the lack of development has for the most part been the focus of developing countries, the Doha Round, also known as the Doha Development Agenda (DDA) of negotiations, is grounded in development. This means that the objectives of this round are intended to reflect the developmental needs of developing countries through the prism of SDT provisions. The aim of this round is to strategise further on the liberalisation of trade, while making it easier for ‘developing countries and least developed countries to integrate into the multilateral trading system’.<sup>14</sup> Developing countries are under-resourced and lack infrastructure, which, coupled with low research and innovation capacity, subsequently renders them a poor investment environment. These factors impact on their degree of trade liberalisation and cause an ineffective integration of developing countries in the global trading system. It is for this reason that Ismail suggests there be a global trade adjustment fund to aid developing countries in dealing with the impacts of trade liberalisation.<sup>15</sup>

Despite being ‘sold’ as the beacon of hope for developing countries, Doha, which is the first round ever since the WTO has adopted the multilateral trading system, has had to deal with old and longstanding issues. The DDA simply continued the tradition of lowering trade barriers where possible and writing rules to maintain trade barriers and for other trade policies.<sup>16</sup> Notwithstanding the ample objectives in the WTO that are focused on development, the implementation of provisions that promote development is cumbersome. SDT is ‘sold’ as the ideal way of addressing these concerns, by enhancing economic growth and development through non-reciprocity and later through limited non-reciprocity when implementation came

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<sup>13</sup>B Hoekman et al. *Development, trade and the WTO: a handbook*. Washington, DC: World Bank. (2002) 506. According to Hoekman, “the transition periods are probably meant to reflect the costs of changes in trade policy rules for an economy. There are typically three different types of cost: cost of adjustment, of implementation and compliance costs. A longer transition (implementation) period could be a way of reducing the adjustment cost.”

<sup>14</sup> Understanding the WTO: Doha Developmental Agenda. Available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/doha1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm) (Accessed 1 February 2017).

<sup>15</sup> F Ismail *Mainstreaming Development in WTO – Developing Countries in the Doha Round* CUTS International (2007) 21.

<sup>16</sup> *Doha Round: What are they negotiating?* Available at [https://www.wto.org/english/tratop\\_e/dda\\_e/update\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/update_e.htm) (Accessed 1 February 2017).

to a halt.<sup>17</sup> In particular, the SDT principle was employed by the WTO as a way to protect developing countries and their economies by allowing them to grow at a pace proportionate to their development level.<sup>18</sup> According to the Preamble of the Marrakesh Agreement establishing the WTO, one of the stated objectives of SDT is to ‘ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with their needs’.<sup>19</sup> This is evidence that SDT was a deep-rooted principle by the time GATT changed to WTO.

## 1.2 RESEARCH PROBLEM

Although SDT intends to capitalise on the liberalisation process through ‘development’ and fairness, the ineffective implementation thereof has a different outcome. Developing countries in the global trading system remain marginalised, resulting in developed countries being the sole beneficiaries of trade liberalisation. It is the argument of the thesis that SDT should not be used as an exploitative tool against the interests of developing countries. Even more so, developing countries should not ‘assume a position that SDT is an end-all solution to their problems’;<sup>20</sup> but SDT provisions should be approached as a negotiation more than a financial aid scheme; otherwise it contravenes the fundamentals of the WTO, which is an organisation aimed at governing global trade. This causes a divergence between helping developing countries with economic growth and development on the one hand and promoting developed countries’ view of what type of development is best.<sup>21</sup>

Of concern is that there seems to be a serious developmental conflict and/or crisis between the objectives of the WTO along with its principle of SDT and the implementation thereof, which is coupled with negative implications for developing countries.

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<sup>17</sup>P. Schwartz. ‘Development in World Trade Law’. *Journal of International Commercial Law and Technology*. Vol. 4, Issue 1. Page 52 <http://jiclt.com/index.php/jiclt/article/viewFile/70/69> (Accessed 1 February 2017).

<sup>18</sup>B Hoekman ‘Operationalizing policy space in the WTO: Beyond special and differential treatment’. *Journal of International Economic Law* (2005) 406.

<sup>19</sup>Agreement Establishing the World Trade Organization 1994.

<sup>20</sup>M Dube. *The WTO Non-Agricultural Market Access (NAMA) negotiations and developing countries: In pursuit of the ‘development agenda’*. Published Dissertation of the University of Pretoria (2010) 52.

<sup>21</sup>P Kleen and S Page ‘Special and differential treatment of developing countries in the World Trade Organization’ *Global Development Studies* (2005) 51.

### **1.3 PRELIMINARY LITERATURE STUDY AND REASONS FOR CHOOSING TOPIC**

This research has an overwhelming significance legally and in the world of academia. It reveals the developmental gap that remains between developing and developed countries, which was something that was not envisioned by those who drafted the provisions relating to SDT. This affects Africa particularly, as Africa accounts for the majority of developing and least-developed WTO member states. The future of Africa in the global trading system will depend on her capacity to negotiate favourable market access with her WTO counterparts; however, the basic structure of SDT makes it rather difficult to do so effectively.

This research will reveal the rationale of protecting developing countries interests and encouraging trade and development insofar as the WTO legal framework permits it. There will further be possible economic, policy, legal, and social constraints which will be associated with any form of change to this effect. A crucial element in its ineffectiveness is that SDT is structured in a way that protects the interests of developing countries while expecting developed countries to restrict their interests. However, in doing so, this research will not make an economic analysis where development is concerned; instead reference will be drawn from other sources where economic authority is required.

### **1.4 LITERATURE REVIEW**

SDT is a longstanding principle; however, the DDA has sparked much debate about it because the round is centred on ‘development’. This indicates that it intends making an analysis and reconsidering the SDT provisions. According to Dube, ‘although “development is at the heart of the Doha Round”, however, the concept of development is not new to the WTO’.<sup>22</sup> Dube also argues that ‘SDT should not be used as an exploitative tool against the interests of developing countries’.<sup>23</sup> This means that SDT as it currently stands cannot be expected to be the only solution to fuel development. Bjornskov and Krivonos hold the view that any developmental effort must be evaluated against the positive effects of globalisation.<sup>24</sup> The thesis agrees with this submission because there is a huge crisis relating to development which should continue to be at the forefront of WTO negotiations. It is obvious that a solution is needed that will shed light on how to manage SDT provisions and make them easily accessible

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<sup>22</sup> Note 20 above at 52.

<sup>23</sup> *Ibid.*

<sup>24</sup> Bjornskov & E Krivonos *From Lome to Cotonou: The New EU-ACP Agreement* (2001) 2.

and effective for developing countries. Needless to say, this cannot be done without the cooperation and willingness of developing countries and developed countries, otherwise SDT will forever remain deadlocked.

Although SDT is intended to incorporate developing countries in the global trading system and improve their trading prospects, the implementation of this has been criticised. Roessler is of the opinion that SDT violates the principle of reciprocity and this consequently discourages developing countries from liberalising<sup>25</sup> as reciprocity is favoured by developed countries and it requires countries to exchange mutual trade concessions.<sup>26</sup> This position is preferred by developed countries, and Jobim remarks that ‘developed countries, based on their economic superiority and underlining the importance of free trade through liberalisation policies, insist on the necessity of reciprocal commitments to promote economic growth and global welfare’.<sup>27</sup> This therefore creates a dilemma that was intended to be resolved at the DDA. A few studies have emphasised the importance of Reciprocity. Subramanian and Wei have analysed the impact GATT/WTO membership has on international trade flows, and their studies have shown that industrial countries which adhere to reciprocal trade negotiations have increased more in trade than developing countries, which had few obligations to reduce their own trade barriers.<sup>28</sup>

The Preamble of GATT 1947 had intentions to raise living standards and ensure full employment through reciprocal free trade.<sup>29</sup> However, Michalopoulos denies that developing countries were a priority when this was decided, and insists that GATT was simply intended for trading without discrimination among equals, to the exclusion of developing countries.<sup>30</sup> Hence there is an inherent conflict between the WTO and SDT, and Dube is of the opinion that SDT was a compromise made as the WTO evolved.<sup>31</sup> Lichtenbaum confirms that the principle of SDT was adopted to address ‘the conflict between trade and socio-economic development

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<sup>25</sup> F Roessler ‘Domestic policy objectives and the multilateral trade order: Lessons from the past’. In A.O. Krueger (ed.), *The WTO as an International Organization*, University of Chicago Press (1998).

<sup>26</sup> *Ibid.*

<sup>27</sup> M Jobim ‘Drawing on the legal and economic arguments in favour and against reciprocity and special and differential treatment for developing countries within the WTO System’ *Journal of Politics and Law* Vol. 6 No.3 (2013) 55.

<sup>28</sup> A Subramanian and S.J. Wei. ‘The WTO promotes trade, strongly but unevenly’ *Journal of International Economics* 72, (2007) 156.

<sup>29</sup> General Agreement on Tariffs and Trade 1947 (GATT 1947) 55 U.N.T.S 194.

<sup>30</sup> C Michalopoulos *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trading System* World Bank Policy Research Working Paper 2388 (2000) 2.

<sup>31</sup>Note 20 above at 28.

and that it was an acknowledgement of the economic vulnerabilities of the newly independent states and an attempt to re-distribute global wealth through the multilateral trading system'.<sup>32</sup>

It was argued that the WTO Most Favoured Nation Principle will contribute towards trade liberalisation. This is another basic principle which provides for equal benefits among countries and which requires equal treatment between countries.<sup>33</sup> On the contrary, Hoekman submits that this principle is not conducive for the growth and development and developing countries need protection from external competition.<sup>34</sup> Bagwell and Staiger declare that developing countries will benefit from trade agreements only provided they do not simply 'free ride' on reciprocal MFN concessions between developed countries, but rather liberalise them.<sup>35</sup> This argument is based on the effects that are caused by trade. This research will propose a similar argument; however, as the thesis argues that more emphasis should be put on trade liberalisation to help developing countries, which could in turn strengthen the multilateral trading system, perhaps then development of such countries will be fully realised.

Athukorala and Jayasuria<sup>36</sup> address the issues not tackled in Hassan, namely the inadequate financial and technical resources that have effectively barred developing countries from reaping the benefits of trade liberalisation successes and market access. They tackle this issue not from a strictly legal perspective, but rather from an economics viewpoint.

The need to provide additional development to developing countries can be found in the concept of Aid for Trade (AfT). The sixth Ministerial Conference in Hong Kong, China in 2005 launched the AfT by endorsing it as one of the primary tasks of the WTO. It was held in the Hong Kong Ministerial Declaration that:

'Aid for Trade should aim to help developing countries, particularly LDCs, to build the supply-side capacity and trade-related infrastructure that they need to assist them to implement and benefit from WTO Agreements and more broadly to expand their trade'.<sup>37</sup>

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<sup>32</sup> Note 11 above at 1003.

<sup>33</sup> Article I.1 of the General Agreement on Tariffs and Trade 1947.

<sup>34</sup> Note 18 above at 406.

<sup>35</sup> K Bagwell and Staiger 'Can the Doha Round be a development round? Setting a place at the table'. In R. C. Feenstra and A. M. Taylor (eds.), *Globalization in an Age of Crisis: Multilateral Economic Cooperation in the Twenty-First Century*, University of Chicago Press. (2014).

<sup>36</sup> P Athukorala and S Jayasuria *Food Safety Issues, Trade and WTO Rules: A Developing Country Perspective*, Blackwell Publishing Ltd (2003) 1396.

<sup>37</sup> Hong Kong Ministerial Declaration (WT/MIN(o5)/DEC), para. 57.

According to the WTO, AfT is there to assist developing countries and LDCs with trade-related infrastructure obstacles which cause constraints on their ability to fully engage in international trade.<sup>38</sup> Karingi and Fabbroni hold that AfT is important and needed because there are a number of poor countries are unable to obtain global market opportunities which affects their ability to produce and export efficiently.<sup>39</sup> They further highlight that:

‘Aid for Trade is about investing in developing countries and it is fundamental for African countries that the initiative reaches full operationalization as soon as possible, and that Aid flows meet the right needs of beneficiary countries’.<sup>40</sup>

Trade is an important aspect necessary to achieve development and if SDT in itself is not enough to reach this goal, it should then be applied in operation with AfT. This is important because according to Hoekman, although there is preferential treatment and SDT in particular to assist developing countries, many of these countries participation in global trade has been stagnant since the 1970s until today.<sup>41</sup>

## 1.5 RESEARCH QUESTIONS AND OBJECTIVES

This research argues that although the provisions under the SDT are primarily for developmental purposes, however, by and large the implementation of the provisions within various WTO agreements are seemingly ineffective in addressing the ‘development’ issue as both an important principle under the SDT and as a general standalone term.

The basis of this argument will lie in answering the following questions:

- a) What are the objectives of the WTO, and to what extent are these aimed at improving market access for developing countries?
- b) To what extent are requirements under the WTO for compatibility with the operation and implementation of SDT provisions by developed countries and developing countries, adhered to?

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<sup>38</sup> Aid for Trade Available at [https://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/aid4trade\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm) (Accessed 11 November 2017).

<sup>39</sup> S Karingi and M Fabbroni *The Reality of Aid for Trade in Africa Does Supply Meet Demand?* Addis Ababa, ET: UNECA. Ministry of Foreign Affairs. (2009) Available at [www.uneca.org/sites/default/files/publications/76.pdf](http://www.uneca.org/sites/default/files/publications/76.pdf) (Accessed 11 November 2017).

<sup>40</sup> *Ibid.*

<sup>41</sup> B Hoekman *Aid for Trade: Why, What, and Where Are We?* World Bank 2010 Available at [http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1273092281133/Bernard\\_Hoekman\\_Aid\\_For\\_Trade.pdf](http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1273092281133/Bernard_Hoekman_Aid_For_Trade.pdf) (Accessed 11 November 2017).

- c) To what extent does SDT uphold the interests of developing and developed countries? How best can SDT be effectuated to ensure that developing countries enjoy the benefits of the global trading system as envisioned by the objectives of the WTO?

## 1.6 PRINCIPAL THEORIES

The needs of countries are grounded on a theory of development that is supposed to deliver for both developing and developed countries. However, given the divergent needs and aspirations of these countries, there is some conflict on which theory is conducive for each of the country's needs. The jurisprudence of the international trade regime therefore lies in following theories and principles:

Trade liberalisation is one of the key aspects of this research. It calls for 'the reduction of artificial barriers to international trade in goods and services'.<sup>42</sup> This theory is a market model which allows for free trade in goods and services between countries with no impediments by government policies that impose tariff barriers.<sup>43</sup> Eisenberg defines free trade as 'general openness to exchange goods and information between and among nations with few-to-no-barriers-to-trade'.<sup>44</sup> This can serve as a vehicle to attain economic growth and development. It also resonates with the argument that free trade is a safety net for both parties involved in trade and the benefits of it far outweigh the losses.<sup>45</sup>

Although trade liberalisation could ideally accelerate development for developing countries, after the establishment of GATT, developing countries came to the realisation that trade liberalisation policies were not too conducive to their development and therefore they needed the system to change. They therefore sought the protectionist theory as a strategy to remedy the problem in order to develop and expand their industrialisation while eliminating the balance of payment problems.<sup>46</sup> This called for the 'use of import substitution to promote industrialisation; use of export subsidies to promote exports; and use of trade controls for balance of payment purposes'.<sup>47</sup> Michalopoulos asserts that this had an effect, and made requests for changes in the world trading system by consequently demanding flexibility for

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<sup>42</sup> M Winters and X Cirera *Trade Liberalization and Poverty: A Handbook*. (2002) 5.

<sup>43</sup> C Lumina 'Free trade or just trade? The World Trade Organization, human rights and development'. *Law, Democracy and Development*. Vol 12, No.2 (2008) 24.

<sup>44</sup> J Eiesenberg *Free Trade versus Fair Trade*. Available at <http://www.aworldconnected.org/article.php?id=560&print=1> (Accessed 10 March 2017).

<sup>45</sup> Friedman *The Case for Free Trade Hoover Digest* (1997) 4.

<sup>46</sup> Note 30 above at 3.

<sup>47</sup> *Ibid.*

developing countries in the application of trade rules and creation of trade preferences for developing countries.<sup>48</sup>

Reciprocity is another basic principle which provides for equal benefits among countries. This means that a country that benefits from another country's trade concessions should provide equal benefits in return.<sup>49</sup> It is another basic principle which provides for equal benefits among countries.<sup>50</sup> This principle in essence limits the free riding under the unconditional MFN principle.<sup>51</sup> In practice, this is designed and is more effective if it is done among equals, which would consequently marginalise developing countries further.

The emphasis on SDT within the WTO system demands that the concept of development be intertwined with the status of interaction between developing and developed countries. To that end, WTO does have development objectives however the effort to effectuate these efforts falls short. It is believed that through the focus on SDT, which is 'based on the premise that development be equated to an increase in a country's gross domestic product'.<sup>52</sup> This can arguably be 'traced back to the mercantilist and capitalist nature of the WTO and the trade negotiations which are basically a parallel of barter trade'.<sup>53</sup>

## 1.7 RESEARCH METHODOLOGY

There are various approaches that will be used for this research. The topic is littered with three different but interrelated disciplines: politics, law and economics. More so, each of these are based on important principles and theories which forms its foundation. However, the thesis will primarily focus on the legal nature and the WTO and SDT. A descriptive approach will therefore be used to describe both historic and existing situations relevant to the research. Secondly, an analytical approach will be used to analyse the GATT/WTO legal framework governing trade and trace the history of SDT through its current status within the WTO. Furthermore, a comparative analysis will be used to compare the implementation of SDT under various negotiations and agreements of the WTO. Lastly, a prescriptive approach will be used for possible policy considerations.

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<sup>48</sup> *Ibid.*

<sup>49</sup> T Cohn *Global Political Economy Theory and Practice* Pearson Education Inc (2005) 232.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Note 20 above at 55.

<sup>53</sup> *Ibid.*

The research will be facilitated by library research and desktop research. There are vast sources available in the international trade arena and therefore this research will require a critical analysis of primary and secondary sources.

The primary sources will include the legal texts of the WTO dealing with the subject, policies, other relevant agreements, decided cases and general literature on the WTO in so much as it relates to the SDT principle.

The secondary sources will include but not limited to journal articles, textbooks, study reports and policy papers on the implementation of SDT after the various processes and phases of which the principle has evolved written by academics and researchers on the issues relevant to the study.

## **1.9 STRUCTURE OF DISSERTATION**

The dissertation will be structured as follows:

### **1.8.1 Outline of study**

Chapter one outlines the introduction to the study.

Chapter two focuses on the historic development of the WTO and a critical conceptual discussion on trade liberalisation and development.

Chapter three is an analysis of the history of SDT provisions as well as extend the concept of SDT as a legal principle within the WTO. The strengths and weaknesses are explored and how SDT works in terms of the participation of developing countries in the global trading system. In addition, the chapter critically reviews the application of SDT in different Agreements under the WTO, which include General Agreement on Tariffs and Trade, the Agreement on Sanitary & Phytosanitary Measures and the Agreement on the Technical Barriers to Trade.

Chapter four reviews current developments such as the Doha Development Agenda and how it intends to marry trade and development through SDT. This also includes the Nairobi and Bali Ministerial Conference which took place recently.

Chapter five contains the findings, conclusion and recommendations of the dissertation.

# **CHAPTER TWO: HISTORIC DEVELOPMENT OF THE WORLD TRADE ORGANIZATION**

## **2.1 INTRODUCTION**

The establishment of the World Trade Organization (WTO) evolved through a series of agreements and multilateral trade negotiations. This entails eight rounds of trade-policy negotiations compliments of the General Agreement on Tariffs and Trade (GATT) as well as the completion of the Uruguay Round in 1994.<sup>54</sup> The international trade agreements embodied in the WTO go far beyond a collection of legal texts and agreements. As such, the legal framework of the WTO cannot be viewed in isolation of the political and economic influences which led to the establishment of this widely accepted organisation. With this in mind, it can be argued that the WTO is the centre of the global trading system and is by the far the most influential international organisation.<sup>55</sup> This Chapter will therefore focus on the historic development of the further have a critical conceptual discussion on trade liberalisation and development. This Chapter seeks to analyse the principle objectives of the WTO and from there analyse whether these objectives are in any way helping developing countries access other markets.

## **2.2 HISTORICAL OVERVIEW OF INTERNATIONAL TRADING SYSTEM: WHERE IT ALL STARTED**

The basic starting point on understanding the history of the WTO needs to be analysed from the point of the economic and political events that led to the current international trade regime. As such, these events played a significant role in global economics and had the most influence in determining the agenda and operation of the WTO. These events include the influence of trade liberalisation in globalisation which has progressed in the following ways over three centuries: In the 18th century, Britain adopted free market and free trade policies and in the middle of the 19th century other countries started liberalising their trade, all thanks to the successes of Britain's economy.<sup>56</sup> Unfortunately things came to a halt after World War I in a

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<sup>54</sup> Note 35 above at 1.

<sup>55</sup> Note 43 above.

<sup>56</sup> J Sachs & Warner *A Economic Reform and the Process of Global Integration*. Brookings Papers on Economic Activity (1995) 9.

negative response to the instability of the global economy as countries began erecting trade barriers.<sup>57</sup>

The trading system under the WTO dates back to the GATT of 1947 which was an interim agreement which provided rules for the global trading system. The origin of GATT can be traced back to the 1920s and 1930s, when trade barriers became increasingly restrictive following World War I.<sup>58</sup> This reached an extreme level when the United States (US) enacted its infamous Smooth-Hawley Tariff Act in 1930 which resulted in tariffs increasing from 38 to 52 percent.<sup>59</sup> Other countries such as Japan and Germany also abandoned free trade and created high trade barriers which were associated with their fascism.<sup>60</sup> Even more countries retaliated against this in the form of restrictive quotas and higher tariffs on US products.<sup>61</sup> Despite Britain's economic success before this period, it too 'succumbed to temptation and itself re-introduced tariffs', putting an end to the free trade system in 1932.<sup>62</sup> Because there was no world economic leadership during this time, such instability in the world economy along with World War II brought an end to what was left of the first liberal world order.<sup>63</sup>

From the period of the Great Depression of 1929 straight through to the 1940s, the United States (US) and the United Kingdom (UK) were the key role players in defining the new world order which would be designed for the period following the World War II.<sup>64</sup> This new world order was based on the ideology of trade liberalisation in an attempt to fight against the threat posed by the Soviet Union.<sup>65</sup> It is through the period after World War II that reignited the situation of the world economy on a more liberal stance. Adhikari and Athukorala point out that for almost 50 years after World War II the global system essentially functioned without an organisation with defined rules of decision making and enforcement to deal with trade related issues among countries.<sup>66</sup> The US then hosted a multilateral and binding conference in 1944 known as the 'UN Monetary and Financial Conference', otherwise commonly known as the

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<sup>57</sup> H Chang *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism* Bloomsbury Press (2008) 22.

<sup>58</sup> Note 35 above at 47.

<sup>59</sup> Note 49 above at 29.

<sup>60</sup> Note 57 above.

<sup>61</sup> J Markusen *International Trade Theory and Evidence* McGraw-Hill Inc (1995) 342.

<sup>62</sup> Note 57 above.

<sup>63</sup> *Ibid.*

<sup>64</sup> Note 27 above at 56.

<sup>65</sup> A Alavi *Legalization of Development in the WTO*. Netherlands: Kluwer Law International BV. (2009) 77.

<sup>66</sup> R Adhikari & P Athukorala *Developing Countries in the World Trading System: The Uruguay Round and Beyond*. Edward Elgar Publishing Ltd. (2002) 1.

Bretton Woods Conference (named after the place where it was hosted).<sup>67</sup> The progress towards trade liberalisation was slow at this point and protectionism as well as state intervention persisted in most developing and communist countries.<sup>68</sup> According to Jobim, the intention of the Bretton Woods Conference was therefore ‘to strengthen international cooperation between countries by coordinating policies and actions against protectionism in order to achieve economic growth’.<sup>69</sup> It was this conference that led to the creation of the International Monetary Fund (IMF), which fell under the institution of the International Trade Organisation (ITO).<sup>70</sup>

### **2.3 THE INTERNATIONAL TRADE ORGANISATION: A BRIEF OVERVIEW**

The end of World War II left many countries including the US in developing multilateral economic and political institutions that would aid the process of global economic reconstruction.<sup>71</sup> It was in 1946 that the negotiations concerning the establishment of the ITO began.<sup>72</sup> Markusen points out that this would be the establishment of the fourth major institution following the United Nations (UN), which is aimed at the resolution of political disputes; the IMF, which is designed assist countries in financial difficulties; and the World Bank, which provides development loans to developing countries.<sup>73</sup> The ITO was intended to specify the regulations under which the multilateral negotiations would commence as well as the manner in which the rules would be applied.<sup>74</sup>

The ITO was governed and regulated by the Havana Charter or Charter for an International Trade Organisation of 1948, which set out its principles and objectives.<sup>75</sup> Markusen argues that ‘the governing documents of the ITO, were quite ambitious, specifying a framework of rules covering not only tariffs on merchandise trade but certain domestic regulatory policies’.<sup>76</sup> Such ambition in fact led agricultural and other business interests in the US and other nations to lobby against it as it had unacceptable and unnecessary constraints.<sup>77</sup> Cohn remarks that ‘the charter was unusually broad in scope’<sup>78</sup> as it not only dealt with commercial policy but also

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<sup>67</sup> Note 1 above at 23.

<sup>68</sup> Note 57 above at 22.

<sup>69</sup> Note 27 above at 56.

<sup>70</sup> Note 67 above.

<sup>71</sup> Note 61 above at 343.

<sup>72</sup> Note 35 above at 46.

<sup>73</sup> Note 71 above.

<sup>74</sup> Note 35 above at 46.

<sup>75</sup> Note 71 above.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Note 49 above at 29.

incorporated economic development, full employment, international investment, international commodity arrangements, restrictive business practices, and the administration and functions of an ITO.<sup>79</sup>

Because of the negative response against the adoption of the ITO, the US congress refused to ratify the Havana Charter, and consequently the ITO did not come into being at that time.<sup>80</sup> The reasons that led to this refusal are, according to Cohn, ‘complex and ironic, because the United States had originally proposed the creation of the ITO’.<sup>81</sup> The Charter had to be drafted with specific sensitivity taking into consideration the post-war effect of Europe and its attempt to recover from the war. This meant that trade negotiators had to reach a point of convergence in terms of meeting everyone’s demands. In doing so, the trade negotiators satisfied neither protectionist nor free trade demands.<sup>82</sup> Cohn points out that ‘US protectionists argued that the ITO would lead to low-cost imports and threaten US ability to form its own trade policy’ and on the contrary, ‘free traders believed that the charters numerous escape clauses and exceptions would interfere with trade liberalisation’.<sup>83</sup>

Following the failure to establish the ITO, all subsequent multilateral negotiations were then carried through with the GATT framework.<sup>84</sup> This was intended to be an interim agreement which was drawn directly from the principles of the ITO. However, despite its intended interim status, the GATT became the permanent international trade organization by default.<sup>85</sup>

## **2.4 THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A BRIEF OVERVIEW**

As an alternative to the ITO, the US and other nations agreed to implement and develop components of the ITO which were less ambitious than the rest. One component was a multilateral agreement intended to negotiate reciprocal reductions in tariffs, while the other set out the general obligations pertaining to trade policy. These components were then put together as the General Agreement on Tariffs and Trade.<sup>86</sup> It was fully established in 1947 and it was

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<sup>79</sup> R Hudec *The GATT Legal System and the World Trade Diplomacy* New York: Praeger (1975) 10.

<sup>80</sup> Note 49 above at 227.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Note 35 above at 46.

<sup>85</sup> *Ibid.*

<sup>86</sup> Note 71 above.

based on the Protocol of Provisional Application in Havana, Cuba.<sup>87</sup> Unlike the ITO, the GATT required no ratification by the US Congress because as Jackson puts it, ‘it was a multilateral agreement among its contracting parties rather than a treaty among sovereign nations’.<sup>88</sup> It is for this reason that countries that were signed to GATT were referred to as contracting parties as opposed to members.<sup>89</sup>

In a comparison of ITO and GATT, Cohn states that:

‘[u]nlike the ITO, which would have become a UN specialized agency on par with the IMF and the World Bank – GATT never attained specialized agency status. GATT continued to be primarily a written code of behaviour on international trade, and it had more limited legal obligations and dispute settlement procedures than the planned ITO. GATT also lacked the Havana Charter’s provisions relating to investment, employment, commodity agreements and restrictive business practices’.<sup>90</sup>

The plan was for GATT to be an interim agreement to carry out the multilateral negotiations; however, Jackson says that ‘GATT gradually developed some characteristics of an International Organization’.<sup>91</sup> Jackson bases this on the fact the GATT had a small secretariat and a couple of committees and working parties, but it also had power to make decisions that would be binding on members.<sup>92</sup> The strengths of the GATT lie in its successful way of reducing tariffs and the manner in which it managed to negotiate non-tariff barriers.<sup>93</sup> This contributed to its fast growing membership. Due to the GATT’s informality and flexibility, this made room for several weaknesses within its framework.<sup>94</sup> Firstly, the fact that GATT was not a formal organisation meant that its members could easily violate and waive the regulations imposed by GATT.<sup>95</sup>

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<sup>87</sup> T Srinivasan *Developing Countries and the Multilateral Trading System*. Delhi: Oxford University Press (1998) 1050.

<sup>88</sup> J Jackson *The World Trading System* Cambridge, MA: MIT Press (1997) 69.

<sup>89</sup> Note 49 above at 228.

<sup>90</sup> *Ibid.*

<sup>91</sup> J Jackson *World Trade and the Law of GATT* Indianapolis, IN: Bobbs Merrill (1969) 120.

<sup>92</sup> *Ibid.*

<sup>93</sup> Note 49 above at 228.

<sup>94</sup> *Ibid* For example, ‘some trade sectors such as agriculture and textiles were exempted from GATT regulations. Agriculture was treated as an exception to GATT restrictions on import quotas and export subsidies; and the developed countries imposed textile import quotas contravening the spirit of the GATT’.

<sup>95</sup> *Ibid.*

The GATT states in its Preamble the objectives of the contracting parties include:

‘raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of resources of the world and expending the production and exchange of goods’.<sup>96</sup>

In its Preamble, the GATT also states that it intends to achieve this by:

‘[r]eciprocal and mutually advantageous arrangements directed to the substantial reduction in tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce’.<sup>97</sup>

GATT puts significant emphasis on reciprocity, and Bagwell and Staiger highlight the fact that “free trade” is not mentioned anywhere under the objectives of the GATT. They add further that ‘instead, the emphasis is on reciprocal tariff reductions extended in a non-discriminatory fashion in order that participating parties could mutually benefit from the resulting increase in income’.<sup>98</sup> Because GATT was a compromise after the failure of the ITO, the Havana Charter contained a provision for the use of protectionist trade measures.<sup>99</sup> This was done with a view to establish, develop or reconstruct a particular industry, provided that the other contracting parties agreed to it.<sup>100</sup>

Since the establishment of GATT in 1947 there have been eight rounds of multilateral trade negotiations and the theme of these rounds were focused on liberalisation as the main trade principle. GATT promoted liberalisation by explicitly lowering import tariffs through the series of multilateral trade negotiations. This was successfully implemented on certain goods; however, with agriculture and textiles, Bagwell and Staiger argue, the liberalisation process moved really slowly.<sup>101</sup> Moreover, GATT could not flourish because it was meant to be an interim agreement and was therefore not equipped to deal with issues such as new trade policy considerations, which became increasingly important to the global economy.<sup>102</sup> It is for this

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<sup>96</sup> Preamble of the General Agreement on Tariffs and Trade, 1947

<sup>97</sup> Preamble of the General Agreement on Tariffs and Trade, 1947.

<sup>98</sup> Note 35 above at 46.

<sup>99</sup> Note 30 above at 2.

<sup>100</sup> *Ibid* This provision was later incorporated into GATT as an amendment in 1948.

<sup>101</sup> Note 35 above at 47.

<sup>102</sup> Note 35 above at These issues included preferential trading agreements, labour and environmental standards, and services, investment, and intellectual property.

reason Jackson says that GATT ‘limped along for nearly fifty years with almost no basic constitution designed to regulate its organisational activities and procedures’<sup>103</sup>

The rules of GATT are laid out in thirty-nine articles, and at the heart of this series of articles are the principles of reciprocity and non-discrimination.<sup>104</sup> The basic principle of GATT is non-discrimination, which has two elements in its fold, one being the Most Favoured Nation (MFN) which requires the equal treatment between countries. As such, Article I.1 of the GATT holds that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.<sup>105</sup>

As a result of this principle, if one country grants another country a special favour, such as lowering the customs duty rate for one of their products, it has to do the same with other countries as well.<sup>106</sup> Lester says that ‘the MFN principle means that every time a country lowers a trade barrier or opens up a market, it has to do so for like goods and services from all its trading partners’.<sup>107</sup>

Like any other rule, there are exceptions, and the MFN has three important exceptions to which it is subject. First, Article XXIV of the GATT set out procedures which allowed countries to form regional trading arrangements such as free trade and customs unions. Secondly, different treatment among developed and developing countries was encouraged which had to be proportionate to their development stages. This was done by developing the Generalised System of Preferences (GSP) under the United Nations Conference on Trade and Development (UNCTAD). GSP was, however, a clear deviation from Article I of the GATT, which prohibits discrimination; hence it is one of the exceptions. Jobim emphasises that:

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<sup>103</sup> Note 88 above at 42.

<sup>104</sup> Note 35 above at 48.

<sup>105</sup> Article I.1 of the General Agreement on Tariffs and Trade (GATT) 1947.

<sup>106</sup> Note 27 above at 56.

<sup>107</sup> Note 8 above.

‘[f]or the GSP to be operative, a waiver pursuant of Article XXV of the GATT was created in 1971 in order to mitigate the content of the MFN clause of Article I and thereby to permit in the implementation of a preferential system within the international trade regime. In 1979, the rule of preferences was definitely established in a permanent basis with the introduction of the Enabling Clause’.<sup>108</sup>

There are three main objectives of the GSP, namely:

- i. To extend earnings on exports of developing countries by opening up developed country markets to them;
- ii. To allocate other means of export earnings for developing countries by weaning them away from commodities and raw materials whose price instability contributes to chronic trade deficits, and encourages exports oriented industrialisation; and
- iii. Accelerate their rates of economic growth.<sup>109</sup>

GSPs were intended to encourage industrialisation and trade development, but they had no solid scope in their application. They were based purely on the discretion of developing countries to administer the GSP system, and it was for this reason that the system received much criticism. The third and final exception to the MFN rule was agreed on in the Tokyo Round of the GATT in the 1970s, where countries were allowed to negotiate side agreements among themselves, known as ‘Codes’. These meant that only the Code signatories were obligated to treat one another without discrimination, providing a ‘conditional MFN treatment’.<sup>110</sup>

Another important principle under GATT is National Treatment (NT), which requires equal treatment between and within countries.<sup>111</sup> According to Lester, this principle focuses on ‘treating foreigners and locals equally, further giving others the same treatment as one’s own nationals’.<sup>112</sup> Article III of the GATT requires that imported and locally produced goods should be treated equally, and the same should apply to foreign and domestic services. According to the text of Article III of the GATT:

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<sup>108</sup> Note 27 above at 58. It is known as the Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries but it is commonly known as the Enabling Clause.

<sup>109</sup> CUTS International South Asian Positions in the WTO Doha Round: In Search of a True Development Agenda (2007) 243.

<sup>110</sup> Note 71 above at 344.

<sup>111</sup> Article III of the GATT 1947.

<sup>112</sup> Note 8 above.

- (1) 'The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
- (2) 'The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
- (3) '(...)
- (4) 'The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.'<sup>113</sup>

Cohn is of the opinion that 'this provision is designed to prevent countries from using domestic measures to limit foreign competition as their tariffs and other external trade barriers decline'.<sup>114</sup> The history of the GATT/WTO shows divergent approaches to interpreting Article III of the GATT. These include 'aims-and-effects approaches that focus on discerning protectionist intent; and economic or market-based approaches that focus on domestic fiscal or regulatory measures that upset competitive relationships between imports and domestic products'.<sup>115</sup>

At the centre of these principles there was also the impact of reciprocity, which requires countries that benefit from other countries to provide roughly the equal benefits in return. Article XXVIII holds that reciprocity means 'that tariff negotiations should be conducted on a reciprocal and mutually advantageous basis.'<sup>116</sup> This rule is based on four sound reasons that have been formulated to justify this rule, namely (i) to avoid 'free riders' under the

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<sup>113</sup> Article III of GATT 1947.

<sup>114</sup> Note 49 above at 232.

<sup>115</sup> Note 1 above at 54.

<sup>116</sup> Article XXVIII of GATT 1947.

unconditional MFN principle<sup>117</sup>; '(ii) to satisfy a country's domestic sceptics; (iii) to be a bargaining chip in negotiations with other countries and (iv) to encourage countries to reduce their trade barriers'.<sup>118</sup>

There were a number of notable gaps in the structure of the GATT, and Alavi holds that it is due to 'its provisional nature, the lack of any organisation to support it, its vague and somehow incomplete rules, and its many exceptions to the general rules'.<sup>119</sup> It is not surprising that these problems were addressed in the Uruguay Round of the GATT, which was a contentious round that lasted from 1986 to 1994.<sup>120</sup> The Uruguay Round was the eighth post-war round of multilateral trade negotiations and the sixth round of multilateral trade negotiations conducted under the GATT. Kenwood and Lougheed allege that it 'was the most ambitious of them all, taking seven years of hard bargaining in areas of trade which, for decades, had been considered too difficult'.<sup>121</sup> In the past, GATT had primarily focused on the trade in commodities and manufactured goods. It was not until the Uruguay Round that it achieved a fair level of success in the liberalisation of agricultural and textile goods and intellectual property.<sup>122</sup>

Like other negotiations conducted under the GATT, the purpose of the Uruguay was to liberalise trade. It was expected that the Uruguay Round would continue moving towards a more open international trade regime. This did not happen. According to Macrory, Appleton and Plummer, 'the Uruguay Round produced a profound alteration of the trade regime in response to an equally profound transformation of international economic relations.'<sup>123</sup> If anything, the Uruguay Round resulted in a systematic change in the world economy.

The Uruguay Round is notably the most significant round of all multilateral trade negotiations conducted under the GATT and the significance is better understood when it's compared with the Tokyo Round of 1973 – 1979 which was at the time the most significant round under the GATT.<sup>124</sup> The main role players in the Tokyo Round were developed countries while the developing countries were not so much involved. When this round was concluded, very few

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<sup>117</sup> B Carl *Trade and the Developing World in the 21<sup>st</sup> Century* New York: Transnational Publishers Inc. (2011) 79.

<sup>118</sup>Note 65 above at 82.

<sup>119</sup> *Ibid.*

<sup>120</sup> Note 35 above at 47.

<sup>121</sup> A.G Kenwood & A.L Lougheed *The Growth of the International Economy 1820-2000: An Introductory Text 4th Edition*. Routledge (1999) 294

<sup>122</sup> S De Vylder S *The Least Developed Countries and World Trade*. 2<sup>nd</sup> Edition. Sida Studies No. 19 (2007) 92.

<sup>123</sup> P Macrory, Appleton A & Plummer M *The World Trade Organization: Legal, Economic and Political Analysis*. Vol 1 Springer Inc. (2005) 4.

<sup>124</sup> *Ibid.*

developing countries had signed one of the nine agreements under the Tokyo Round.<sup>125</sup> And African countries?

Shenkar and Luo are of the opinion that the Uruguay Round was intended for the expansion of the GATT framework and ‘reintroduced the idea of a comprehensive international trade organisation to coordinate international economic activities including those involving a large number of developing countries.’<sup>126</sup> Macrory, Appleton and Plummer further add that:

‘[d]eveloping countries were active in all phases of the Uruguay Round, and their involvement broadened the potential for trade-offs and the package deal that ultimately was agreed upon. The strong support of developing countries was instrumental in encouraging the major parties – the United States and European Union – to settle. It is true that the diplomatic behaviour of the Uruguay Round still reflected the bipolar structure that had characterised the Tokyo Round, but the former was nevertheless impacted by the new actors that had capacity to force changes in the process and outcome of the negotiations’.<sup>127</sup>

The major feature of the conclusion of the Uruguay Round was its establishment of the WTO, which in essence completed the work of the ITO which had been abolished.

## **2.5 THE ESTABLISHMENT OF THE WORLD TRADE ORGANIZATION**

As has been highlighted above, the WTO, which is a successor of the GATT, evolved through a number of multilateral trade negotiations which include old and new issues of trade. The move from GATT to WTO was essential because the GATT was not an organisation as such, but an arrangement by means of which countries could discuss and agree on issues pertaining to international trade. The Uruguay Round, being the eighth and final round of multilateral trade negotiations, finally led to the establishment of the WTO. It was established through the Agreement Establishing the World Trade Organization, commonly known as the WTO Agreement, and this was done by signing the agreement in Marrakesh, Morocco in April 1994. Upon the establishment of the WTO, it was decided that the WTO Agreement would come into force on 1 January 1995; and in the same breath it was decided that the GATT of 1947 would be terminated on 31 December 1994.<sup>128</sup>

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<sup>125</sup> *Ibid* at 5.

<sup>126</sup> O Shenkar & Luo Y *International Business* John Wiley & Sons Inc. (2004) 202.

<sup>127</sup> Note 123 above at 56.

<sup>128</sup> *Ibid*.

According to the WTO Agreement, the main objective of the WTO is the following:

‘To provide a common institutional framework for the conduct of trade relations among its members ... with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development’.<sup>129</sup>

The first and most important function of the WTO is generally to implement the facilitation, administration and operation of the WTO agreement and, most importantly, to further their objectives.<sup>130</sup> It is a multilateral trade organisation aimed at international trade liberalisation. Because it is a successor of the GATT, Shenker and Luo hold that the main objectives, aims and rules of the WTO still ‘foster non-discrimination, transparency and predictability in the conduct of trade policy.’<sup>131</sup> The WTO therefore upholds these objectives ‘by administering trade agreements; acting as a forum for negotiating trade; to administer Dispute Settlement Understanding; reviewing national trade policies; to assist developing countries on trade policy issues, through technical assistance and cooperating with other international organisations.’<sup>132</sup>

The governance structure of the WTO makes the Ministerial Conference the top-level decision-making body of the WTO and Article IV of the WTO Agreement provides that all decision-making powers shall reside in a Ministerial Conference, which should be held at least every two years and should be attended by ministers from all WTO Members.<sup>133</sup> In between the Ministerial Conference intervals, the General Council, which comprises of ambassadors of member states, may exercise decision-making powers.<sup>134</sup>

Despite the GATT being terminated and replaced with the WTO, the WTO Agreement includes the text of GATT and as such it continues to exist as a substantive agreement. Bagwell and Staiger point out that ‘the WTO Agreement includes ... a set of additional agreements that build on and extend GATT principles to new areas’.<sup>135</sup> As mentioned above, for example, the WTO carries through the principle of non-discrimination through Most-Favoured Nation (MFN) and National Treatment (NT) as with the GATT. Because the WTO was established for

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<sup>129</sup> Article II.1 of The Agreement Establishing the World Trade Organization 1995.

<sup>130</sup> Article III of the Agreement Establishing the World Trade Organization 1995.

<sup>131</sup> Note 126 above.

<sup>132</sup> Article III of the Agreement Establishing the World Trade Organization 1995.

<sup>133</sup> Note 123 above at 62.

<sup>134</sup> *Ibid.*

<sup>135</sup> Note 35 above at 1.

the improvement of world trading system, Adhikari and Athukorala opine that ‘the WTO provides the world trading system with an effective institutional and legal framework for the design and enforcement of trade rules’.<sup>136</sup> In a comparison with the GATT preamble, the WTO Agreement adds worth and significance to respecting and preserving the environment, the objective of sustainable development as well as the development of developing countries.<sup>137</sup>

## **2.6 DEVELOPED AND DEVELOPING COUNTRIES IN THE WORLD TRADING SYSTEM**

Developing countries are considerably weak and late bloomers to economic growth and development. With the establishment of the WTO there had to be major transformative changes that had to be implemented in the world trading system. During the period of the GATT, developing countries were largely on the sidelines of the world trading system.<sup>138</sup> This meant that developing countries were not serious participants in any of the functioning of the world trading system. The underlying theories of trade at the time as well as the development prevalent during this period emphasised that development is essential to protect developing countries from the competitive work market.<sup>139</sup> Barceló’s evaluations of the GATT period of 1947 to 1995 show that ‘developing countries need to protect “infant industries” and a shelter local producer was highly touted.’ He further points out the evidence of this as found under Article XXVIII of the GATT which indicates that ‘under its provisions developing countries have wide-ranging authority to protect select industries with quotas that would otherwise run afoul of Article XI’s prohibition on quantitative restrictions’.<sup>140</sup>

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<sup>136</sup> Note 66 above. 2.

<sup>137</sup> P Macrory, Appleton A & Plummer M *The World Trade Organization: Legal, Economic and Political Analysis*. Vol 1 Springer Inc. (2005) 80.

<sup>138</sup> J Barceló *Developing countries and the WTO* Cornell Law Forum (2005) 8.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

Article XVIII of GATT 1947 Governmental Assistance to Economic Development: ‘The contracting parties recognize 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. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.’

In 1979, the GATT adopted an exception in favour of developing countries as a way to improve their role in the international trading system. The Enabling Clause was thus enacted, and it allows developed countries, or otherwise industrial countries, to grant developing countries preferential access to their markets.<sup>141</sup> This is commonly known as the GSP regime as discussed above. For developed countries, the Enabling Clause has given them wide and discretionary powers to manage and to build their own system of preferences. This meant that such countries could choose the products they would like to import and the unfortunate consequence of this for developing countries was that developed countries could create ‘perverse incentives against manufacturing in poor countries.’<sup>142</sup> As expected, this instantly caused great instability in the system which prevented developing countries to have a solid and long-term possibility of economic growth and development.

Developing countries have always desired an international trading system that fully incorporates them and to fit in harmoniously in the world trading system. During the period that led to the establishment of the Havana Charter of 1947, Kenneth Dem said positively that:

‘It was the US position that less-developed countries could best develop by participating fully in a multilateral non-discriminatory system with the lowest possible levels of tariffs and no quantitative restrictions. This position proved totally unacceptable to the less-developed world, which sought both affirmative commitments by all member countries to further the process of economic development, and, more important, specific exceptions to many of the prohibitions of the Charter in order to permit the less-developed countries to follow an independent commercial policy. The reigning view in less-developed countries was that economic development ... required the creation of import substitution industries. It was asserted that such industries could flourish only behind high tariff walls supplemented ... by quantitative restrictions’.<sup>143</sup>

The prospect of full participation in the multilateral trading system was, and to a large extent still is, bleak for developing countries. In an attempt to remedy this, these countries had to be very critical of the applicability of certain principles such as non-discrimination enshrined in Article I of the GATT. Developing countries therefore argued that ‘equal treatment of unequals is unjust’, and they have vouched that there has to be some discrimination in their favour in

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<sup>141</sup> *Ibid.*

<sup>142</sup> C Thomas & J.P Trachtman *Developing Countries in the WTO Legal System* Oxford University Press: New York (2009) 6.

<sup>143</sup> K Dem *The GATT: Law and International Economic Organization* Chicago: University of Chicago Press (1970) 225.

this instance.<sup>144</sup> According to Hoekman, their desire here was, firstly, to be excused from making reciprocal tariff reductions as per Part IV of the GATT; second, to have tariff preferences in markets of developing countries; and last, to be afforded special and more favourable treatment.<sup>145</sup> This created a well-intentioned understanding that a specific set of rules applied for developing countries while others did not apply. The report of the Brand Commission also emphasises that ‘the Tokyo Round agreement had recognized that preferential treatment of developing countries should be accepted as a permanent feature of the world trading system rather than a temporary exception’.<sup>146</sup>

The Uruguay Round that took place under the GATT framework was the first of its kind to include developing countries into the trading system as partners. Therefore, when the WTO came into being, it did so on the basis of the ‘single undertaking’. Steger defines the Single Undertaking as ‘an all or nothing package’ which is designed to bring uniformity between member states.<sup>147</sup> This meant that all previous members of the GATT, developing countries included, could subsequently be contracting parties of the WTO and *all* its agreements.<sup>148</sup> Developing countries had to accept the core rules of the GATT although they had not been functioning participants from the onset. This also included agreeing to what had previously been ‘side agreements’ which amended, expanded and tightened the original GATT rules.<sup>149</sup> This is mainly because GATT was constructed with a multitude of loopholes. Because of this bargain, developing countries also had to accept the new agreement on intellectual property (also known as the Trade Related Aspects of Intellectual Property Rights, or TRIPS) and they also gained some advantages in agriculture and textiles.<sup>150</sup>

Despite the efforts of the Uruguay Round to improve the position of developing countries, it did not fully attend to certain issues within the system. The exception under the GSP was left in creating, and more so continuing the discrimination in favour of developing countries within the international trading system. Although this seems like positive discrimination against

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<sup>144</sup> B Hoekman and C Ozden *Trade Preferences and Differential Treatment of Developing Countries* Edward Elgar Publishing Ltd (2006) 202.

<sup>145</sup> *Ibid.*

<sup>146</sup> Independent Commission on International Development Issues *North South: A Program for Survival* Cambridge: MIT Press (1983) 183

<sup>147</sup> D Steger *The Culture of WTO: Why it needs to change*. *Journal of International Economic Law* (2007) 483.

<sup>148</sup> Note 138 above at 9.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

developing countries, it is also discrimination against them as it does not treat them like fully fledged members.

## 2.7 UNDERLYING THEORIES

Having established the institutions and agreements governing international trade, it is now pertinent for the research to embark on a brief discussion of the underlying theories which could be argued form the foundation current international trade relations. International trade is primarily the exchange of goods and services across borders. Shenker and Luo explain that export structures vary across countries and therefore countries do not mimic each other as they have different vulnerabilities to trade conditions.<sup>151</sup> International trade theories are therefore in place to explain this.

The first theory in international trade history is the mercantilist theory, which emerged in the mid-sixteenth century in England. The term ‘mercantilism’ was first used by Adam Smith, an English economist who used it in reference to economic thought and practice.<sup>152</sup> It places great emphasis on the ability of the government to improve the well-being of its residents using a system of centralised controls. Mercantilists strongly believed that there was a strong connection between power and wealth and that these were progressive tools to achieve legitimate goals of national policy.<sup>153</sup> It was a big view of mercantilists that a state’s power depended on the amount of gold and silver it could accumulate in the public treasury.<sup>154</sup> Shenker and Luo explain that:

‘[u]nder mercantilism, the government had two goals in foreign economic policy. The first goal was to increase the wealth of the nation by acquiring gold. Mercantilists identified national wealth with the size of a nation’s reserves of precious metals (which could be used to hire mercenary armies). The second policy goal was to “extract trade gains from foreigners through regulations and controls so as to achieve a surplus in the balance of trade through maximizing exports (e.g., subsidies) and minimizing imports (e.g., tariffs and quotas)’,<sup>155</sup>

Mercantilism lies in the idea that trade stimulates the economy in way that is aimed at the accumulation of bullion (precious metal) and national power.<sup>156</sup> Mercantilists therefore took

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<sup>151</sup> Note 126 above at 17.

<sup>152</sup> Note 49 above at 24.

<sup>153</sup> *Ibid.*

<sup>154</sup> Note 49 above at 24.

<sup>155</sup> Note 126 above at 17.

<sup>156</sup> G Dunkley *Free Trade: Myth, Reality and Alternatives* University Press Ltd (2004) 19.

all necessary measures to ensure that their gold and silver was accumulated. This was done by increasing their exports and decreasing their imports.<sup>157</sup> This theory served as an integral part of building up state authority as well as territorial unification through its emphasis on national power. However, it has been criticised by Adam Smith as he believed that mercantilists followed ‘beggar-thy-neighbour’ policies that would eventually lead to international conflict. The main reason for this is that it would be fairly impossible for all states to have a ‘balance-of-trade’ surplus, which means more exports than imports.<sup>158</sup>

The prevailing economic wisdom according to Wolf is that ‘rules of international economic order exist to bind governments and restricts their actions, in order to allow agents, wherever located, to make long term plans ... to participate fully in the integrated world economy.’<sup>159</sup> These rules of international trade are in place to help countries survival within the international trade community<sup>160</sup>. Wolf is also of the opinion that:

‘[t]he rules of the international trading system were not designed to achieve free trade. It was accepted that individual countries were bound to differ on this issue and that many would wish to reserve the right to protect. At the same time, it is politically difficult to sustain greater liberalism in one democratic country than in another when they are in apparently similar circumstances’.<sup>161</sup>

Since the mercantilist prejudices are somewhat strong, it renders it virtually impossible to liberalise trade unilaterally. Wolf argues that reciprocal bargaining over trade barriers has become the best instrument of general trade liberalisation; however, the principle of reciprocity is an effective technique to effect liberalisation but it actually also generates conflict and resentment where no economic justification exists.<sup>162</sup> There have been some strong arguments made against liberalisation by developing countries, the principle reason being that ‘developing countries already import all they can’, and, with their high level of indebtedness, can certainly not import any more. Moreover, trade liberalisation is also considered by some as being the key to economic growth and development, and it is also feasible that some countries have strongly benefited from opening up their markets. The advantage of liberalisation is that it will

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<sup>157</sup> Note 49 above at 24. They increased exports of manufactured goods and restricted exports on raw materials and technology to limit the ability of others to develop their own manufacturing capabilities. They also limited imports of manufactured goods, and only imported raw materials that would reduce costs on their own manufacturers.

<sup>158</sup> *Ibid.*

<sup>159</sup> Note 144 above at 204.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid* at 205.

decrease discrimination against various sectors of trade, while boosting imports and exports increase in investment which will all trigger productivity gain while also increasing the economic growth.<sup>163</sup>

On the other hand, developed countries are well-known for their protectionist disposition (which can be traced to early developments of trade), especially on products of export interest to developing countries. This protectionist tendency includes ‘major disparities in the tariffs applied among developed countries themselves’ compared to those applied on developing country products. The protection granted to developed countries ‘costs developing countries in excess of the official development assistance flows’.<sup>164</sup> With the prevalence of protectionism, interestingly the average tariff rate applied by the Organisation for Economic Cooperation and Development (OECD) countries in respect of developing country exports on a MFN basis is four times more than what they apply among themselves.<sup>165</sup>

The most important of these underlying theories is that they must contribute to the theory of development. After the Uruguay Round, developing countries had expected a largely positive outcome, and by and large the outcomes of this Round were supposed to reflect the developmental aspirations of developing countries as well as fuel economic growth and development. Development is an ideology or otherwise *theory* that has no standard definition within the WTO as the question ‘how’ development is to be achieved has not been fully explored. Actually, this is probably the reason the development crisis of developing countries cannot be fully addressed. Emmerij defines it as ‘the idea that all countries could purposefully pursue policies of economic and social advance, which overtime would rapidly improve the welfare and living standards of their population’.<sup>166</sup> Development is a constant thread running through the WTO and it is at the heart of the Doha Round of negotiations, which seeks to address the correlation between trade and development. The banner of this round is labelled the Doha Developmental Agenda and will be discussed further later in research.

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<sup>163</sup>P Draper *The Political Economy of Trade Reform in Emerging Markets: Crisis or Opportunity?* (2009) 239.

<sup>164</sup> A Hammouda *How the Doha Round Could Support African Industry?* African Trade Policy Centre (2007) 4.

<sup>165</sup> *Ibid.*

<sup>166</sup> L Emmerij *Has the UN Faced up to the Development Challenges?* in le Pere and Samasuwo (eds) *The UN at 60 – A New Spin on an Old Hub* (2006) 105.

## **2.8 CONCLUSION**

This chapter has shown the evolution of the world trading system and also signifies the need of the WTO to govern and regulate the trading system. It has also shown how some issues that existed in the past are still relevant today and are useful in shaping the global economy. With every organisation or agreement that had been deadlocked from the ITO to the GATT, there has always been an alternative to secure its effectiveness to keep the world trading system operational. Currently, the crisis lies in development, particularly for developing countries and it seems imperative that the WTO prioritises getting a point of convergence between development and developing countries.

# **CHAPTER THREE: SPECIAL AND DIFFERENTIAL TREATMENT WITHIN THE WORLD TRADE ORGANIZATION**

## **3.1 INTRODUCTION**

When the WTO launched the Doha Round of trade negotiations, the debate around the meaning of Special and Differential Treatment (SDT) was put under the spotlight, as well its contribution to development. SDT was established in response to the economic vulnerabilities of developing countries and the trade inequalities through the multilateral trading system. In preparation for the fourth session of the Ministerial Conference, the need for SDT was described as follows:

‘It was conceived in acknowledgement of the fact that developing countries were at ... very different stages of economic, financial and technological developments and therefore had entirely different capacities as compared to developed countries in taking on multilateral commitments and obligations.’<sup>167</sup>

Despite this, SDT provisions have been largely criticised for their ineffectiveness and bear very little evidence of practical use in the WTO; consider their failure to promote the development needs for developing countries. In theory, however, SDT provisions seem to have great potential, but it is the implementation of them that falls short. This is because the provisions under SDT do not fully represent the spectrum of possibilities for developing countries.

This chapter will briefly discuss the history of SDT provisions and its meaning as a legal principle within the WTO framework. It will also analyse its strengths and weaknesses in terms of the impact it has on developing countries within the global trading system. Lastly, this chapter will critically review the application of SDT provisions in different WTO Agreements.

## **3.2 MEANING OF SPECIAL AND DIFFERENTIAL TREATMENT**

The Preamble of the Agreement Establishing the WTO states its wishes to ensure that developing countries have a secure share of growth under international trade and that this growth should at the very least be proportionate to the developing countries’ economic

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<sup>167</sup> *Preparations for the fourth session of the Ministerial Conference: proposal for a framework on special and differential treatment* WTO Document WT/GC/W/442 19 September 2001 Par 1 as quoted in Ewelukwa “*Special and Differential Treatment in International Trade Law: A Concept in Search of Content* (79) North Dakota Law Review (N.D. L. Rev.) (2003) 834.

development capacity.<sup>168</sup> According to Dube, this means that by the time GATT changed to WTO, SDT was already firmly entrenched as a principle.<sup>169</sup> Since trade liberalisation is ‘the reduction of artificial barriers to international trade in goods and services’,<sup>170</sup> the underlying rationale of SDT lies in the belief that trade liberalisation under MFN is not sufficiently adequate for the development of developing countries and that they need a bit more protection from external competition.<sup>171</sup> The aim of SDT is therefore to protect the interests of developing countries and assist in their participation in the multilateral trading system.

As mentioned above, SDT is one of the core principles of the WTO framework and it is exclusively for the use and benefit of developing countries and least developed countries. There are over 150 SDT provisions under the WTO, and these fall specifically under the realm of ‘development’.<sup>172</sup> These provisions merely show the variety and forms of which SDT can be applied. The Secretariat of the WTO has classified the various SDT provisions into six categories, namely:

- a) provisions aimed at increasing the trade opportunities and assist the domestic industries of developing countries;
- b) provisions under which the WTO members should safeguard the interests of developing countries. This can be done by implementing procedures in enforcement of the rights of or against developing countries;
- c) flexibility of commitments, if action, and use of policy instruments;
- d) provisions for transitional time periods for developing and least developed countries;
- e) provisions for technical assistance to developing and least developed countries provisions; and
- f) provisions relating to least developed country Members.<sup>173</sup>

Of these various provisions, some are more effective and meaningful in their scheme of application. These six categories also suggest better ways to improve the position of developing

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<sup>168</sup> Preamble of WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization. April 1994.

<sup>169</sup> Note 20 above at 29.

<sup>170</sup> Note 43 above at 24.

<sup>171</sup> B Hoekman *Operationalising Policy Space in the WTO: Beyond Special and Differential Treatment* Journal of International Economic Law Vol 8 (2005) 46.

<sup>172</sup> The International Centre for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD) *Special and Differential Treatment 1* (13) Doha Round Briefing Series (2003) 1.

<sup>173</sup> Implementation of Special and Differential Treatment in WTO Agreements and Decisions – WTO Document WT/COMTF/W/77.

countries in the world trading system, at the same time trying to further achieve the objectives of the WTO.

To ensure that the implementation of these provisions is effective, ‘non-binding provisions need to be made binding in order to provide some means and improve prospects for securing their implementation’.<sup>174</sup> In the same breath, ‘the mandatory obligations need to be highlighted so that they can be implemented immediately and unconditionally’.<sup>175</sup> Another problem with enforceability relates to the nature of the language used to express the obligations. According to Garcia, these provisions should be divided according to the nature of their language, and only then will it be more useful to decide whether and how to make these provisions mandatory.<sup>176</sup> When divided, Garcia then provides four categories under which these provisions should fall under. First are provisions employing purely discretionary language, which means that the provision is merely permissive and does not create any legal obligation.<sup>177</sup> Second would be the “best endeavours” clauses, which express a moral obligation on Members to ‘try their best’.<sup>178</sup> Third are the *de facto* non-binding or fake mandatory provisions which employ words of a mandatory nature but are structured in a way that gives them no legal effect.<sup>179</sup> Last are the mandatory provisions which use language that requires concrete, enforceable commitments.<sup>180</sup> Garcia’s argument must be understood along with the general functioning of the multilateral trade agreements, and the extent to which SDT forms an integral part of the entire WTO system, as its objectives are to improve the living conditions of developing and least developed countries, while effectively securing their fruitful participation in the multilateral trading system.<sup>181</sup> Also, SDT has been argued to be intended to address the disparities that are prevalent among developed, developing and least-developed countries, and make adjustments where necessary to enable developing and least developed countries to meaningfully benefit from trade agreements.<sup>182</sup> Lastly, the assistance provided by developed countries to developing and least developed countries should be consistent with their

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<sup>174</sup> WTO Document *Special and Differential Treatment Provisions – Joint Communication from the African Group in the WTO* TN/CTD/W/3 (2002) 4.

<sup>175</sup> *Ibid.*

<sup>176</sup> FJ Garcia *Beyond Special and Differential Treatment* Boston College International & Comparative Law Review Vol. 27:29 (2004) 310.

<sup>177</sup> *Ibid.* 211.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> Note 176 above at 312.

<sup>181</sup> Note 174 above.

<sup>182</sup> *Ibid.*

developmental needs.<sup>183</sup> Thus, the use of such language does not provide much assistance in ensuring that SDT provisions are effective in securing fruitful participation of developing countries in the global trading system.

The presence (generally) of these provisions and the extent in which they are used through the WTO system does not equate with their effective application. Dube argues that there is a clear lack of convergence between the provisions as stated on paper and the actual application of SDT.<sup>184</sup> Such failure has therefore led developing countries to push for a more ‘development’-centred agenda in the Doha Round.<sup>185</sup>

As such, the Doha Ministerial Declaration<sup>186</sup> focused on strengthening SDT. In this round, developing countries pointed out the shortcomings of SDT provisions and wanted better implementation of the provisions which would also result in the provision of more feasible benefits. Paragraph 44 of the Doha Ministerial Declaration States as follows:

‘We reaffirm that provisions for special and differential treatment are an integral part of 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’.<sup>187</sup>

The intended outcome of this paragraph would be to strengthen the SDT provisions to make them more precise, effective and operational.<sup>188</sup> Ensuring that SDT provisions and objectives are effectively applied depends much on whether developed countries can apply SDT provisions effectively and to their optimum potential. To a great extent, the challenge lies in applying a blanket rule on what the ‘special needs’ are for developing and least-developed countries. Another defect is the WTOs failure to define what a developing country is, which

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<sup>183</sup> *Ibid.*

<sup>184</sup> Note 20 above at 30

<sup>185</sup> *Ibid.*

<sup>186</sup> Doha Ministerial Declaration WTO Doc WT/MIN(01)/DEC/1.

<sup>187</sup> Doha Ministerial Declaration WTO Doc WT/MIN(01)/DEC/1.

<sup>188</sup> WTO Document *Special and Differential Treatment Provisions – Joint Communication from the African Group in the WTO* TN/CTD/W/3 (2002) 3.

could also possibly be a limitation of the scope of effective application of the SDT.<sup>189</sup> This begs the question whether SDT is relevant in upholding developing countries interests and at the same time being compatible with the developmental objectives of the WTO. De Vylder is of the opinion that it is important to remember, when assessing SDT provisions, that ‘they were not introduced because of a common conviction that they are the best way to promote development for developing countries’.<sup>190</sup> He further argues that ‘SDT is generally superficial in the sense that it is not based on the analyses of the special needs of developing countries’.<sup>191</sup>

As such, it should be noted that the economic growth and development of a country is not dependent only on international trade, even though it is invariably one of the biggest and most important tools that can be used to alleviate poverty, while fuelling economic growth and development. Hoekman draws on the fact that a country’s own trade policies can be one of the primary aspects that determines their benefits,<sup>192</sup> and adds that ‘establishing the appropriate trade and complementary policies should consequently figure in the design of national development and poverty-reduction strategies’.<sup>193</sup> Hoekman’s view on this is influenced by the fact that by and large, a country’s trade policies are bound to both multilateral and regional disciplines and individual countries trade performance is thus determinant on other countries actions or omissions.<sup>194</sup>

It is important to remember that the WTO provides a forum to negotiate improved market access and to formulate rules on agreements of trade related matters which is intended to be beneficial for both developing and developed countries. Since developing countries primarily benefit from the rules-based system; they would not be able to negotiate in their own favour and would have very little influence on policies of large countries.<sup>195</sup> The big challenge, however, lies in getting the rules right. One of the dimensions of the SDT system is also based on rules, which include calls for developed countries to provide assistance to developing and least-developed countries, to help them implement certain disciplines as well as exempt them from certain rules of the WTO.

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<sup>189</sup> A Brennan *The Special and Differential Treatment Mechanism and the WTO: Cultivating Trade Inequality for Developing Countries?* Trinity College Law Review Vol 14 (2011) 153.

<sup>190</sup> Note 122 above at 97.

<sup>191</sup> *Ibid.*

<sup>192</sup> B Hoekman et al *Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancun* in B Hoekman & C Odzen (ed) *Trade Preferences and Differential Treatment of Developing Countries* Edward Elgar Publishing Ltd (2006) 481.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid* 482.

Likewise, the challenge here is implementing SDT provisions in a manner that will be beneficial for developing countries, particularly considering the non-mandatory element of SDT provisions.<sup>196</sup> The criteria used to implement these rules do not do much in contributing to making the exemptions very meaningful.<sup>197</sup> An example of this is the extended deadlines enjoyed by developing countries. These are often arbitrarily established and inconsistent with their objective. De Vylder's observation is that 'the rationale behind longer deadlines is based on the assumption that the regulations are, in principle, good for everyone but developing countries need a little more time to implement them'.<sup>198</sup> Instead, the consequence of these exemptions is that they are intended to deal with temporary transitional problems when introducing new regulations instead of managing development.<sup>199</sup>

Not only are there divergent interests between developed and developing countries, there is also an issue of special preferences that are granted to developing countries, cause friction between them and least-developed countries. Kleen and Page make an observation that:

'[a]s long as SDT offered to LDCs was a little different from that of developing countries, as long as all SDT was regarded as an unimportant issue by most developed countries, and as long as GATT regulated only lightly what types of SDT were actually offered by developed countries, and as long as GATT regulated only lightly what types of SDT were actually offered by developed countries, the issue of which countries were in which classes was more for academic debate than active negotiation. All these conditions have changed. For non-LDCs at low income levels, often with close regional association to LDCs (Kenya in East Africa, Zimbabwe or Mauritius in Southern Africa, Ghana or Nigeria in West Africa), what was a minor technical difference is becoming a conspicuous disadvantage, a potential cause of diverted investment, and at a minimum a complication from rules of origin in their own regions and in exports to other markets'.<sup>200</sup>

This, in short, sums up the key issues that are embedded in SDT and need to be resolved.

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<sup>196</sup> *Ibid.*

<sup>197</sup> Note 122 above at 98. The criteria used are that a country is a developing country, LDC, or has a GDP of less than USD1 000 per capita.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> Note 21 above at 90.

### 3.3 HISTORY OF SPECIAL AND DIFFERENTIAL TREATMENT

Since the 1950s, developing countries have received a form of special treatment, which is known as *special and differential treatment*. However, SDT, as it is commonly referred to, is not necessarily a programme with a purpose of strengthening developing countries' trade and development; instead it is a collection of provisions which vary in both character and importance.<sup>201</sup> This means some provisions and regulations are binding while others are not, and some apply only to LDCs to the exclusion of developing countries. This potentially creates a pattern of holistic ineffectiveness of all SDT provisions.

The need for SDT provisions in the GATT may date back to the 1950s and possibly even much earlier than that. The underlying reasons for the need during this period relates to the fact that in the 1950s, the balance of payment problems for developing countries were caused by the low-income status, which this would result in developing countries facing permanent balance of payment problems.<sup>202</sup> This meant that it was impossible for most developing countries to liberalise, because such actions would only widen their trade deficits. Whalley also adds that these arguments were complemented by the Prebisch-Singer thesis, dating back to the 1950s, which posed the argument that 'developing countries always face a secular decline in their terms of trade; suggesting that developing countries would need to be given preferential access to developed county markets to offset these effects'.<sup>203</sup>

Before SDT was firmly established, the issues surrounding its provisions and the implementation thereof have evolved in the GATT/WTO system for many years and through a series of negotiation. Before any further discourse on the provisions of SDT can be discussed, it is necessary to include a brief account of how SDT has evolved with time. For the purpose of this research, only two developmental stages will be distinguished, namely, Pre-Uruguay and Post-Uruguay.

#### 3.3.1 Special and differential treatment before the Uruguay Round

In 1957, a panel of experts were appointed by GATT contracting parties to make a report on the international trade at the time, with particular focus on the 'failure of the trade of less developed countries to develop as rapidly as that of industrialised countries, excessive short-

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<sup>201</sup> Note 122 above at 95.

<sup>202</sup> J Whalley *Special and Differential Treatment in the Millennium Round* in B Hoekman and C Ozden (ed) *Trade Preferences and Differential Treatment of Developing Countries* Edward Elgar Publishing Ltd (2006) 474.

<sup>203</sup> *Ibid.*

term fluctuations in the primary products and widespread resort to agricultural protection'.<sup>204</sup> Gottfried Haberler, who was the chairman of the panel that was appointed, formulated a report which got the Contracting Parties to examine ways in which developing countries could achieve greater access in the world markets. The report was called Trends in International Trade, also known as the 'Haberler Report'. The end result of the Haberler Report was that it contributed to the introduction of Part IV of GATT.<sup>205</sup>

These arguments which arose from the trade deficits of developing countries brought about the creation of the UNCTAD in 1964. This led to the introduction of Part IV into the GATT, as discussed above; and the concept of non-reciprocity as a negotiating strategy for developing countries in the Tokyo Round.<sup>206</sup> This was an entirely new section that had been included in the GATT by 1965, entitled Trade and Development. The significance of Part IV of the GATT is that it afforded SDT some legal relevance and recognised the link that existed between trade and development.

It consisted of Article XXXVI through to XXXVIII, which were unfortunately not binding:

'Article 36 recognizes the development needs for developing countries, the importance to them of improved market access, price stabilisation, diversification of economic structures and inter-agency cooperation. It also contains a clear statement of the principle of non-reciprocity, i.e. that developing countries should not need to reciprocate trade concessions made to them by developed countries in negotiation. Article 37 represents a best efforts commitment (with no obligation for action) to the prioritization of products of interest to developing countries in any trade liberalization. Article 38 provides for joint developed-developing country actions, citing possibilities for action in the commodities field, inter-agency cooperation, possibilities of studying the export potential of developing countries and other related issues.'<sup>207</sup>

Put simply, Article 36 establishes non-reciprocity, which calls for developed countries to grant concessions to developing countries without expecting anything in return. Paragraph 1 of this Article also outlines the differences between developing and developed countries and reasons why SDT is important for developing countries in the international trade community. It recognises that '...achieving economic and social advancement should be governed by such rules and procedures ... as are consistent with the objectives set forth in this Article'. Article

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<sup>204</sup> K Kennedy *Special and Differential Treatment of Developing Countries* in P Macrory et al (Ed) *The World Trade Organization: Legal, Economic and Political Analysis* (2005) Vol 1 1535.

<sup>205</sup> *Ibid.*

<sup>206</sup> Note 202 above at 475.

<sup>207</sup> *Ibid.*

37 encourages developed countries to open their markets more for developing countries and Article 38 lays out the objectives to be followed by developed countries for granting unilateral tariff concessions for developing countries.<sup>208</sup> Part IV formed an integral part of the GATT 1994 as a binding legal instrument however; it was drafted in such a way that implies that the regulations are not mandatory. The result of this was that developed countries made very few, if any, binding legal commitment to developing countries Part IV.<sup>209</sup>

The Tokyo Round which took place from 1973 to 1979 adopted a number of ‘codes’ which expanded the regulations under GATT to include technical trade barriers and subsidies.<sup>210</sup> During this Round, the actions of developing countries were heavily aimed at codifying SDT. This was after developing countries were disappointed after the Kennedy Round of 1967 which did not improve market access for developing countries.<sup>211</sup> Nevertheless their expectations changed when the Ministerial Declaration that launched the Tokyo Round gave them hope. This declaration pointed out one of the goals of this Round, holding that:

‘[this round would] ... secure additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports, the acceleration of the rate of growth of their trade ... [and] a substantial improvement in the conditions of access for the products of interest to the developing countries...’<sup>212</sup>

When the Round took off in 1973, SDT for developing countries amounted to Article 18, Article 28 *bis* (iii) and Part IV. This was an addition to the preferences that existed under GSPs which were covered a waiver under Article 25 that was set to expire in 1981, notwithstanding the Article I MFN commitment.<sup>213</sup> The waiver only affected Article I of the GATT; however, this waiver still makes GSP legally possible although it does not obligate developed countries to offer tariff preferences to developing countries. This allows flexibility in terms of developed countries withdrawing or modifying its GSP program at any given time.<sup>214</sup> The concept of GSPs was first introduced by UNCTAD in 1964 where ‘developing countries argued that preferential tariffs in developed-country imports would have several salutary benefits for

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<sup>208</sup> Note 122 above at 96.

<sup>209</sup> Note 204 above at 1536.

<sup>210</sup> Note 280 above.

<sup>211</sup> *Ibid.*

<sup>212</sup> BISD, 20th Supp. 19,20 (1974).

<sup>213</sup> Note 202 above at 476.

<sup>214</sup> Note 204 above at 1540.

developing countries.’<sup>215</sup> The implication of this was that ‘developing countries would increase their exports, that they would diversify into industries that produce and export high value goods and lastly that GSP would decrease their reliance on foreign aid’.<sup>216</sup> There are a number of criticisms directed at the scope of application of GSPs. It has three basic guiding principles, namely generality, non-discrimination and non-reciprocity,<sup>217</sup> but because it is entirely voluntary, its application becomes uneven.

The waiver of 1971 under the GSP Decision was not renewed in terms of the Tokyo Round Decision upon its conclusion in 1979.<sup>218</sup> Interestingly, the Enabling Clause was also adopted to regulate opportunities to provide developing countries with preferential tariff treatment.<sup>219</sup> This clause, as the name suggests, enables developed countries to afford preferential tariff treatment to developing countries, but does not oblige them to do so. Paragraph 1 of this clause holds that ‘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’.<sup>220</sup> There are four areas in which preferential treatment can be afforded to developing countries and Paragraph 2 of the Enabling Clause identifies them as the following:

- a) preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the General System Preferences;
- b) differential and more favourable treatment with respect to the provisions of the General Agreement concerning no-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
- c) regional or global arrangements entered into among less-developed contracting parties for the mutual reduction or elimination of tariffs and ... of non-tariff measures, on products imported from one another; and
- d) special treatment of the least-developed among the developing countries in the context of any general or specific measures in favour of developing countries.<sup>221</sup>

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<sup>215</sup> *Ibid* at 1536).

<sup>216</sup> *Ibid*.

<sup>217</sup> C Michalopoulos *The Role of Special and Differential Treatment of Developing Countries in GATT and the World Trade Organization* World Bank Policy Research Working Paper 2388 (2000) 10.

<sup>218</sup> Note 214 above at 1542.

<sup>219</sup> Note 122 above at 96.

<sup>220</sup> Paragraph 1 of the Enabling Clause.

<sup>221</sup> Paragraph 2 of the Enabling Clause.

Kennedy is of the view that there is a great risk that comes with preferential treatment of developing countries as they might harm trade liberalisation efforts among developed countries.<sup>222</sup> However, the use of preferential treatment is circumscribed under paragraph 3, which called for SDT to ‘facilitate and promote the trade of developing countries and not to raise barriers or create undue difficulties for the trade of any other contracting parties’.<sup>223</sup> This paragraph further reiterates that the preferential tariff treatment should not create a barrier to multilateral trade liberalisation and for it to respond positively to the developmental needs of developing countries.

The issue of reciprocity in trade concessions is not imposed by the Enabling Clause. Paragraphs 5 and 6 specifically relieve developing countries from making reciprocal tariff concessions, and developed countries must abide by the utmost restraint in expecting concessions from developing countries. For example, the AGOA scheme of the US requires that sub-Saharan African countries establish the following: ‘a market scheme based economy; the rule of law and political pluralism; economic policies to reduce poverty; a system to combat corruption and bribery; protection of workers’ rights and elimination of barriers to trade and investment.’<sup>224</sup>

The Enabling Clause in its application vouches for the GSP preferences but falls short in providing a remedy for the failings of the GSP nor does it create any legally binding mandates for its use by developed countries insofar as it pertains to SDT. As Michalopoulos holds, the Enabling Clause gave a formal voice to the discretionary and permissive nature of SDT; however it failed in extending the concept further to make it legally binding.<sup>225</sup>

The concept of graduation is brought into play by Paragraph 7 of the Enabling Clause which formalises it into a legal concept. This means that developing countries would graduate into more legally binding obligations provided their economic and trade situations improved.<sup>226</sup> This paragraph alludes that for graduation from GSP to occur, the economic conditions of developed countries should improve which means that ‘they would accordingly expect to participate more fully in the framework of rights and obligations under the General

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<sup>222</sup> Note 204 above at 1543.

<sup>223</sup> Paragraph 3 of the Enabling Clause.

<sup>224</sup> S Garay and Cornejo *Rules of Origin and Trade Preferences* in Hoekman *et al* (eds) *Development, Trade and the WTO: A Handbook* (2002) 115.

<sup>225</sup> Note 30 above at 7.

<sup>226</sup> Paragraph 7 of the Enabling Clause.

Agreement'.<sup>227</sup> The concept of graduation may have done more harm than good. It begs the question of when exactly a developing country should graduate.? Dube argues that while SDT is aimed at the improvement of developing countries and therefore carries the graduating element, the lack of definitions complicates matters and allows developed countries to be discriminatory in their application of GSP preferences.<sup>228</sup>

The concept of graduation has created conflicting interests between developing and developed countries. While developed countries tried to push developing countries into fuller participation in the GATT-WTO system, developing countries resisted. More so, according to Kennedy, 'donor developed countries have reminded beneficiary developing countries that preferential tariff treatment is neither an end in itself nor is it meant to last in perpetuity'.<sup>229</sup>

At this point, the concept of SDT was generally accepted as an instrument that could be used to drive development for developing countries. If the provisions were applied sufficiently and effectively, SDT could have easily been an indispensable tool for growth.<sup>230</sup> This was unfortunately so as a result of the non-binding factor associated to the application of SDT provisions by developed countries. In other words, developed countries did not have to assist developing countries if they did not want to. The prime reason for such a flaw is the language used in the provisions. According to Lichtenbaum, the language fails to direct any action, but it merely encourages developed countries to grant preferences to developing countries.<sup>231</sup>

Despite the legal content of the SDT provisions being vague, during this period, developing countries were trying to make major moves that would guarantee them a trade agenda that would move them closer towards development. Before the Uruguay Round, this seemed reasonably possible. Here, developing countries were allowed to maintain a certain level of protection of their markets; reciprocal trade concessions were not required from them; they were permitted to use subsidies to support their exports; the GPS system granted them preferential access to developed country markets; and there was a Fund in place for them to support their commodity stabilisation schemes.<sup>232</sup> The Fund refers to the Common Fund for Commodities (CFC) which was established after negotiations with UNCTAD.<sup>233</sup> As

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<sup>227</sup> *Ibid.*

<sup>228</sup> Note 20 above.

<sup>229</sup> Note 204 above at 1535.

<sup>230</sup> Note 228 above at 40

<sup>231</sup> Note 11 above at 1014.

<sup>232</sup> Note 30 above at 9.

<sup>233</sup> *Ibid.*

progressive as this could have turned out to be, Dube firmly holds that ‘where there is an expectation of progress with each new trade round, in terms of SDT the Uruguay round was, to all intents and purposes, a rolling back of the progress of SDT’.<sup>234</sup>

### **3.3.2 Special and differential treatment after the Uruguay Round**

SDT evolved further from its meaning from this round going forward. From a negotiating point of view, there have been a number of significant SDT provisions that were created that particularly related to specific agreements under the WTO. Because it will be nearly impossible to consider all of them, for the purpose of this paper, focus will be on the Single Undertaking Principle.

The Single Undertaking is of significant importance to the history of the SDT because it changed the dynamics of SDT. With the Single Undertaking, developing countries had to adopt all trading agreements and policies and according to Ismail, this immensely reduced their space for national policy and consequently weakened the SDT provisions.<sup>235</sup> The position of SDT after the Uruguay Round moved away from the traditional principles of non-reciprocity and this stage developing countries were permitted to maintain different levels of obligations to what was called ‘limited non-reciprocity’ which meant that reciprocity was qualified by different implementation periods.<sup>236</sup>

There are a number of reasons why developing countries agreed to succumb to demands of developed countries that they adopt a Single Undertaking approach. Firstly, as development was a priority in the minds of developing countries, they needed improved market access in developed countries market industries such as agriculture and they were consequently willing to let go of non-reciprocity for this.<sup>237</sup> For developing countries, the Single Undertaking was a matter of accepting everything and leaving the GATT system. They also needed to change the trading system and remove protectionism, particularly in the agricultural and textile industries.<sup>238</sup> On the contrary, it was argued that during this period, SDT provisions and flexibilities had inadvertently driven developing countries to pursue highly unsuccessful development policies which were essentially driven by protectionism and import

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<sup>234</sup> Note 230 above at 41.

<sup>235</sup> Note 11 above at 4.

<sup>236</sup> Note 176 above at 297.

<sup>237</sup> *Ibid.*

<sup>238</sup> A Keck and P Low *Special and Differential Treatment in the WTO: Why, When and How?* World Trade Organization Staff Working Paper ERSD (2004) 9.

substitution.<sup>239</sup> This was following the constant tariff escalation tactics by developed countries. Such escalation hindered the diversification of developing countries industries due to the high protection of processed goods.<sup>240</sup>

The bargain made by developing countries at this stage was essentially a bad bargain. The problem did not resonate in the round itself, but stemmed from the differentiation of development that is prevalent among the members of the WTO. Most WTO agreements explicitly uphold the interests of developed countries, leaving developing countries lurking on the sidelines. To a much more significant extent, the standards encapsulated in the WTO agreements start from the status quo of developed countries with the consequence of developing countries having to bear the burden of implementation.<sup>241</sup> Hence the Single Undertaking is considered a bad bargain. Developing countries were effectively excluded when this was negotiated, and it had been negotiated only by developed countries. This resulted in a great imbalance on top of long-standing imbalances. To cure this defect, the SDT provisions were written in almost every agreement of the Uruguay Round. This was done by factoring in longer implementation periods as well as technical assistance as way of way helping developing countries keep up.

Despite the remedy provided, developing countries still struggled to implement the obligations they took on under the Uruguay agreements. In a study convened by Finger and Schuler of the customs valuation agreement, sanitary and phytosanitary agreement standards and intellectual property rights, they attempted to examine whether there were any problems with their implementation and concluded that given the magnitude of implementation problems, unfortunately, extended implementation periods cannot remedy the imbalance.<sup>242</sup> The fact that the global trading system predominantly prescribes to the needs and interests of developing countries may well be the contributing factor to the failure to remedy this imbalance. Although a remedy was provided, its ineffectiveness results from the context of the agreement not being consistent with economic and developmental needs of developing countries. Again, the applicability of SDT raises more concerns.

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<sup>239</sup> Note 30 above.

<sup>240</sup> *Ibid.*

<sup>241</sup> Note 171 above at 410.

<sup>242</sup> J M Finger and M Schuler *Implementation of Uruguay Round Commitments: The Development Challenge* The World Economy 23 (2000) 19.

### 3.4 APPLICATION OF SDT PROVISIONS IN WTO AGREEMENTS

The single biggest problem with the application of SDT provisions is its implementation. Throughout the Uruguay Round, history shows that developing countries cannot take on the obligations they assumed, while developed countries have a choice of whether or not to apply SDT provisions. Of concern is the failure to enforce SDT provisions afforded for developing countries. It characterises a strong legal vacuity and thus cannot be litigated upon.

The outcomes of the Uruguay Round were supposed to reflect the developmental needs developing countries by applying SDT provisions in WTO agreements. There is a more detailed journey of how the concept has been applied and evolved throughout the GATT/WTO framework, but of particular note for this chapter, focus will be only on the application of SDT provisions in the SPS Agreement and TBT Agreement.

#### 3.4.1 SDT and the Agreement on the Application of Sanitary and Phytosanitary Measures

Human, plant and animal life and health fall under the sovereign territory of a country and it is the duty of governments to protect them.<sup>243</sup> This duty includes employing measures to protect human, animal and plant life and health within their territory against any form of risks that can be contained in food and agricultural products.<sup>244</sup> All these put together are termed sanitary and phytosanitary (SPS) measures.<sup>245</sup> The idea of offering protection measures is to prevent or limit the spread of toxins and create or maintain a disease-free environment. For example, there was a ban by many countries in the European Community of beef imports as a result of the outbreak of foot-and-mouth disease in 2001. More recently, in March 2017, the South African government announced restrictions of red meat imports owing to evidence showing that Brazilian meat-packers have been selling ‘rotten and substandard produce’ for several years.<sup>246</sup>

SPS measures are an important part of international trade. There will always be a market for the trade of food and agricultural products and for as long as that is so SPS measures will have

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<sup>243</sup> D Prévost and P Van den Bossche *The Agreement on the Application of Sanitary and Phytosanitary Measures* in P Macrory et al (Ed) *The World Trade Organization: Legal, Economic and Political Analysis* (2005) Vol 1 231.  
<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.* Human and animal life as well as health falls under the sanitary aspect while plant life or health is phytosanitary.

<sup>246</sup> A Ismail ‘SA bans imports from Brazil over rotten meat scandal’ Fin24 22 March 2017 available on <https://www.fin24.com/Economy/sa-bans-imports-from-brazil-over-rotten-meat-scandal-20170322> (Accessed 19 June 2017).

an important impact on international trade.<sup>247</sup> However, SPS standards vary from country to country as they have to reflect their national priorities, their different stages of economic development and consumer preferences.<sup>248</sup> These standards can have both negative and positive impact countries. Prévost and Van den Bossche describe that ‘the high cost of meeting the plethora of health standards means that exporters are forced to charge higher prices for their products on the export market or are even completely excluded from this market’.<sup>249</sup>

Although the measures and standards selected are based on legitimate concerns about health, it is possible for some countries to have suspicious motives behind their standards that could possibly lead to disguised barriers of trade. For this reason, the WTO contains rules that regulate ‘the conflict between competing goals of trade liberalisation (and thus economic growth) and the protection of human, animal and plant health’ which is said ‘to apply equally to developed and developing countries’.<sup>250</sup> At the same time, the SPS Agreement takes into consideration economic and technical deficits faced by developing countries. Prévost adds that it is important to factor in the differences in capacity across different levels of development and the effectiveness of the SPS Agreement will depend on ‘the ability of countries to comply with, and benefit from. Their rules on their starting position’.<sup>251</sup> The SPS Agreement reflects on this in its Preamble and acknowledges that:

‘... developing country Members may encounter special difficulties in complying with sanitary and phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary and phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;...’<sup>252</sup>

It seems that this recognition of the different developmental stages between developed and developed countries by the SPS Agreement allows the agreement itself to afford developing

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<sup>247</sup> Note 243 above at 232.

<sup>248</sup> *Ibid.* Prévost and Van den Bossche sum up the examples of SPS measures as: regulations setting maximum residue levels for toxins or contaminants, approval procedures for additives, quarantine requirements to minimize the spread of pests and diseases, labelling requirements to notify consumers of potentially-harmful foodstuffs (such as allergen-containing products), regulations governing the process or production method whereby the product is made, inspection or certification requirements or outright bans on potentially hazardous products.

<sup>249</sup> *Ibid.* This unfortunately can be a major stumbling block for developing countries that participate in food and agricultural trade.

<sup>250</sup> *Ibid.*

<sup>251</sup> D Prévost *Operationalising special and differential treatment of developing countries under the SPS Agreement* SAYIL 30 (2005) 86.

<sup>252</sup> In the 7th Preambular paragraph of the Agreement on the Application of Sanitary and Phytosanitary Measures.

countries special provisions. As with other agreements of the WTO, these provisions relate to technical assistance and SDT in favour of developing countries.

#### **3.4.1.1 Technical assistance**

Developing countries have a need for technical assistance to ensure that the application and use of the SPS Agreement is efficient and beneficial to all. The term overall seems broad, but what it requires is for improved understanding by developing countries of the rules and the acquisition of technical and scientific capacity that is required for both developed and developing countries to adhere to their obligations while also enforcing their rights under the agreement.<sup>253</sup> To complement the provision of technical assistance for developing countries, there are several actors involved, which includes ‘other WTO Members, the WTO Secretariat, as well as other international organisations such as the Food and Agricultural Organization (FAO) (including Codex and the International Plant Protection Convention), the World Health Organization, the World Organization for Animal Health and the World Bank’.<sup>254</sup> More importantly, for the provision of technical assistance to be effective, the participation and contribution of developing countries is vital.

Under Article 9.1 of the SPS Agreement, Members agree to take on and facilitate the provision of technical assistance to developing country Members, which can be done either bilaterally or through international organisations. There are various forms in which this assistance can be facilitated, such as processing technologies or research and infrastructure, as well as the establishment of national regulatory bodies that take various forms including advice, credits, and grants and donations.<sup>255</sup> Overall this technical assistance and expertise allow countries to adjust to, and comply with, SPS measures as relevant for their markets.<sup>256</sup>

Further, Article 9.2 deals specifically with the case where substantial investments are put in place in order to necessitate an exporting developing country Member to fulfil the SPS measures of an importing country Member.<sup>257</sup> This means that it would be in the interests of an importing Member to provide technical assistance that will permit the developing country

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<sup>253</sup> Note 243 above at 356.

<sup>254</sup> *Ibid.*

<sup>255</sup> Article 9.1 of Agreement on the Application of Sanitary and Phytosanitary Measures.

<sup>256</sup> *Ibid.*

<sup>257</sup> Article 9.2 of Agreement on the Application of Sanitary and Phytosanitary Measures.

Member to maintain and expand its market access opportunities for a specific product.<sup>258</sup> Be it as it may, this still does not oblige any Member to provide technical assistance.

As such, to keep technical assistance relevant and effective, there is an SPS Committee where documents are compiled and circulated among Members to identify specific fields for technical assistance needs by means of a questionnaire in addition to informal discussions held on the issue.<sup>259</sup> The DDA also recognises that technical assistance is important as it has the potential to enable developing countries to benefit fully from the global trading system.<sup>260</sup> In addition to this, the General Council for the Joint Communication from the African Group in the WTO agreed to establish a facility within a Global Trust Fund for ensuring that:

- a) Developing and least-developed country Members have the financial and technical capacity to meet the requirements under the Agreement;
- b) Delegations from developing and least-developed country Members attend and effectively participate in meetings of the Committee and relevant international standard setting organisations;
- c) Measures adopted under the Agreement do not contravene the rights of developing and least-developed country Members.<sup>261</sup>

The Committee employed to deal with the SPS Agreement considered a variety of trade concerns in 2016. These range from avian influenza and African swine fever to plant pests and novel foods.<sup>262</sup> There have been 416 trades concerned since the establishment of the WTO in 1995, but there have been only 148 reported solutions by WTO members of these issues,<sup>263</sup> and a partial resolution has been reported for another 32 issues.<sup>264</sup> This means that not all those raising the trade concern have accepted the solution, or a solution has not been found for all the products at issue.<sup>265</sup> In total, about 43 percent of the issues have been reported with partial or complete solutions since 1995, while the remaining 57 percent have not reported a solution.<sup>266</sup>

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<sup>258</sup> *Ibid.*

<sup>259</sup> Note 243 above at 356.

<sup>260</sup> *Ibid.*

<sup>261</sup> WTO Document TN/CTD/W/28.

<sup>262</sup> Annual Report 2017 World Trade Organization page 55.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid* 56.

<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.*

As such, there were three meetings held by the Committee on SPS Measures in 2016 which dealt with specific trade concerns. The most recent and important trade concerns reported are:

‘Namibia’s concerns over South Africa’s revised veterinary health certificates for cattle, sheep and goats; Israel’s concerns over Costa Rica’s regulation on pesticides and related substances; Brazil’s concerns over EU restrictions on exports of pork from the state of Santa Catarina; EU concern relating to China’s import restrictions due to Schmallenberg Virus and Highly Pathogenic Avian Influenza; and Russia’s import restrictions on certain animal products from Germany’.<sup>267</sup>

SPS measures are fluid and therefore health requirements are constantly changing. To help developing countries keep up with these measures, notifications are sent to inform trading partners of coming changes in the importing member’s requirements, provided it is not an urgent health protection issue.

#### **3.4.1.2 Special and differential treatment**

In the SPS Agreement, SDT provisions are aimed at ensuring that developing countries and their special needs are considered when it comes to the implementation of provisions under the agreement. How this works is that certain provisions that developing countries cannot keep up with will be implemented in a more favourable manner, this is in addition to flexibility in the provisions contained in the SPS Agreement for developing countries.<sup>268</sup>

Under Article 10.1 Members are obliged to take into account the special needs of developing country Member and least-developed countries in particular. However, this does not oblige developed countries to alter the SPS measure to cater for developing country needs. Prévost and Van den Bossche characterise this as the ‘best endeavour’ obligation.<sup>269</sup> This means that developed countries must use all efforts necessary to fulfil the obligation. However, on the contrary, although the provision states that Member ‘shall take account of the special needs of developing country Members’, Garcia points out that ‘*shall* is the classic word of binding obligation in international treaties, but since *take account of* is not defined, the provision by itself attains no binding substantive legal effect’.<sup>270</sup>

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<sup>267</sup> *Ibid.*

<sup>268</sup> Note 243 above at 358.

<sup>269</sup> *Ibid.*

<sup>270</sup> Note 176 above at 312.

Article 10.2 allows for the phased introduction of new sanitary or phytosanitary measures. Without obliging Members, it encourages them to allow longer time-frames for compliance on products of interest to developing countries in order to maintain export opportunities for them.<sup>271</sup>

Interestingly, the SPS Committee can grant developing countries specific time-limited exemptions, on request, from all or some of their obligations under the SPS Agreement as provided for by Article 10.3. The aim of which is to enable developing countries to comply with their obligations, while taking into account their financial, trade and development needs.<sup>272</sup>

Article 10.4 states that Members should encourage and facilitate the active participation of developing country Members in the relevant international organisations. Considering how developing country participation has been in the past, the issue of their participation under this provision is onerous. This shift to the participation of developing countries in numerous committees of international organisations, especially where standards are developed and proposed to be adopted is contentious. Not only does it require financial and human resources, it also requires technical expertise to formulate positions regarding standards of interests to the country.<sup>273</sup> Of course this has improved over the years, with increased active participation of developing countries in international organisations.

#### **3.4.1.3 Transitional periods**

Another form of special treatment granted for developing countries is transitional periods. Article 14 of the SPS allowed for the delayed implementation of the obligations under the agreement for developing and least-developed countries. This granted them a five-year period, from the time the WTO Agreement came into force, for the delayed implementation of their obligations. The period for delayed implementation subsequently ended in January 2000.<sup>274</sup>

### **3.4.2 SDT and the Agreement on Technical Barriers to Trade**

The Agreement of Technical Barriers to Trade (otherwise known as the TBT Agreement) ensures that technical regulations and standards, as well as the process of assessing conformity

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<sup>271</sup> Article 10.2 of Agreement on the Application of Sanitary and Phytosanitary Measures.

<sup>272</sup> Note 251 above at 108.

<sup>273</sup> Note 243 above at 358.

<sup>274</sup> *Ibid.* The transitional period for implementation of agreements by developing countries and LDCs will be discussed further under the case studies in Chapter 4.

procedures, which play a vital role, do not generate needless obstacles to trade.<sup>275</sup> Technical regulations, standards and conformity assessment procedures play a vital role on a daily basis.<sup>276</sup> This Uruguay Round Agreement allows WTO Members to pursue what they have agreed on in terms of legitimate regulatory and standardisation interests, in addition to trying to ensure that the regulations and standards do not interfere with international trade in goods.<sup>277</sup> The TBT Agreement also makes the stages of formulating, implementing and applying technical regulations, and conformity assessment procedures become more transparent for Members to be aware of the regulations and standards present in other Members' jurisdictions in order to fuel development and assess their application.<sup>278</sup>

Like the SPS Agreement, the TBT Agreement prefers international standards. However, TBT does not require a scientific justification that brings about strict requirements.<sup>279</sup> However, its application requires a certain level of sensitivity. Appleton cautions:

‘If the TBT Agreement is applied too strictly, the legitimate policy interests of Members will be thwarted. If the TBT Agreement is applied too laxly, technical regulations may be used for protectionist purposes and the gains of Members have achieved through progressive rounds of tariff reductions may be lost.’<sup>280</sup>

The sensitivity of applying the TBT Agreement is especially important for developing countries as for such countries, technical regulations and standards imposed by developed countries for their social policy goals may feed their protectionist desires.<sup>281</sup> Moreover,

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<sup>275</sup> *Ibid* (Note 122 above) above at 109.

<sup>276</sup> A Appleton *The Agreement on Technical Barriers of Trade* in P Macrory et al (Ed) *The World Trade Organization: Legal, Economic and Political Analysis* (2005) Vol 1 373

These terms are defined in Annex 1 of the TBT Agreement as follows:

Technical Regulation:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Standard:

Document approved by a recognized body, that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with the terminology, symbols packaging, marking or labelling requirements as they apply to a product, process or production method.

Conformity Assessment Procedure:

Any product used, directly or indirectly to determine that relevant requirements in technical regulations or standards are fulfilled.

<sup>277</sup> *Ibid*.

<sup>278</sup> *Ibid*.

<sup>279</sup> Note 275 above.

<sup>280</sup> Note 276 above.

<sup>281</sup> Note 276 above at 373.

developed countries fear that the strict application of the TBT Agreement will result in trade measures which are designed to pursue legitimate social policy objectives being struck down.<sup>282</sup>

#### **3.4.2.1 Technical assistance**

Article 11 of the TBT Agreement puts forward numerous technical assistance provisions. These provisions require WTO Members to:

- a) Advise other members, especially developing country Members, on the preparation of technical assistance;
- b) Grant technical assistance, especially for developing country Members, on mutually agreed terms and conditions regarding the establishment of national standardising bodies and participation in these bodies, and encourage their national standardisation bodies to do likewise;
- c) Take reasonable measures as may be available to them to arrange for the regulatory bodies within their territories, in particular developing country Members;
- d) Take reasonable measures in respect of developing countries to advise on the establishment of bodies for the establishment of conformity with standards;
- e) Grant technical assistance regarding the steps that should be taken by foreign producers seeking access to conformity assessment systems operated by governmental and non-governmental bodies;
- f) Members or participants of international or regional systems for conformity assessment shall grant technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfil the obligations of membership or participation in such systems;
- g) Grant developing country Members technical assistance on the institutions and legal framework of international and regional systems for conformity assessment sufficient to enable them to fulfil the obligations of membership or participation in such systems;
- h) To give priority to the needs of developed countries.<sup>283</sup>

This agreement has the benefit of creating unnecessary technical complications to international trade and therefore contributes in ensuring that trade runs smoothly and efficiently. The fact

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<sup>282</sup> *Ibid.*

<sup>283</sup> Article 10 of the Agreement of Technical Barriers to Trade.

that it promotes transparency is a big bonus for developing countries as it limits the adoption of protectionist measures.

### **3.4.2.2 Special and differential treatment**

Article 12 of the TBT Agreements sets forth the provisions necessary for special and differential treatment of developing countries. Under Article 12, Members are required to:

- a) Pay specific attention to the provisions of this Agreement in as much as it concerns the rights of developing countries;
- b) Take into account the special developmental, financial and trade needs of developing country Members when implementing the TBT Agreement at a national level;
- c) Ensure that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing countries. This should be done by taking into account the special, developmental, financial and trade needs of developing countries in the preparation and application of technical regulations, standards and conformity assessment procedures;
- d) Bear in mind the special difficulties of developing countries during consultations by formulating and implementing standards and technical regulations and conformity assessment procedures.<sup>284</sup>

Article 12 of the TBT Agreement fails to grant developing countries with permanent derogations to the substantive provisions of its agreement and Appleton holds that ‘the pro-

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<sup>284</sup> Other provisions for SDT found under Article 12 of the TBT Agreement are as follows:

- e) Recognize that, although international standards, guides or recommendations may exist in their particular technological and socio-economic conditions, developing countries may adopt certain technical regulations, standards and conformity assessment procedures that are aimed at preserving indigenous technology and production methods and processes compatible with their developmental needs;
- f) Take reasonable measures to ensure that developing countries are not expected to use international standardizing bodies and international systems for conformity assessment are organized and operated in way that will facilitate active and representative participation of relevant members, taking into account the special problems of developing countries;
- g) Take reasonable measures to ensure that international standardizing bodies examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing countries;
- h) Provide technical assistance to developing countries in respect of Article 11 to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing countries. The terms and conditions of the technical assistance shall be taken at the stage of development of the requesting Members and in particular of least developed countries;
- i) Take full account of the fact that developing countries may face institutional and infrastructural problems in the process of preparing their technical regulations, standards and conformity assessment procedures and the fact that their special development, trade needs and technological development may hinder to discharge their obligations fully under this agreement. Therefore they should be granted time-limited exceptions to obligations under the TBT Agreement.

developing country character of Article 12 is unambiguous although not particularly meaningful'.<sup>285</sup> Again, this stems from the flawed nature of SDT provisions which are not binding and will probably be unenforceable. Of all the nine provisions under Article 12 that relate to SDT, they take only four forms, which are to:

- 1) Recognise and take into account the special needs of developing countries;
- 2) Facilitate the participation of developing countries;
- 3) Provide technical assistance; and
- 4) Grant time-limited exceptions.

As has been highlighted throughout the chapter, the principal concern in international trade is the conflicting interests between developed and developing countries. Moreover, with regard to the TBT Agreement, there is a substantial amount of mistrust in many developing countries of the trade measures taken by developed countries for protectionist purposes. Notwithstanding the fact that the TBT Agreement contains provisions that favour developing countries, it is still very critical to evaluate whether the provisions governing SDT are both efficient and effective.<sup>286</sup>

### **3.5 CONCLUSION**

This chapter carried out a definitive analysis of the SDT provisions and the extent to which they are applied in the two selected WTO Agreements to determine whether or not the application of SDT provisions contributes to the inferior treatment of developing countries in the global trading system. Simply put, the SDT provisions do contribute to the inferior treatment of developing countries, and they invariably uphold the interests of developed countries. SDT provisions as they now stand immensely hinder developing countries' attempts to participate actively in the international trading system with other countries. Contrary, in fact, to the spirit of the SDT provisions, they restrict the full potential and benefits for developing countries. Finally, the fact that the SDT provisions cannot be enforced and litigated upon leaves the fate of developing countries dependent on the discretion of developed countries.

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<sup>285</sup> Note 276 above at 404.

<sup>286</sup> *Ibid* 409.

# **CHAPTER FOUR: CURRENT DEVELOPMENTS IN THE INTERNATIONAL TRADE COMMUNITY**

## **4.1 INTRODUCTION**

The Doha Round of Negotiations is grounded on the theory of development. This round is primarily intended to deliver to the development needs of developing countries and the fact that it was labelled the Doha Development Agenda (DDA) further raised the expectations and objectives of this round. Although development is often said to bear some association to civilisation, the two are not synonymous. According to Adibe, ‘development understood in the modern sense refers to better living standards and the availability of resources that make life easier and more enjoyable’.<sup>287</sup> On an international trade scale, a big part of the problem is that many developing countries are not well equipped to fully enjoy the benefits and opportunities of global trade. This makes the outcome of the Doha Round significant for developing countries.

As such, the chapter aims to determine the extent in which SDT upholds the interests of developing and developed countries? More so, if there is a way in which SDT can be effectuated to ensure that developing countries reap the benefits of the global trading system as envisioned by the objectives of the WTO. To answer this, this chapter will review the most recent and current developments since the inception of the Doha Round. Trade and development are important themes through this round as it is aimed to fuel economic growth and development. The association between both trade and development will be analysed through the framework of SDT.

## **4.2 LAUNCHING THE DOHA DEVELOPMENT AGENDA**

During the 1960s, there were overwhelming social and socio-economic problems such as poverty, unemployment and unfair income distribution, which were increased significantly by the high rates of economic growth in developing countries.<sup>288</sup> It is not clear what poverty means in the international trade context apart from measuring it according to the countries’ Gross Domestic Product (GDP). A relevant question that needs to be determined is how poverty or

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<sup>287</sup> E Adibe *World Trade Organization (WTO): Trade Rules/Agreements and Developing Countries*. NAUJILI (2013) 121.

<sup>288</sup> Note 166 above at 109.

the eradication thereof relate to development?<sup>289</sup> Pahuja strongly opines that ‘when we talk about the persistence of global poverty, the solution is still always development’.<sup>290</sup> Wiarda makes an observation that economic growth is necessary to provide for investment for future growth and pay for social services.<sup>291</sup> This is to say that economic growth and development are mutually exclusive; however, Wiarda further adds that ‘economic growth is a *sine quo non* for development’.<sup>292</sup> Therefore plans to achieve any form of development should be altered to include economic growth and socio-economic issues.<sup>293</sup> In addition to this, it should equally consider ‘political, social and legal development’.<sup>294</sup>

One of the platforms used to try to address the economic growth and development issues was through to UN’s implementation of the Millennium Development Goals and Targets (MDGs). This was created due to the increasing global awareness of worldwide poverty.<sup>295</sup> The MDGs are aimed at developing a global partnership for development by establishing open trading and furthering a financial system that is rule-based, predictable, and non-discriminatory.<sup>296</sup>

After much need for the system to change in order to incorporate more sustainable development within the global trade community, new international trade negotiations were launched, known as the Doha Development Agenda (DDA).<sup>297</sup> This Ministerial Conference is the first round of multilateral trade negotiations to ‘explicitly focus on the development dimension of world trade.’<sup>298</sup> The Ministerial Declaration of Doha Round outlines the main aim as the following:

‘International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of

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<sup>289</sup> The focus of this thesis is not on poverty, but the concept is introduced to give a better understanding as to what contributes to the slow development of developing countries.

<sup>290</sup> S Pahuja *Global Poverty and the Politics of Good Intentions* in R Buchanan and P Zumbansen *Law in Transition: Human Rights, Development and Transitional Justice* Hart Publishing (2014) 33.

<sup>291</sup> H Wiarda *Political Development in Emerging Nations – Is There Still a Third World* Belmont USA , Thomson (2004) 35.

<sup>292</sup> *Ibid.*

<sup>293</sup> Note 166 above at 111.

<sup>294</sup> Note 17 above at 50.

<sup>295</sup> C Kaufman & M Grosz *Poverty, Hunger and International Trade: What’s Law Got to Do with It? Current Mechanisms and the Doha Development Agenda* Cambridge University Press (2013) 97 Right now nearly ½ of the world’s population – more than 3 billion people live on less than \$2.50 a day. As of 2016 the World Bank has estimated that there were 896 million poor people in developing countries who live on \$1.90 a day or less. Available at <https://www.worldhunger.org/2015-world-hunger-and-poverty-facts-and-statistics> (Accessed 5 November 2017).

<sup>296</sup> *Ibid.*

<sup>297</sup>This was on November 14, 2001 at the Fourth Ministerial Conference of the WTO I Hague *Doha Development Agenda: Recapturing the Momentum of Multilateralism and Developing Countries* AM. U. Int’L L. Rev Vol 17:1097 (2003) 1099.

<sup>298</sup> Note 295 above at 98.

the WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work programme adopted in this Declaration. Recalling the Preamble of the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of the world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well-targeted, sustainability financed technical assistance and capacity-building programmes have important roles to play.<sup>299</sup>

After the Uruguay Round of negotiations that stretched over eight years, leading to the seemingly successful launch of the WTO, why, then, was there a need for the Doha Round? Apart from the need to negotiate on international trade issues, Cho strongly holds that ‘[t]he UR (Uruguay Round) could not effectively address rich countries’ longstanding protectionism...’.<sup>300</sup> Another big problem, as previously stressed, are the implementation issues. These include palpable difficulties experienced by developing countries in their implementation of Uruguay Round commitments. Furthermore, developing countries grew more frustrated with the inadequacy of rich countries’ implementation of commitments in areas such as agriculture and textiles.<sup>301</sup> Developing countries then resorted to voicing their frustration regarding the uneven distribution of the Uruguay Round benefits between themselves and developed countries.<sup>302</sup> This was approached with importance in the Doha Declaration, stating that ‘we attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them’.<sup>303</sup> Notably, before the Doha Round was launched, there were major disparities between developed and developing countries and the Ministers of Member countries were nowhere near a resolution at their first meeting at Doha in November 2001.<sup>304</sup> The fear that an agreement on a new round of negotiations would fail was borne in the minds of many countries. For this reason, the conclusion of the Doha meeting included a declaration stating that:

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<sup>299</sup> Ministerial Declaration adopted at the Ministerial Conference on 14 November 2001 in Doha, WT/MIN(01)/DEC/2, Paragraph 2 and 3.

<sup>300</sup> S Cho *Doha’s Development* Berkeley Journal of International Law Vol. 25:2 (2007) 168.

<sup>301</sup> *Ibid.*

<sup>302</sup> *Ibid.* The voicing of frustration by developing countries marked the beginning of the Seattle Debacle. Developing countries took to the streets in protest against the rich countries failures to honour their commitments.

<sup>303</sup> Ministerial Declaration adopted at the Ministerial Conference on 14 November 2001 in Doha, WT/MIN(01)/DEC/2, Paragraph 12.

<sup>304</sup> T N Srinivasan ‘The future of the global trading system: Doha round and beyond’ in E Zedillo (ed) *The Future of Globalization: Explorations in Light of Recent Turbulence* Routledge (2007) 117.

‘[w]e hereby undertake [a] broad and balanced work programme ... that incorporates both an expanded negotiating agenda and other important decisions and activities necessary to address the challenges facing the multilateral trading system’.<sup>305</sup>

There is a strong argument regarding the reason behind the successful launch of the Doha Round. Srinivasan proposes an argument that the terrorist attack on the World Trade Centre in New York on 11 September 2001 was one of the factors that contributed to the launch of the Doha Round.<sup>306</sup> The basis of his argument stems from the fact that there were frustrations with the lack of development; the attack was launched; and this subsequently led developed countries to be more understanding of developing countries’ concerns and thus label the new round as a ‘development’ round.<sup>307</sup> This was indeed an urgent call from the international community for the trade system to maintain development and reduce poverty actively.<sup>308</sup> However, this is not the only reason that led to the launch of the Doha Round. There had been many calls for some form of change to occur insofar as development is concerned. According to international development organisations, it was in the best interests of developed countries to contribute towards poverty reduction and economic growth and development in developing countries as this will discourage social unrest and maintain global peace.<sup>309</sup>

The DDA had extremely high hopes on fuelling development; however, the negotiations were clouded by the longstanding challenges of finding a fair compromise between WTO members, particularly developed and developing country members.<sup>310</sup> ‘Development is the banner of the Doha Round’ as Dube puts it.<sup>311</sup> This was so labelled with the intention of feeding the development needs of developing countries. However, despite development being the constant thread through the Doha Round, there is no standard definition attached to it.<sup>312</sup> This becomes problematic in determining to what extent the development needs and interests of both

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<sup>305</sup> Ministerial Declaration adopted at the Ministerial Conference on 14 November 2001 in Doha, WT/MIN(01)/DEC/2, Paragraph 11.

<sup>306</sup> Note 304 above.

<sup>307</sup> *Ibid.*

<sup>308</sup> Note 300 above at 169 There were also previous calls for development issues to be addressed. The Third Ministerial Conference of the WTO held in 1999 in Seattle is one example of the problems faced during trade negotiations. This round was labelled the Battle of Seattle due to the fiasco that occurred in trying to launch this Round. The ineffective and non-transparent decision-making process of the WTO contributed to the collapse of the Seattle talks. Developing countries were also retaliating to the disparities that exist between their interests and those of developed countries. They further perceived the Seattle Round as a way for developed countries to distort the WTO agenda in their favour. Developed countries argued that the protectionism of developed countries in respect to agriculture and textiles disregarded their liberalisation rhetoric. For the first time in the history of trade negotiations, the discussions ended up in loud squabbles and protest action.

<sup>309</sup> Note 300 above at 169.

<sup>310</sup> Note 295 above at 99.

<sup>311</sup> Note 20 above at 50.

<sup>312</sup> *Ibid.*

developed and developing countries are being upheld. In addition to this, what is also not explained is what is being done to ensure the complaints of developing countries are adhered to, particularly regarding provisions contrary to their development needs. These needs differ among different developing countries (although it must be noted that there are some issues that they all have in common), is the development agenda as proposed by the Doha Round flexible enough to cater for a plethora of development needs of developing countries? This assumption is based on the fact that some developing countries and least-developed countries' economic situations hinder them from fully exploiting the benefits of international trade and therefore fail to fairly compete in the world market.<sup>313</sup>

In the quest to fully understand the concept of development and how it can be brought about, Pahuja makes an observation that:

‘[i]n the context of international law and development, though, this judgement is reversed once more. Interventions directed at bringing about “development” are assessed primarily by reference to the intentions of the “developer”, rather than the effect of those actions on the “developing”. This is exacerbated by the way in which accountability measures usually involve accountability to the donors, not to the subjects of developmental interventions. In other words, we, in the rich world, assess ourselves, and base that assessment on our intentions’.<sup>314</sup>

This is significant in showing upholding of interests can be skewed more in favour of developed countries as opposed to developing countries.

According to Schwartz, the meaning of development is that it is an ideology that is readily functional in a way that is compatible political mobilisation.<sup>315</sup> The idea of development in the pre-Doha Round era has evolved. Integrating developing countries in the world trading system by reducing barriers and creating a more ‘liberal global environment for trading, finance, and technological progress’, which were intended to hasten their growth and development.<sup>316</sup> For this to be done effectively, Srinivasan opines that it is imperative not to ignore the domestic constraints of developing countries such as their social and economic structure. If the WTO wants to create a situation where countries can seize the opportunities of growth and development, then it needs to work on removing domestic barriers of developed countries as well.<sup>317</sup> The demands of all developing countries are not aligned because they have different

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<sup>313</sup> Note 287 above at 122.

<sup>314</sup> Note 290 above at 47.

<sup>315</sup> Note 294 above at 50.

<sup>316</sup> *Ibid* Note 304 above at 128.

<sup>317</sup> *Ibid*.

economic, social and political structures that influence their demands. Therefore, some demands of developing countries may not be in the interests of all the other developing countries as a group.<sup>318</sup> Effectively, this is evidence that the ‘one size fits all’ approach to development by the DDA is flawed and cannot accurately represent and cater to the demands and needs of different developing countries.

Although the Doha Round is premised on development issues and concerns raised by developing countries, the concept of development is nothing new to the WTO and therefore this round and the Uruguay Round should not be looked at in isolation.<sup>319</sup> As mentioned above, both these rounds were confronted with conflict between developed and developing countries on a number of issues.<sup>320</sup> The objective of the Doha Round’s incorporation of development into its agenda is actually nothing new to the WTO.<sup>321</sup> The underlying rationale of SDT illustrates the prevalence of development objectives through the WTO. There have been many noted loopholes under the SDT provisions and it is thus not sufficiently adequate to address fully the development needs of developing countries. In essence, the WTO has a major desire to fulfil its development objectives, but does not seem well-equipped to carry them through.

A further argument that has been proffered is that perhaps the Doha Round was also launched to remedy the deficiencies of development objectives under the WTO. According to Bhandari, ‘negotiators seemed jubilant about delivering the expected outcome of the development round. However, before long the jubilation was overwhelmed by suspicion and contradiction’.<sup>322</sup> As set out in paragraph two of the Doha Ministerial Declaration, the DDA seeks to address the association between trade and development. However, Bhandari notes a material aspect that was not taken into consideration when the round started, stating that:

‘[w]hen the Doha Round was launched, it is probable that no one had pondered the challenging nature of the political economy of trade and development negotiations. The challenges overwhelmed the negotiators, especially because negotiations had been driven by domestic political interests over trade issues, and they had been conducted using a weak methodology’.<sup>323</sup>

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<sup>318</sup> *Ibid.*

<sup>319</sup> S Bhandari ‘Doha Round negotiations: Problems, potential outcomes and possible implications’ 4(2) Trade, Law and Development (2012) 356.

<sup>320</sup> *Ibid.*

<sup>321</sup> Note 20 above, 50.

<sup>322</sup> Note 319 above, 354.

<sup>323</sup> *Ibid* 355.

As a result of this, the Doha Round has been ongoing since 2001 to date, despite it being anticipated to be grandest round in the history of international trade. There is still no tangible sign of when the round might be concluded and according to Bhandari, the reason the negotiations are prolonged is because of the reluctance of key role players to liberalise their markets as well as the ‘give and take’ approach between negotiating parties employed in its methodology.<sup>324</sup>

#### **4.3 SPECIAL AND DIFFERENTIAL TREATMENT UNDER THE DOHA DEVELOPMENT AGENDA**

The SDT issues under the WTO, coupled with their implementation issues are important to the development aspect of the Doha Round and its DDA mandate.<sup>325</sup> The Doha Ministerial Conference emphasised the importance of SDT provisions as an integral part of the WTO and there was a plan to ‘take fully into account the principle of special and differential treatment embodied in Part IV of the GATT 1994 ... and all other relevant WTO provisions’.<sup>326</sup> Paragraph 2 of the Doha Ministerial Declaration makes provision for the enhancement of market access, balanced rules, technical assistance and capacity building programmes that ensure that developing countries have increased opportunities in multilateral trading gains. This provision is undoubtedly premised on development -the main mandate of the Doha Round.

The foremost problem that has been stressed continuously insofar as SDT is concerned, is its implementation issue. On this, the Doha Ministerial Declaration provides that ‘we attach the utmost importance to the implementation-related issues and concerns by Members and are determined to find appropriate solutions to them’.<sup>327</sup>

The Doha Ministerial Declaration also recognises technical cooperation/assistance and capacity building as core elements to achieve development in the multilateral trading system.<sup>328</sup> However technical assistance is limited for the use of developing countries only and LDCs in assisting them to adjust to WTO rules and obligations.<sup>329</sup>

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<sup>324</sup> *Ibid* 356.

<sup>325</sup> *The WTO’s Special and Differential Treatment Negotiations Paragraph 44* African Trade Policy Centre Analytical Note SC/AN/TDP/2017/3.

<sup>326</sup> Ministerial Declaration adopted at the Ministerial Conference on 14 November 2001 in Doha, WT/MIN(01)/DEC/2, Paragraph 50.

<sup>327</sup> *Ibid* at Paragraph 12.

<sup>328</sup> *Ibid* at Paragraph 38.

<sup>329</sup> Ministerial Declaration adopted at the Ministerial Conference on 14 November 2001 in Doha, WT/MIN(01)/DEC/2, Paragraph 38.

Furthermore, the Doha Ministerial Declaration provides that Members reaffirm that the SDT provisions form part of an integral part of the WTO agreements.<sup>330</sup> Furthermore, the Declaration notes the ‘concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries’.<sup>331</sup> The Declaration further agrees that all SDT provisions shall be reviewed with the intention of ‘strengthening them and making them more precise, effective and operational’.<sup>332</sup> For this reason, a work programme on SDT is set out in the Decision on Implementation-Related Issues and Concerns.<sup>333</sup> This decision instructs the Committee on Trade and Development to:

- a) Consider SDT provisions that are non-binding in nature and consider the legal and practical implications for developed and developing country Members when converting these provisions into mandatory provisions.
- b) Examine additional ways in which SDT provisions can be more effective and improved ways in which developing countries and LDCs may be assisted to make best use of SDT provisions.
- c) Consider how SDT provisions may be incorporated into the architecture of WTO rules.<sup>334</sup>

This shows that the Doha Round had a precise plan of action on how it intended to achieve its development goals. The Doha Round identified that the application of SDT provisions falls short of their intended objectives as well as the objectives of the WTO. The non-binding factor of the SDT provisions was one of the stumbling blocks to its effective implementation. However, the Doha Round recognised this problem and incorporated a potential solution into its mandate to ensure that SDT provisions are not only effective, but mandatory too.

Years of negotiations went by and revealed deep divisions between members of the WTO regarding the appropriate scope of SDT and a suitable way to achieve the Doha Mandate.<sup>335</sup>

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<sup>330</sup> *Ibid* para 44.

<sup>331</sup> *Ibid*.

<sup>332</sup> *Ibid*.

<sup>333</sup> *Ibid*.

<sup>334</sup> The Decision on Implementation Related Issues and Concerns Paragraph 12 in Ministerial Declaration adopted at the Ministerial Conference on 14 November 2001 in Doha, WT/MIN(01)/DEC/2.

<sup>335</sup> B Hoekman & M Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* 3rd Edition Oxford University Press (2009) 547.

There were 88 proposals made by developing countries, many of which were African, LDC and ‘Like-Minded’<sup>336</sup> groups.<sup>337</sup> Their demands were broken down into the following:

- 1) Better preferential access to markets;
- 2) Greater freedom to use trade restrictions;
- 3) Greater freedom to delay or refrain from adoption of WTO rules or policy principles;
- 4) Proposals relating to development aid and technical assistance for implementation; and
- 5) Calls for greater transparency and accountability on the part of industrialised country membership of the WTO for achieving SDT objectives.<sup>338</sup>

The proposals were essentially about changing the best-endeavours language of SDT provisions to ensure that developed countries obligations are mandatory and weakening substantive WTO disciplines.<sup>339</sup> Hoekman argues that considering that Part IV entails is outside the control of developed countries, it was expected that they would object to suggestions to make SDT obligations mandatory.<sup>340</sup> The Economist members of the WTO did not make any prominent arguments during negotiations, but argued that ‘insofar as the economics of the disciplines embodied in many WTO agreements are sound, many of the proposals to weaken their reach are unlikely to benefit developing countries.’<sup>341</sup>

From a development perspective, discussions on SDT were unusual because their focus was not on whether SDT proposals during negotiations had a development merit. According to Hoekman, ‘proposals were not objected to so much because they would not do much good to the country or group proposing them, but because they would impose negative externalities’.<sup>342</sup> On the issue of waivers of Article I of the GATT regarding the MFN principle, Paraguay argued that they should not be used to accord privileges to other developing countries, while at the same time discriminating against other developing countries.<sup>343</sup> Instead, they should apply to all developing countries as this would be in line with the Enabling Clause and its provisions.<sup>344</sup> If it did not apply to all developing countries, Paraguay suggested that the developed country

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<sup>336</sup> W Goode *Dictionary of Trade Policy Terms* 5<sup>th</sup> Edition Cambridge University Press (2007) 265.

Like Minded group of developing countries are a group active in WTO negotiations. Its core members are Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe.

<sup>337</sup> Note 335 above at 549.

<sup>338</sup> *Ibid.*

<sup>339</sup> *Ibid* 550.

<sup>340</sup> *Ibid.*

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid.*

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid.*

that provided a preference should provide compensation to the excluded developing country.<sup>345</sup> There is no doubt that the adoption of this proposal might have been controversial, or at the very worst rejected, by most developed countries. Hoekman shows how developed countries would manipulate this to work well in their favour. He holds that in practice, developed countries would be prepared to accept export subsidies from LDCs only because they were unlikely to cause serious problems to their own industries and not because this would be beneficial from a development point of view.<sup>346</sup>

There was no progressive conclusion on the SDT negotiations in the Doha Round, at least not on all issues and concerns raised. However, this was not the end of the road for the development agenda of the Doha Round.

#### **4.4 THE BALI MINISTERIAL CONFERENCE**

After much difficulty to bring the Doha Round to a conclusion, the Bali Ministerial Conference was launched to restore hope of coming to a successful conclusion of the development agenda, as initially proposed. In December 2013 in Bali, Indonesia, the Ministers met for the Ninth Session. The so-called Bali package was warmly welcomed by many governments and was seen as a way to restore the credibility of the WTO as a negotiating forum and ultimately close the Doha Round.<sup>347</sup> The issues that formed part of the Bali Package were trade facilitation as the biggest one and other issues related to development, including cotton, food security in developing countries, and other provisions specifically for LDCs.<sup>348</sup>

The outcome of the Bali Ministerial Conference brought forth two important developments to the DDA. Firstly, trade ministers were now able to reach a final agreement without being bound to a Single Undertaking agreement which entails that ‘nothing is agreed until everything is agreed’.<sup>349</sup> According to Liang ‘this by itself is a significant political breakthrough, and should provide at least a tenuous start to future DDA negotiations’.<sup>350</sup> Secondly, the final agreement on Trade Facilitation was reached.

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<sup>345</sup> WTO Document TN/CTD/W/5 Add.1, Add.2.

<sup>346</sup> Note 335 above at 550.

<sup>347</sup> C Bellman *The Bali Agreement: Implications for Development and the WTO International Development Policy* (2014) Available at <https://poldev.revues.org/1744#entries> (Accessed 26 August 2017).

<sup>348</sup> M Hassan A *WTO Agreement on Trade Facilitation: Can it really facilitate trade?* Dissertation of the University of St. Gallen (2014) 64.

<sup>349</sup> M Liang *The International Trading System Post-Bali: The Need for a New Paradigm* 9 Asian J. WTO & Int'l Health L & Pol'y (2014) 353.

<sup>350</sup> *Ibid.*

The Director General of the WTO was really pleased with the outcome of this round. In his speech, he said ‘for the first time in our history: the WTO has truly delivered’.<sup>351</sup> This was truly a milestone, considering how long the DDA has been in existence. He further said that ‘with the Bali package you have reaffirmed not just your commitment to the WTO — but also to the delivery of the Doha Development Agenda’.<sup>352</sup>

There were some concerns, however, as some countries felt that the primacy that was being given to trade facilitation in this round would shift or water down the emphasis and focus on development.<sup>353</sup> However, development remained a huge priority for Bali, and it was still able to put specific focus on the needs of developing countries. According to Narlikar and Priyasarshi the agenda at the Bali Ministerial Conference was narrow enough to maintain significant focus on development issues, while at the same time re-engaging influential stakeholders in the developed countries.<sup>354</sup>

#### 4.4.1 The Trade Facilitation Agreement

The dictionary of trade policy terms defines trade facilitation as the ‘simplification and harmonisation of international trade procedures aimed at minimising obstacles to the movement of goods across borders.’<sup>355</sup> Yean narrowly defines trade facilitation as:

‘[t]he improving of cross-border administrative measures or more broadly to include behind-the-border measures such as infrastructure, institutional transparency, good governance, and domestic regulations. All these measures affect trade costs and with it the trade performance of a country’.<sup>356</sup>

With the environment rapidly changing and technology becoming more advanced, there is a serious need for ‘reliable, high-speed delivery systems’ as Hoekman and Kostecki put it, in order to keep up with today’s global business.<sup>357</sup> Given the nature of international trade, it is important to have a fast, effective and advanced supply chain system that will simplify international trade procedures instead of having to rely on border controls and related

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<sup>351</sup> WTO website, Speech by DG Azevêdo of 7 December 2013, available at [http://www.wto.org/english/news\\_e/spra\\_e/spra16\\_e.htm](http://www.wto.org/english/news_e/spra_e/spra16_e.htm) (Accessed 7 September 2017).

<sup>352</sup> *Ibid.*

<sup>353</sup> A Narlikar and S Priyasarshi ‘Empowering the poor? The successes and limitations of the Bali package for the IDCS’ *Third World Quarterly*, 35:6 (2014) 1060 Available at <http://dx.doi.org/10.1080/01436597.2014.907727> (Accessed 12 November 2017).

<sup>354</sup> *Ibid.*

<sup>355</sup> Note 336 above at 436.

<sup>356</sup> T S Yean *Trade Facilitation Synergies between WTO and ASEAN Initiatives* ISEAS – Yusof Ishak Institute No 47. (2017) 2.

<sup>357</sup> Note 346 above at 604.

administrative and documentary requirements that are both costly and time consuming.<sup>358</sup> Put simply, trade facilitation involves all procedures necessary to facilitate trade.

Although there are no provisions under the WTO Agreement that deal explicitly with trade facilitation, the Trade Facilitation Agreement states in its Preamble the desire to ‘to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994.’<sup>359</sup> These provisions deal with treatment of goods in transit, fees and formalities and requiring transparency of national trade regulations respectively. The Trade Facilitation Agreement was adopted from the Agreement on Customs Valuation particularly on antidumping and on subsidies and countervailing measures and other agreements and subsequently modified them to fit the rapid advances of the global business environment. This was done through the by extension of disciplines on matters addressed in articles V, VIII and X of the GATT 1994.<sup>360</sup>

Trade facilitation was first put on the trade negotiations agenda at the Singapore Ministerial Conference in 1996 following demands for more comprehensive rules to facilitate trade.<sup>361</sup> No agreement was reached on this matter, which was likely influenced by developing countries scepticism about negotiating on the subject due to the potential implementation costs which they would incur should the agreement come into force.<sup>362</sup> Some of the arguments against this were that some governments were not equipped well enough to modernise customs procedures, while others were reluctant to take on legal obligations that would potentially increase their exposure to WTO disputes.<sup>363</sup> On the contrary, developed countries were looking to establish binding norms within the WTO on this matter; and, of course, many developing countries opted for more voluntary and legally non-binding commitments.<sup>364</sup> Although no agreement was reached at this time, it highlighted the need for trade facilitation; hence it was tabled at every subsequent meeting after this, until it was adopted at the Bali Ministerial Conference in 2013.

As such, the Trade Facilitation Agreement of the WTO was concluded at the Bali Ministerial Conference in 2013 and finally came into force on 22 February 2017. It is the first ever multilateral trade agreement to be reached since the Uruguay Round.<sup>365</sup> The Agreement

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<sup>358</sup> *Ibid.*

<sup>359</sup> Agreement on Trade Facilitation Ministerial Decision of 7 December 2013 WT/MIN(13)/36 WT/L/911.

<sup>360</sup> B Hoekman *The Bali Trade Facilitation Agreement and Rulemaking in the WTO: Milestone, Mistake or Mirage?* Robert Schuman Centre for Advanced Studies Global Governance Programme-132 European Institute University (2014) 11.

<sup>361</sup> Note 335 above at 609.

<sup>362</sup> *Ibid.*

<sup>363</sup> Note 360 above.

<sup>364</sup> *Ibid.*

<sup>365</sup> Note 356 above at 2.

consists of only two sections. The first section consists of thirteen articles and it deals with both substantive and procedural measures on availability of information, facilitated customs procedures, border cooperation, and dispute resolution. Section two deals with SDT provisions as they apply to developing countries and LDCs. This section is further divided into three categories with different implementation and notification standards in each category.<sup>366</sup>

The Trade Facilitation Agreement applies only to country Members who have signed and agreed to its adoption. What is interesting is that most provisions under this agreement are legally binding, with the word “shall” being used throughout the Agreement. Hassan explains that ‘the fact that most of the commitments will not be on a “best endeavour” basis makes it a strong legally binding agreement’.<sup>367</sup> The implementation of these legally binding provisions will officially take off once developing countries as well as LDCs have fulfilled their transition periods.<sup>368</sup>

#### **4.5 THE NAIROBI MINISTERIAL CONFERENCE**

From 15 to 19 December 2015, the Tenth Ministerial Conference of the WTO was held in Nairobi, Kenya. This Ministerial Conference is one for the books as it was the first Ministerial Conference ever to be held on African soil. Although it was merely a continuation of the longstanding and complex DDA, it was not business as usual. The complexities of the Doha Round from its inception in 2001 were carried through to the Nairobi Ministerial Conference. However, Froman was adamant that ‘Nairobi will mark the end of an era’.<sup>369</sup> To achieve this, Froman stressed that ‘what cannot be achieved in Nairobi will not be achieved by trying again with the same failed approach’.<sup>370</sup>

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<sup>366</sup> Category A contains provisions that a developing country Member or LDC Member designates for implementation upon entry into force of this Agreement, or in the case of LDCs within one year of entry into force. Category B contains provisions that a developing country Member or a LDC Member designates for implementation on a date after a transitional period of time following the entry into force of this agreement. Category C contains provisions that a developing country Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building. Article 14 of The Ministerial Decision: Agreement on Trade Facilitation, WTO document WT/MIN(13)/36; WT/L/911, 11 December 2013.

<sup>367</sup> Note 348 above at 66.

<sup>368</sup> Developed countries have committed to apply the substantive portions of the Trade Facilitation Agreement from the date it takes effect. Developing and LDCs will only apply those substantive provisions of the Trade Facilitation Agreement which they have indicated they are in a position from the date the agreement came into force. LDCs were given an additional year to do so.

<sup>369</sup> M Froman *We are at the end of the line on the Doha Round of talks* Available at <http://voxeu.org/article/wto-lives-doha-round-does-not> (Accessed 27 August 2017).

<sup>370</sup> *Ibid.*

The Nairobi Ministerial Conference highlighted its intention to continue with the development goal of the DDA by reaffirming that it is committed to make more positive efforts towards development in order to ensure that developing countries and LDCs have a fair share of the world trade growth that is consistent with their development needs.<sup>371</sup>

The most important conversation during this conference was the role of the WTO in the negotiations which will in turn lead to the fate of the DDA. Although it seems as though the role of the WTO in multilateral trade negotiations may be different from the consideration of specific issues under the DDA, they are in fact largely connected. To this effect the Nairobi Ministerial Declaration focused on the WTO as a global trading forum, stating:

‘We reaffirm the pre-eminence of the TWTO as the global forum for trade rules setting and governance. We acknowledge the contribution that the rules-based multilateral trading system has made to the strength and stability of the global economy. We reaffirm the value of our consistent practice of taking decisions through a transparent, inclusive, consensus-based, Member-driven process.’<sup>372</sup>

The Nairobi Ministerial Declaration regrettably failed to reaffirm the DDA and its mandate specifically.<sup>373</sup> It is rather contradictory in its approach insofar as the DDA and its mandate are concerned. Under paragraph 32 of the Declaration, it acknowledges that many Members reaffirm the DDA as well as the Declaration and Decisions adopted at Doha. In the same paragraph, it claims that other Members believe new approaches are necessary to achieve a more successful outcome and therefore do not reaffirm the Doha mandate. Furthermore, the Nairobi Declaration made provision for WTO members to bring new issues to the table if they so wish beyond those under the DD. However, this is subject to consensus on this being reached.<sup>374</sup>

This is a major compromise reached under the Nairobi Declaration and may have negative implications attached to it. The first consequence of raising new issues is that the issues contained under the DDA run the risk of not being resolved, despite already being deadlocked. At the same time, Kanade makes a simple formulation of the consequence, stating that this Declaration has ‘provided developed countries with legal justification for elevating non-Doha

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<sup>371</sup> Nairobi Declaration Paragraph Adopted 19 December 2015 WT/MIN(15)/DEC Paragraph 7.

<sup>372</sup> *Ibid* at Paragraph 3.

<sup>373</sup> M Kanade *Chronicles of the Doha Wars: The Battle of Nairobi – Appraisal of the Tenth WTO Ministerial* Strathmore Law Journal (2016) 162.

<sup>374</sup> Nairobi Declaration Paragraph Adopted 19 December 2015 WT/MIN(15)/DEC Paragraph 34.

issues to the same level of Doha levels'.<sup>375</sup> Another consequence resulting from this Declaration is that it provides developed countries with the opportunity 'to claim that the DDA is dead and buried and it is time to move on to further liberalisation'.<sup>376</sup>

Despite the Nairobi Declaration seemingly making an already bad situation worse, paragraph 31 tries to salvage the can of worms it has opened, holding that:

'[n]evertheless, there remains a strong commitment of all Members to advance negotiation on the remaining Doha issues. This includes advancing work in all three pillars of agriculture, namely domestic support, market access and export competition, as well as non-agriculture market access, services, development, TRIPS and rules'.

The Ministerial Conference was concluded with a Ministerial Declaration<sup>377</sup> and the Nairobi Package,<sup>378</sup> which comprised a series of decisions on six Ministerial Decisions. Among them were decisions on agriculture, cotton and issues relating to LDCs.<sup>379</sup> On the outcome of this round, Wilkinson holds that the Nairobi outcome will rekindle the multilateral system. However, in the absence of mandatory obligations, there is still very little to force developing countries to prioritise negotiations that are of specific interest to developing countries.<sup>380</sup>

#### 4.6 CASE STUDIES

It is important to make an observation on how developing countries and LDCs, African countries in particular, manage their participation in the WTO. These case studies make an analysis on the extent to which developing countries have been integrated into the global trading system and whether they are able to benefit meaningfully from such participation. According to Gallagher, being a member of the WTO and taking advantage of that membership is not the sole responsibility of the government; instead, it also requires the participation of different stakeholders in the economy such as goods and services producers, industry associations, consumer associations, civil society groups, and academic analysts.<sup>381</sup>

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<sup>375</sup> Note 373 above at 163.

<sup>376</sup> *Ibid.*

<sup>377</sup> World Trade Organisation, Nairobi Package, Tenth WTO Ministerial Conference, 15 to 19 December 2015, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/nairobipackage\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairobipackage_e.htm) (Accessed 27 August 2017).

<sup>378</sup> *Ibid.*

<sup>379</sup> Note 373 above at 156.

<sup>380</sup> Note 4 above at 254.

<sup>381</sup> P Gallagher et al *Managing the Challenges of WTO Participation: 45 Case Studies* Cambridge University Press (2005) 1.

#### 4.6.1 Kenyan flowers

When the Marrakesh Agreement was signed in 1994, Kenya was among the founding members of the WTO.<sup>382</sup> Therefore, as a member, Kenya is a signatory to all WTO Agreements.<sup>383</sup> The country's participation in the WTO is largely prominent in the agriculture sector as it forms a big part of their economy and produces the country's major exports.<sup>384</sup> One such industry is the cut flower trade, which is governed by the WTO's Agreement on Agriculture (AoA) because flowers fall within its scope of 'products of agriculture'.<sup>385</sup> Kenya is part of the East African Community (EAC) which is a regional intergovernmental organisation which is said to be one of the fast growing regional economic blocs in the world.<sup>386</sup>

The cut flower industry in Kenya is among one of the fastest growing sectors of its economy, but like any other developing country, Kenya has issues formulating effective trade policies.<sup>387</sup> Despite this, and as part of the founding members of the WTO, Kenya has made remarkable progress in WTO matters and it has built structures that make it easier to implement WTO agreements.<sup>388</sup> Kenya's participation in the WTO has been successfully carried through in all major WTO trade negotiations,<sup>389</sup> and its active participation as a WTO member could have possibly led to the decision for it to host the Tenth Ministerial Conference in 2015.

As such, trade policies in Kenya are created and influenced by internal demands that are usually initiated by individuals or institutions.<sup>390</sup> The WTO is an external influence that shapes and determines the trade policy in Kenya and as part of compliance with WTO obligations, it requires that there be a trade policy document.<sup>391</sup> As a developing country, Kenya has been receiving assistance since 1998 under the Joint Integrated Technical Assistance Programme for Selected Least-Developed and other African Countries (JITAP) as part of the technical co-

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<sup>382</sup> W Odhiambo et al *Kenya's Participation in the WTO: Lessons Learned* in P Gallagher et al *Managing the Challenges of WTO Participation: 45 Case Studies* Cambridge University Press (2005) 284.

<sup>383</sup> *Ibid.*

<sup>384</sup> *Ibid* 291.

<sup>385</sup> P Singh *No Roses without Thorns: Global Consumers of Cut Flowers as Political Actors* KY, J Equine, Agric & Nat. Resources L Vol 6. No 1. (2014) 24.

<sup>386</sup> Regional Economic Blocs key to attaining Pan-Africanism Available at <https://www.eac.int/press-release/219-247-947-regional-economic-blocs-key-attaining-pan-africanism> (Accessed 23 November 2017).

<sup>387</sup> Note 382 above.

<sup>388</sup> Note 381 above at 293.

<sup>389</sup> *Ibid.*

<sup>390</sup> MM Opondo 'Trade policy in the cut flower industry in Kenya' *Globalization and poverty* (nd) Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.203.455&rep=rep1&type=pdf> (Accessed 11 September 2017).

The institutions include the Fresh Produce Exporters Association of Kenya, the Kenya Flower Council, civil society organisations or concerned government ministries.

<sup>391</sup> *Ibid.*

operation and capacity building facility of the WTO, which works under the sponsorship of the International Trade Centre (ITC) and the UNCTAD.<sup>392</sup> These institutions have played a fundamental role in making the multilateral trade system in the private and public sector well-known in Kenya.<sup>393</sup>

#### 4.6.2 South African citrus exports

South Africa underwent dramatic social and political turmoil during the 1990s and this clashed with the final stages on the Uruguay Round negotiations establishing the WTO.<sup>394</sup> The political order in South Africa under the apartheid that deliberately excluded that black majority from political participation had adverse consequences for the country's participation in the global trading community. According to Erasmus, 'the consequence was domestic destabilisation, an inability to function as a normal member of the international economy and becoming the prime target for sanctions'.<sup>395</sup> These sanctions affected South Africa's international political standing, and this also affected its ability to trade, borrow and participate in international organisations.<sup>396</sup>

South Africa eventually resolved its political problems through negotiations that led to a democratic rule in April 1994 which normalised the state and society.<sup>397</sup> This political change was imperative for South Africa from an international trade perspective. Apart from the rioting that took place in the country as a way of revolting against the apartheid system, the costs of sanctions in South Africa became incredibly unbearable.<sup>398</sup> These sanctions affected South Africa's international political standing and its ability to trade and participate in international organisations.<sup>399</sup> Had this transition to democratic rule not taken place, it is presumed that South Africa would have remained isolated from international trade structures and possibly even the WTO.<sup>400</sup> Now that the political transformation has taken place, Erasmus says that 'active participation in the activities of the multilateral WTO is very much part of the policies and actions of the new South Africa'.<sup>401</sup>

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<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid.*

<sup>394</sup> G Erasmus *South Africa* in P Macrory et al (ed) *The World Trade Organization: Legal, Economic and Political Analysis* (2005) Vol 3 352.

<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid* at 354.

<sup>398</sup> *Ibid.*

<sup>399</sup> *Ibid.*

<sup>400</sup> *Ibid.*

<sup>401</sup> *Ibid* 356.

When South Africa joined the WTO, it became party to WTO Agreements.<sup>402</sup> It is also an active member of the African Union (AU) and the Southern African Development Community (SADC).<sup>403</sup> The Constitution of the Republic of South Africa provides a framework for the conclusion of international treaties in their legal framework. Section 231 of the Constitution holds that international agreements are binding to the country only after they have been approved by resolution of the National Assembly.<sup>404</sup> The South African Constitution also explicitly states that when interpreting domestic laws, international agreements should be used as reference and guidelines.<sup>405</sup> This case study, in particular, examines the development of South Africa's citrus exports under the AoA as an example of the country's participation in the WTO.

It is trite to point out that the South African government views the Doha Round as an opportunity for fundamental and structural changes to the development model of international trade.<sup>406</sup> There are a number of specific issues that are important to South Africa, one of which is agriculture. South Africa believes that negotiations on agriculture should be tailored to incorporate structural changes and the distribution of agricultural production in the world economy as a whole.<sup>407</sup> This case study will examine the agriculture export trade profiles of South Africa which fall under the Department of Agriculture, Forestry and Fisheries. The main objective is to give a practical example of South Africa's participation in the WTO, with specific focus on the application of SPS measures.

In the agriculture sector, most South African exports are destined for either the European Union (EU) or other African countries.<sup>408</sup> Agriculture exports are quite complex; in particular, for the EU, any market access gains are likely to be negotiated under the Trade and Development Cooperation Agreement (TDCA) instead of multilateral agreements.<sup>409</sup> What is ironic is that multilateral agreements that improve conditions for EU market access are likely to reduce

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<sup>402</sup> N Joubert *The Reform of South Africa's Anti-Dumping Regime* in P Gallagher et al *Managing the Challenges of WTO Participation: 45 Case Studies* Cambridge University Press (2005) 520.

<sup>403</sup> Note 394 above at 359.

<sup>404</sup> Section 231 of the Constitution of the Republic of South Africa, 1996.

<sup>405</sup> Section 233 of the Constitution, 1996.

<sup>406</sup> Note 394 above at 371.

<sup>407</sup> *Ibid* at 372.

<sup>408</sup> M Lubinga 'How the Agreement on Agricultural might improve the South African agricultural, forestry and fisheries trade performance' in R Sandrey et al *WTO: Agricultural Issues for Africa* Trade Law Centre and National Agricultural Marketing Council (2017) 69.

<sup>409</sup> *Ibid*.

South African preferential access conditions and would therefore have very little value for South Africa.<sup>410</sup>

The country is one of the largest citrus exporters in Africa, which accounts for more than 25 percent of the global trade, and half of its citrus is exported to the EU.<sup>411</sup> This makes the citrus exports the largest under the agriculture sector. Furthermore, the local South African citrus industry has 1 600 growers with 120 000 people in their employ to push production. It exports about 1,5 million tons of citrus a year.<sup>412</sup>

Both South Africa and the EU are signatories to the SPS Agreement as well as the International Plant Protection Centre (IPPC),<sup>413</sup> which secures the common and effective international action to prevent the spread pests affecting plants and plant products. The IPPC works in conjunction with the requirements under the SPS Agreement.<sup>414</sup> In recent years, South Africa has faced stringent Citrus Black Spot (CBS) regulations imposed by the EU on the basis that it is an important phytosanitary requirement for citrus import permission.<sup>415</sup> The EU had to impose this preliminary sanction, and it indicated that should South Africa exceed more than five allowable CBS interceptions, then this would subject the whole country to a ban. The primary reason for taking this measure was because CBS had not occurred in the EU and they therefore feared that the disease contained in the citrus exports would spread throughout the EU territory.<sup>416</sup>

The impact of this has had negative economic implications for the South African citrus exports. This led the South African citrus industry in 2017 to suspend citrus fruit exports to the EU with immediate effect as a deliberate risk management step to ensure future exports to EU markets.<sup>417</sup> The Citrus Growers' Association listed direct and indirect costs associated with the EU measure, which include 'spraying, replanting earlier than necessary, added inspection costs, and storage costs for impounded fruit at European ports'.<sup>418</sup> With this being the largest export

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<sup>410</sup> *Ibid.*

<sup>411</sup> *Ibid* 117. However, the focus of this thesis is not to analyse the particular SPS provisions.

<sup>412</sup> See Business Report, South Africa's Financial daily of 20 March 2015.

<sup>413</sup> Note 408 above at 130.

<sup>414</sup> Note 355 above at 242.

<sup>415</sup> E Carstens et al *Citrus Black Spot is absent in the Western Cape, Northern Cape and Free State Province*. Working Paper. Stellenbosch: University of Stellenbosch (2012).

<sup>416</sup> Note 408 above at 117.

<sup>417</sup> Citrus Industry halts EU exports. Available at <http://www.heraldive.co.za/business/2017/10/25/citrus-industry-halts-eu-exports/> (Accessed 9 November 2017). The industry has requested the Department of Agriculture to give effect to this decision by suspending inspection and the issuing of phytocertificates for all EU citrus exports.

<sup>418</sup> EU to halt SA imports after citrus disease alert Available at <https://mg.co.za/article/2013-06-10-eu-plans-to-halt-imports-from-sa> (Accessed 9 November 2017).

sector, Phakathi holds that ‘the loss may include both permanent and seasonal employment in the sector and may cost the country millions in revenue losses’.<sup>419</sup> Because South Africa is a developing country, compliance with the regulations may be costly; however, non-compliance will have bigger ramifications. Unfortunately, unlike the EU, South African agricultural producers do not receive direct support from the government, and this will aggravate the impact of the ban imposed.<sup>420</sup>

#### 4.6.3 **Zambian honey exports**

Zambia is a member of the WTO and is also signatory to its Agreements as a consequence, but as an LDC, it encounters great difficulties in its participation in international trade negotiations.<sup>421</sup> Despite Zambia’s constraints on participation in the WTO, it receives support from donors and international agencies which had advanced it to a more reformed policy-making system and institutions.<sup>422</sup> The Zambian Ministry of Commerce, Trade and Industry is the body responsible for formulating and conducting trade policy.<sup>423</sup> Because the Zambian economy is heavily dominated by copper exports, the Zambian government tries to diversify their exports by prioritising other products such as honey, cotton and aluminium wires.<sup>424</sup>

Beekeeping in Zambia has been one of the prominent income-generating activities for centuries, and this can be attributed to the favourable nature and climate.<sup>425</sup> It plays a crucial role for Zambian forestry and agriculture. As such, the country is quite popular for its honey production, which has been certified organic because of the climate conditions and the traditional processing and harvesting methods used by the beekeepers.<sup>426</sup> There are several ways in which beekeeping can be processed to produce honey in Zambia. Some of these include, ‘produce table honey and industrial honey that are often used by bakeries and food

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<sup>419</sup> S Phakathi *The Impact of Agricultural Subsidies on the Policy of Agricultural Exports in South Africa Within the Context of the WTO Jurisprudence* Dissertation of the University of Western Cape (2016) 43.

<sup>420</sup> *Ibid.*

<sup>421</sup> S Bilal and S Szepesi ‘How regional economic communities can facilitate participation in the WTO: The experience of Mauritius and Zambia in P Gallagher et al *Managing the Challenges of WTO Participation: 45 Case Studies* Cambridge University Press (2005) 375. Zambia is a member of the Commonwealth Market for Eastern and Southern Africa (COMESA).

<sup>422</sup> *Ibid* 379.

<sup>423</sup> Note 421 above at 379.

<sup>424</sup> A Case Study of Zambian Honey Exports Kommerskollegium National Board of Trade (2009) 4 Available <https://www.kommers.se/Documents/dokumentarkiv/publikationer/2009/rapporter/report-case-study-of-zambian-honey-exports.pdf> (Accessed 11 September 2017).

<sup>425</sup> *Ibid.*

<sup>426</sup> W Mwanza et al ‘Resolving non-tariff barrier disputes: multilateral versus regional mechanisms’ in R Sandrey et al *WTO: Agricultural Issues for Africa* Trade Law Centre and National Agricultural Marketing Council (2017) 131.

processors; propolis which is used as natural medicine; beeswax for candles; and floor polish and honey beer which can be extracted from honey comb'.<sup>427</sup>

Zambia is an approved honey exporter to different countries such as the UK, Belgium, the US, France, Botswana, Italy, and South Africa.<sup>428</sup> For the purpose of this research, focus will be only on exports to the EU (which has a differential developmental status from Zambia) and South Africa (which is a developing country). Since Zambia falls under the group of LDCs, the duty on its exports is abolished, provided the Zambian exporter can provide the EU importer with a certificate of origin which proves that the honey is wholly obtained in Zambia and it is accompanied by a health certificate.<sup>429</sup> The SPS Agreement of the WTO also comes into play here in order to protect domestic animal and plant health and food safety.<sup>430</sup> Because honey is an animal product, it is subject to more stringent rules by EU importers.<sup>431</sup> Member countries are allowed to set their own standards on the products they are importing with the condition that these standards are scientifically justifiable.<sup>432</sup>

For Zambian honey exporters, compliance with SPS standards is not entirely compulsory.<sup>433</sup> This is because beekeepers in sub-Saharan Africa enjoy a level of competitive advantage of not having to make use of antibiotics and other such drugs for their bees as their bee population is not exposed to diseases and predators.<sup>434</sup> On the contrary, however, it is a prerequisite to fulfil EU SPS regulations to gain access to their markets. Fortunately for Zambia, as with most sub-Saharan Africa, beekeepers enjoy a competitive advantage of no diseases and predators.<sup>435</sup> This puts the EU markets at ease of any risk.

Similarly to the EU, Zambia also exports honey to South Africa, but it has not been smooth sailing as with the EU. Relevant to the discussion is that South Africa and Zambia are signatories of the WTO SPS Agreement and the IPPC.<sup>436</sup> Interestingly, Zambian honey exports to South Africa are subject to a condition executed by the South African border control that the honey first be irradiated.<sup>437</sup> This was after South Africa alleged that Zambian honey carried a

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<sup>427</sup> Note 424 above.

<sup>428</sup> *Ibid.*

<sup>429</sup> *Ibid.*

<sup>430</sup> Article 2 of the paragraph of Agreement on the Application of Sanitary and Phytosanitary Measures, LT/UR/A-1A/12 (signed 15 April 1994).

<sup>431</sup> Note 424 above.

<sup>432</sup> *Ibid.*

<sup>433</sup> *Ibid.*

<sup>434</sup> *Ibid.*

<sup>435</sup> *Ibid.*

<sup>436</sup> Note 426 above at 131.

<sup>437</sup> *Ibid.*

pest called the American Foulbrood (AFB).<sup>438</sup> South Africa was adamant that non-irradiated Zambian honey may not be exported to South Africa, despite Zambia denying the allegations on the basis that no AFB has been found in Zambia.<sup>439</sup> For Zambia, the problem with irradiating its honey is that loses its organic status and this constitutes a major trade barrier for Zambia. Finding a solution is even a bigger challenge for these WTO Members as Mwanza et al points out that due to ‘the lack of financial, organisational and human capacity, the time-consuming process of the WTO dispute settlement mechanisms and the complexity of the WTO rules’<sup>440</sup> are the primary reason why developing countries do not make use of the multilateral dispute settlement mechanisms put in place.<sup>441</sup>

#### **4.7 AID FOR TRADE**

Considering all the problems faced by developing countries insofar as trying to have beneficial participation in the multilateral trading system and finally achieving development, the WTO came to a realisation that there has to be global financial support offered to developing countries. At the 2005 Ministerial Conference hosted in Hong Kong, the WTO launched the Aid for Trade (AfT) initiative which is intended to provide global financial support to developing countries and LDCs.<sup>442</sup> This Ministerial Conference provided a platform for further development of AfT. Paragraph 57 of the Hong Kong Ministerial Declaration declares that:

‘Aid for Trade should aim to help developing countries, particularly LDCs, to build the supply-side capacity and trade related infrastructure that they need to assist them to implement and benefit from WTO Agreements and more broadly to expand their trade. Aid for Trade cannot be a substitute for the development benefits that will result from a successful conclusion to the DDA’.

AfT is considered as an important instrument that will be used to aid trade and development and to do this, it encompasses a number of categories to achieve its goal. These include ‘more trade-oriented infrastructure, an improved production capacity, and by supporting negotiations

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<sup>438</sup> *Ibid.*

<sup>439</sup> *Ibid.*

<sup>440</sup> *Ibid.*

<sup>441</sup> *Ibid.*

<sup>442</sup> T Ijjo and I Shinyekwa ‘Foreign aid and trade capacity development: Recent evidence from Uganda’ *Journal of Sustainable Development*; Vol. 9, No. 3; Published by Canadian Center of Science and Education 39 (2016) 39.

concerning trade policy regulation and trade liberalisation.<sup>443</sup> To ensure that developing countries reap these benefits, the core purpose of AfT is to help developing countries to:

- (i) Increase their trade in goods and services;
- (ii) Integrate into the multilateral trading system, and
- (iii) Benefit from liberalised trade and increased market access.<sup>444</sup>

According to Karingi and Fabbroni, there is still much confusion about what AfT really is, what it entails, how it will work, and how it will be financed.<sup>445</sup> Dube raises a concern stating that ‘since AfT is a donor initiative and is currently funded by international financial institutions and multilateral agencies, concerns do arise as to its effectiveness for development purposes’.<sup>446</sup> However, to clear any confusion, Page holds that the best way to understand AfT is to differentiate between aid for costs related to the WTO and aid that is required to help countries develop.<sup>447</sup>

#### **4.8 CONCLUSION**

Development forms an integral part of the global trading system and with there being a development crisis within the system, it is left to the WTO to prioritise it even further. There has to be a more holistic application when approaching development; in that way the loopholes will decrease significantly. Had this been a set priority from the start and had the WTO had an effective plan of action in terms of their approach to development, neither the SDT nor the DDA would have been deadlocked.

This chapter has shown how the WTO attempted to enhance development through the DDA. There has to be an alternative way in which the WTO approaches development without only associating it to economic growth, or every other round of negotiations will be used to fill in the blanks of the round that came before it and that will be a futile exercise. There is still an extremely long road to development and it is important for the WTO to make the development project their priority and approach it from a developing countries perspective.

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<sup>443</sup> *Ibid.*

<sup>444</sup> Prepared by the United Nations Economic Commissions for Africa (UNECA) Global review for Aid for Trade 2011, African Case Stories: A snapshot of Aid for Trade on the ground in Africa Available at [http://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/african\\_cse\\_stories\\_e.pdf](http://www.wto.org/english/tratop_e/devel_e/a4t_e/african_cse_stories_e.pdf) (Accessed 8 November 2017)

<sup>445</sup> Note 39 above.

<sup>446</sup> Note 20 above at 80.

<sup>447</sup> S Page *Aid for Trade: A new issue in the WTO* in D Njinkeu & H Cameron *Aid for Trade and Development* (2009) 140.



## **CHAPTER FIVE: FINDINGS, CONCLUSION AND RECOMMENDATIONS**

### **5.1 INTRODUCTION**

There is an imbalance that exists between developing countries and developed countries in the multilateral trading system which leads to the benefits of trade being in favour of developed countries. In recognition of this, the WTO takes initiative by providing SDT provisions for developing countries as an attempt to somewhat give them an advantage in the multilateral trading system to enable them to compete with developed countries. The title of this thesis is ‘Special and Differential Treatment Provisions within the World Trade Organization: The Pursuit of Development for Developing Countries’; thus the purpose of the research was to identify whether there is a fundamental problem insofar as the implementation of SDT is concerned; and if so, it seeks to recommend alternate ways to make the concept more tangible and beneficial for developing countries.

### **5.2 FINDINGS**

SDT provisions are promoted as the primary objective to achieve development for developing countries. After extensively reviewing the history of the GATT/WTO through to the establishment of the SDT, it was identified that SDT as it currently stands is weak and ineffective. The research sought to analyse the primary objectives of the WTO which lie in the removal of barriers to trade and regulation of international trade and of importance the extent to which these objectives improve market access for developing countries.

In answering this question, the research focused on the historic development of the international trading system from the establishment of the GATT right through to the birth of the WTO. It established that historical events of an economic and political nature have shaped and continue to shape the current structure of the multilateral trading system

The research in chapter two established that although SDT was later adopted to remedy the discrepancies between developing and developed countries, the basic rationale behind it dates back to the era of the GATT. Its basic principles of the Most Favoured Nation, National Treatment and Reciprocity which were not entirely formally referred to in the agreement was, however, intended, and was structured to promote trade between equals, which subsequently excluded developing countries. Seeing that developing countries could not keep up with these

principles, the research identified that a mechanism such as the Generalised System of Preferences (GSP) was used to differentiate developing countries from developed countries by exempting developing countries from complying with GATT principles and by developed countries giving them trade preferences.<sup>448</sup> Interestingly, it was found that the success was short lived or at the very worst non-existent, as GSPs were granted voluntarily and at the discretion of developed countries and therefore not implemented effectively. One would think that before the establishment of SDT provisions, the WTO would have realised that non-binding trade preference provisions are not at all effective. They are unstable, and history shows that they deny developing countries a solid basis to participate in the multilateral trading system.

Furthermore, it was found that as developing countries were not key participants in the multilateral trading system, the GATT adopted the Enabling Clause, which was another exception that favoured developing countries in the multilateral trading system as it enabled developing countries to receive preferential market access from developed countries.<sup>449</sup> However, like the GSPs, the Enabling Clause gave developed countries wide discretionary powers to decide on whether or not they would like to make use of the of the system of granting preferential market access to developing countries.<sup>450</sup> This again contributed to the instability of developing countries' growth and development and strengthened the gap that exists between them.

Notably, multilateral trading has undergone significant changes since GATT was established in 1947 up to the last round of trade negotiations under the GATT, which was the Uruguay Round, and which led to the establishment of the WTO. Within this context, the research aimed to determine the extent to which the objectives of the WTO benefit developing countries, noting the many positive changes in the multilateral trading regime with regard to developing countries.

As such, to remedy the exclusion of developing countries' participation under the GATT, the WTO's ingenious Single Undertaking effectively meant that developing countries had to accept the main rules of the GATT/WTO despite having been previously sidelined.<sup>451</sup> Similarly to the GATT, the provisions and the main objectives of the WTO insofar as developing countries are

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<sup>448</sup> Note 27 above at 58.

<sup>449</sup> Note 138 above at 8.

<sup>450</sup> *Ibid.*

<sup>451</sup> Note 147 above at 483.

concerned are to assist them on ‘trade policy issues through technical assistance and cooperating with other international organizations’.<sup>452</sup>

As such, chapter three examined the extent in which these objectives are compatible with the structure of SDT provisions. This research has identified that there is a fundamental problem with the implementation of SDT provisions for developing countries. When looking into the history of SDT provisions, the research found that there is an inherent conflict between WTO and SDT, which was introduced as a compromise as the WTO evolved. Notwithstanding the Preamble of the GATT 1947 and later the WTO recognising the need to raise living standards and ensure full employment through reciprocal free trade, it was clear that developing countries was not a priority as the GATT regulated non-discriminatory trade among equals, these being developed countries. This in essence caused a conflict between the WTO and the interests of developing countries through SDT

Furthermore, another major problem identified with the SDT is the use of the uncertain and nugatory language of the provisions. The language used is suggestive, not prescriptive, which allows room for developed countries not to adhere to them as they do not create a mandatory legal obligation. It is therefore essential that the possibility of strengthening the content of SDT provisions be investigated and strictly attended to by the Committee on Trade and Development and the WTO as a whole. In a meeting held in April 2017, the Committee on Trade and Development declared their intention to reduce inequality as a necessary step to ensuring long-term economic growth and development.<sup>453</sup> Much of how this is intended to be done is not clear. However, it involves reduction of poverty more than it does the promotion of development to make trading more beneficial for developing countries.

The research identified the primary function and purpose of SDT which is to ‘cure’ the economic vulnerabilities and trade inequalities experienced by developing and least-developed countries. In order to do this, the interests of developing countries must be upheld. However, this must not be to the exclusion of developed countries’ interests, which has been a major stumbling block. . Intrinsically, the research looked into whether the interests of both developing and least-developed countries are being upheld in the application of SDT provisions and whether there is a way in which SDT can be effectuated in order to ensure that developing

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<sup>452</sup> Note 126 above at 202.

<sup>453</sup> Development Committee Communique: An Essential Role, A New Approach Available at <https://www.tralac.org/news/article/11542-development-committee-communique-as-essential-role-a-new-approach.html> (Accessed 12 October 2017).

countries reap the benefits of the multilateral trading system. Ultimately, the research showed that the failure by the WTO to define developing countries and their exact needs makes upholding their interests futile. Even though the WTO requires the application of SDT provisions to be consistent with its development objectives, this research found that SDT cannot do this while at the same time upholding developing countries' interests. This is because there are different needs and interests among different developing countries, and applying SDT provisions similarly becomes unsubstantial and this will remain so until there is a considerable evaluation of the special needs of developing countries.

Development is sought to be achieved by the WTO through the SDT and to balance the interaction between developing and developed countries. SDT is intended to level the playing fields between developed and developing countries, but it becomes incapable of producing any useful results because the developing countries themselves are not at an equal level. Considering the primary objectives of the WTO, it is not sufficient for a few developing countries to thrive while the rest are lurking in the shadows.

After an analysis of the SDT provisions, Brennan found that they contribute to the inferior treatment of developing countries, and the direct consequence of this is failure by developing countries to increase their international trade with other countries.<sup>454</sup> She suggests that the SDT provisions be reformulated in a way that discourages protectionism by developed countries and delays the emergence of developing countries into the multilateral trading system.<sup>455</sup> However, Brennan cautions that despite the reform, developed countries would still find a way to abuse the reformed SDT mechanism for their self-serving purposes.<sup>456</sup> This comes as no surprise, and thus research found that the interests of developed countries are held at a much higher level than those of developing countries. The impact of this has even granted developed countries the ability to re-model development mechanisms to benefit themselves more.

Against this background, the research in chapter three then sought to understand how the SDT is implemented, by an analysis of the SPS and TBT agreements.<sup>457</sup> As noted in the relevant chapter, the SPS agreement regulates the imposition of health safety requirements on imported plant and animal products<sup>458</sup> and allows countries to impose health standards necessary for the protection of human, animal and plant life, provided these measures do not impose restrictions

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<sup>454</sup> Note 189 above at 159.

<sup>455</sup> *Ibid.*

<sup>456</sup> *Ibid.*

<sup>457</sup> Chapter three Section 3.4.

<sup>458</sup> Note 122 above at 109.

on international trade. Of concern was the fact that developing countries are finding the implementation of this agreement expensive. For this reason, SDT provisions exist to ensure that developing countries' needs are catered for insofar as implementation boundaries are concerned. Further, in respect of the TBT Agreement, which ensures that there are no unnecessary impediments to trade caused by technical regulations, standards and procedures for assessment of conformity,<sup>459</sup> it was again found that developing countries experienced some difficulties with implementation, and SDT is used to try cure this problem.

Ultimately, in both agreements, there is an acknowledgment of the developmental gap that exists between developing and developed countries and the SDT framework therefore grants developing countries special provisions. These agreements also contain undertakings concerning technical assistance in an attempt to take the interests of developing countries into consideration.<sup>460</sup> However, the scepticism of developing countries and the non-binding nature of the SDT provisions worsens the lack of implementation of the provisions.

The shortcomings of the SDT provisions and issues of development are known to the WTO, and therefore this research looked into recent attempts to address these challenges. In recognition of the development issues faced by developing countries, the current WTO Ministerial Conference launched in Doha in 2001 had development as its main focal point. The Doha Round is still ongoing so there is no set outcome on how developing countries' interests will be attended to. Trying to resolve these problems may be challenging because the current inequalities in the multilateral trading system stem from the pre-Uruguay era and possibly even before that. In fact, the issues and the inability to resolve them are also a result of the exclusion of developing countries from the multilateral trading system from the very beginning. Even when developing countries were finally incorporated into international trade, the WTO procedures still displayed a strong bias towards developed countries.

The rebranding of the Doha Round as the Doha Development Agenda (DDA) displayed a greater understanding of the needs and difficulties faced by developing countries as well as putting much-deserved weight on developmental issues. However, despite this, there is still a deficit in understanding what exactly developing countries need. The DDA also pursued the strengthening of SDT provisions as they could not be isolated from development, and that being their aim, they also focused on the Doha mandate plan on improving SDT provisions for

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<sup>459</sup> *Ibid.*

<sup>460</sup> Note 189 above.

developing countries by making them more, effective and operational, and most importantly, making them mandatory. Thus far, many proposals have been tabled in order to bring the Doha Round to a fruitful conclusion, but with no success, as the round is still ongoing, and the last meeting was held in 2015 in Nairobi in Kenya.

Interesting developments under the Doha Round include the Trade Facilitation Agreement (TFA), which shows significant progress in the structure and content of international trade agreements, and which was a product of the Bali Ministerial Conference under the mandate of the DDA. This was an important development as part of the DDA objectives is to remove any obstacles to trade. It was established that developing countries still find it challenging to keep up with our rapidly changing economic and technological world, and therefore the TFA was necessary in making the cross-border system more advanced in order to ensure accessibility and effectiveness. As such, the positive aspect of this is that international trade will therefore be much smoother.

The research found it of relevance that there is indeed a section in this agreement that deals specifically with SDT provisions in order for developing countries and LDCs to have fewer difficulties in implementing the agreement. It is applicable to signatories only, and contains legally binding obligations which are seen in the use of clear, concise, and obligatory language. This is a significant milestone by drafters of international trade agreements and reduces the chances of shortfalls in implementation as seen with many agreement provisions. The fact that the DDA is yet to be concluded is evidence of how many problems need solving in the multilateral trading system, especially where developing countries are concerned. Not even the Nairobi Ministerial Conference of 2015 marked the end of the DDA. Because of the inability to bring the DDA to a close, a new approach was adopted during this round, but unfortunately it was contradictory and moved slightly away from the DDA mandate. However, those in charge managed to salvage the problem. It was suggested that further trade liberalisation was needed in order to better reach the goals of the DDA.

In an attempt to measure whether or not the challenges faced by developing countries were being attended to, this research conducted a case study on Kenya, South Africa and Zambia to get a clearer picture of how these developing countries are incorporated into the WTO and how beneficial their participation is. It focused primarily on their trade with developed countries because that is where the major gap lies. In applying the SPS and TBT agreements to the case studies, it identified that although the SPS measures did not cause unnecessary obstacles to

trade, the exporter developing countries and LDCs still struggled with compliance because it has cost implications. However, SDT makes provision for longer time-frames to comply with provisions of the Agreements. It is the opinion of this paper that although these longer time-frames are helpful, they are not the best way to achieve trade and development. The main reason is that the world of trade is rapidly changing, and countries have to keep up with the fast-changing demands. This causes a conflict between keeping up with quick revolving demands and taking longer to comply with certain longstanding demands.

Despite the notable objectives of helping developing countries to exploit trade opportunities effectively, this has been an inefficient approach. Thus another approach to help developing countries address their development concerns is through the use of AfT. Ideally, in the context of international trade, trade instead of aid should be the best way to achieve development. However, given the non-coherent gap between developing and developed countries and the approach the WTO takes with SDT, this has not been the case. Therefore, this research proposes in chapter five that the best way to address development concerns appears to be to use AfT.

In summation of the findings, the WTO must improve market access objectives for developing countries, but SDT does not allow this to happen. Although the objectives of both the WTO and SDT include development, the outcome of things in the multilateral trading system shows quite the opposite. SDT provisions seem to promote market access only in developed countries and prioritise protectionism in developing countries. Practically speaking, this seems like an ideal setup. It actually is not. The main goal is development, and realising it has been stagnating. Therefore, a number of things have to be modified in order to best effectuate SDT so that developing countries can enjoy benefits of the multilateral trading system.

Having identified the various findings, the research now has the difficult task of offering certain recommendations.

### **5.3 RECOMMENDATIONS**

Based on the shortcomings identified above, this thesis presents a number of recommendations. It is the opinion of this thesis that the basic starting point for any discourse on finding a probable solution is to define every single element necessary to achieve development in order to give it more context. The approach of fuelling development through SDT is inefficient and not substantial; hence there have been a number of inconsistencies in the system.

First, there is an urgent need to strengthen the concept for a more progressive and harmonised approach of SDT, and this thesis holds that for this to be done, it is imperative for the WTO to define fully and extensively what a developing country is. This should go with the acknowledgment that no two developing countries are the same, and therefore their needs and interests are different. Apart from looking at the GDP, in terms of needs and interests, research shows that a developing country is one that has needs that a developed country does not have or is not entitled to have, but the scope and ambit of these needs are not described. The closest the WTO has come to defining these needs is by describing them as ‘development, financial and trade needs of developing countries’.<sup>461</sup> This definition is lacking in meaning and it does not come close to being a correct representation of developing countries’ needs. The use of the word ‘development’ to define special needs is redundant when these special needs are required to achieve development.

This thesis therefore recommends that the needs and interests of developing countries should be put into various classes, instead of applying a ‘one size fits all’ approach, because it is devoid of meaning and far from reality. Further, applying rules equally on an unequal situation does not produce equal results. This is because developing countries are at different economic, financial and technological stages which then varies their capacity to fulfil their multilateral trade obligations.

Once the needs of developing countries are identified and classified, Hynes and Lammersen suggest that focus should also be on identifying and tackling the most binding constraints faced by developing countries. Once that is done, the constraints that have the biggest impact on expanding trade and promoting development should be addressed first.<sup>462</sup> The research aligns itself with this recommendation, which involves identifying a method to diagnose and resolve these constraints; and therefore suggests consultations with relevant parties to pinpoint the trade needs and constraints that prevent developing countries from expanding trade and achieving development.<sup>463</sup>

It is also critical that the issues within the SDT be revised since they have not done much in the way of fully integrating developing countries into the multilateral trading system. This is not to say they have not done anything at all, but they have not done enough to ensure that

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<sup>461</sup> Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* Adopted 20 April 2004 WT/DS245/AB/R.

<sup>462</sup> W Hynes & F Lammersen *Facilitate trade for development: Aid for trade* ADBI Working Paper Series, No. 670 (2017) 3.

<sup>463</sup> *Ibid.*

developing countries are on a secure footing to attain and sustain economic growth and development. Brennan recommends, which this thesis agrees with, that the practice of developed countries not adhering to obligations should come to an end and that there should be reformulation of the various provisions, resulting in a clear understanding of which provisions are binding or non-binding on developed countries.<sup>464</sup> The Doha mandate of making the SDT provisions mandatory is a step forward, but what is more important is imposing some form of legal sanctions on the failure to oblige. This is suggested in the hopes that developed countries will actually support and adhere to SDT provisions.

In respect of compliance with the SPS and TBT agreements and their contribution to development, Adibe believes that they place a heavier burden on the developing countries.<sup>465</sup> This research found, in chapter four, that when developing countries trade with developed countries, especially as exporters, there is a strong likelihood that the developed country has to comply with standards set by developed countries and this will have major cost implications as a consequence of compliance. It is obvious that the cost of compliance for developed countries is then much lower, which aggravates the already existing gulf of development and trade imbalance between developing and developed countries. The research agrees with Adibe's recommendation that to ameliorate the effects that these agreements have on developing countries, SDT provisions in both agreements should be reinforced in a way that gives special consideration to different needs of developing countries standards. This highlights the point made of classifying developing countries in accordance to their needs, which will make fulfilling them a lot easier.

The need to change the approach of the SDT can lead to a form of SDT contained in AfT which will enhance a stronger multilateral trading system. AfT is the perfect fit as it is meant to assist developing countries with implementing trade agreements as well as benefiting from trade opportunities. However, like any other aspect of the WTO, implementation and achieving desired results will not be an easy task.

On identifying that AfT is an effective measure by means of which the WTO can achieve development for developing countries, there are a number of factors that need careful attention to ensure they do not fall short in implementation. Although SDT and AfT are not one and the same thing, it is recommended that the two never be looked at in isolation because they

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<sup>464</sup> Note 189 above at 160.

<sup>465</sup> Note 287 above at 133.

ultimately have the same objectives under the WTO of enhancing trade and development for developing countries. This research showed that the SDT as it currently stands does not fulfil its objectives due to its shortfalls in implementation and it is therefore suggested that it be altered in a way that is coherent with the scope and ambit of AfT. The main and most important objective this suggestion is trying to improve development for developing countries. This will also allow the WTO to achieve push towards its fundamental mandate while at the same time adhering to the needs of both developed and developing country members.

Special attention should be paid to how AfT will enhance development and improve the work of SDT. Trade liberalisation should also be a part of reaching the development goals. Although opening markets has been a controversial subject, if done under the spectrum of AfT, that should determine the extent to which trade liberalisation should take place. If this is done accurately, it will strengthen the position of developing countries in the multilateral trading system.

As such, Ijjo and Shinyekwa believe that aid can boost trade. However, they recommend that aid should not be used as a ‘substitute for domestic resource mobilisation to finance increased control over production conditions, especially in terms of production technology and quality and standards capability’.<sup>466</sup> When translating this to fit the case studies conducted in this research, Kenya, South Africa and Zambia should use the aid as a way to support their trade development efforts. It is recommended that the aid should merely supplement the needs of these countries to help with trade and development and not as a substitute of the work already done. In their trade policies, these countries should ensure that the conditions for aid are effective and that they eliminate possible corruption and mismanagement as a result of the aid. Hence Nunn and Qian warn that aid can indeed be detrimental without accountable governance.<sup>467</sup>

Based on the discussion in chapter four, that the AfT becomes instrumental may be one of the most important steps in achieving development and improving the status quo of SDT. Owing to the fact that the outcome and conclusion of the DDA is still in the air, it is imperative that the WTO further prioritises discussions on AfT to avoid any future failures in its implementation and operation. Kaufmann and Grosz suggest that the DDA should no longer be used as an instrument to overcome the shortcomings of the Uruguay round; instead it is

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<sup>466</sup> Note 442 above at 46.

<sup>467</sup> N Nunn & N Qian *Aiding Conflict: The Impact of the US Food Aid on Civil War* National Bureau of Economic Research Working Paper 17794 (2012) 28.

important for the issues relating to economic growth and development to be discussed and researched, and suitable resolutions reached.<sup>468</sup> Hence this thesis suggests that the combined work of both SDT and AfT be looked at extensively and be used as a joint tool to achieve development goals of the WTO.

Unfortunately, the master plan under the Doha Round and its development agenda was to succeed in addressing the trade and development concerns of developed countries, which did not materialise. Garcia recommends that there be a whole new focus for the trade and development policy under the WTO, which should be built on fairness.<sup>469</sup> There is no doubt that SDT on its own is not enough to support developing countries in their pursuit of development. Hence this thesis has extensively recommended the use of AfT as a form of a development aid. In conclusion, once all the loopholes within the system of reaching development goals for developing countries are reviewed and adhered to, only then can development be fully realised. If not, then the development agenda as well as the fate of developing countries will remain elusive.

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<sup>468</sup> Note 295 above at 108.

<sup>469</sup> Note 176 above at 316.

## **ANNEXURES**

### **GENERAL AGREEMENT ON TARIFFS AND TRADE**

#### **Article I of GATT 1947: General Most-Favoured-Nation Treatment provides as follows:**

‘1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.’

#### **Article III of GATT 1947: National Treatment on Internal Taxation and Regulation provides as follows:**

‘1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

‘2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.’

### **AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION**

#### **Agreement of Sanitary and Phytosanitary Measures**

**Definition 1: ‘Sanitary or phytosanitary measure’:** ‘Any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease carrying organisms or disease-causing organisms; (b) to protect

human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.’

**Article 9: Technical Assistance 1:** ‘Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organisations. Such assistance may be, *inter alia*, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries.’

**Article 9. 2:** ‘Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.’

**Article 10: Special and Differential Treatment 1:** ‘In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.’

**Article 10.2:** ‘Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.’

**Article 10 3:** ‘With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.’

**Article 10.4:** ‘Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.’

**Article 14: Final provisions:** ‘The least-developed country Members may delay application of the provisions of this Agreement for a period of five years following the date of entry into force of the WTO Agreement with respect to their sanitary or phytosanitary measures affecting importation or imported products. Other developing country Members may delay application of the provisions of this

Agreement, other than paragraph 8 of Article 5 and Article 7, for two years following the date of entry into force of the WTO Agreement with respect to their existing sanitary or phytosanitary measures affecting importation or imported products, where such application is prevented by a lack of technical expertise, technical infrastructure or resources.’

## **Agreement on Technical Barriers to Trade**

### **Article 12: Special and Differential Treatment of Developing Country Members**

**Article 12.1:** ‘Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.’

**Article 12.2:** ‘Members shall give particular attention to the provisions of this Agreement concerning developing country Members rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreements institutional arrangements.’

**Article 12.3:** ‘Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.’

**Article 12.4:** ‘Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.’

**Article 12.5:** ‘Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.’

**Article 12.6:** ‘Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.’

**Article 12.7:** ‘Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.’

### **Article 11: Technical Assistance to Other Members**

**Article 11.1:** ‘Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.’

**Article 12.8:** ‘It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the “Committee”) is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests, the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.’

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# ETHICAL CLEARANCE CERTIFICATE



27 March 2017

**Ms Karabo Elizabeth Hlne (212560187)**  
School of Law  
Howard College Campus

Dear Ms Hlne,

**Protocol reference number: HSS/0259/017M**

**Project title:** Special and differential treatment provisions and the World Trade Organization: The pursuit of Development for Developing Countries

### Full Approval – No Risk / Exempt Application

In response to your application received on 23 March 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

**PLEASE NOTE:** Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Dr Shenika Singh (Chair)

/ms

cc Supervisor: Ms Clydenia Stevens  
cc Academic leader Research: Dr Shannon Bosch  
cc School administrator: Mr Pradeep Ramsewak

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