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MARKET ACCESS AND SUSTAINABLE DEVELOPMENT: A LEGAL AND POLICY ANALYSIS OF THE MARKET ACCESS REGIME OF THE LEAST DEVELOPED COUNTRIES UNDER THE WTO

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This thesis is presented for the degree of Doctor of Philosophy in Law

2011

Contents

Statement of Candidate

I certify that the work in this thesis, entitled *Market Access and Sustainable Development: A Legal and Policy Analysis of the Market Access Regime of the Least Developed Countries under the WTO*, has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis itself have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are acknowledged in the thesis.

Sharmin Jahan Tania (41296575)
Date 29 August 2011

Publication and Conference Presentations

Chapter One

Sharmin Jahan Tania, 'Re-examining the Unfairness of International Trading Regime: From the Perspective of Justice Theories and Fairness Discourse' (Paper presented in the 13th Biennial Conference of the International Society for Justice Research (ISJR) in Banff, Alberta on 21–24 August 2010).

Chapter Two

Sharmin Jahan Tania, 'Interface between Market Access and Sustainable Development: In the Context of the Economic Crisis' (Paper presented in the 17th ANZSIL Conference in Wellington on 2–4 July 2009).

Guest lecture on 'Market Access and Sustainable Development' in Trade and Environment Law (Law 852), offered by the Department of Environmental Law, Macquarie University on 21 April 2009.

Chapter Three

Sharmin Jahan Tania, 'The Applicability of the Principle of Non-discrimination in GSP Schemes: Revisiting *EC–Tariff Preferences*' (Paper presented in the Post-graduate Conference on Law and Crisis in the University of Sydney on 31 October 2009).

Chapter Five

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Chapter Six

Sharmin Jahan Tania and Shawkat Alam, 'Liberalisation of Sewerage and Waste Management Services and the GATS: Implications and Challenges for Developing Countries' (2011) 12(4) *Journal of World Investment and Trade* (forthcoming).

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List of Abbreviations

AB	Appellate Body
ACP States	African, Caribbean and Pacific States
ACWL	Advisory Centre on WTO Law
AGOA	African Growth and Opportunity Act
AMS	Aggregate Measurement of Support
Annex MNP	Annex on Movement of Natural Persons
AoA	Agreement on Agriculture
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
AQIS	Australian Quarantine and Inspection Service
ATC	Agreement on Textiles and Clothing
CACM	Central American Common Market
CAP	Common Agriculture Policy
CAPs	Conformity Assessment Procedures
CBDR	Principle of Common but Differentiated Responsibility
CFC	Chlorofluorocarbon
CITES	Convention on International Trade in Endangered Species
Code	Code of Good Practice
Codex	Codex Alimentarius Commission
CPD	Centre for Policy Dialogue
CSD	United Nations Commission on Sustainable Development
CTD	Committee on Trade and Development
CTDSS	Committee on Trade and Development Special Session
CTE	Committee on Trade and Environment
CTESS	Committee on Trade and Environment Special Session
CUTS	Consumer Unity and Trust Society
DDA	Doha Development Agenda
DFQF	Duty-Free, Quota-Free
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism

DSU	Dispute Settlement Understanding
EBA	Everything but Arms Initiative
EC	European Community
EGS	Environmental Goods and Services
EMIT Group	A Group on Environmental Measures and International Trade
ENT	Economic Needs Test
EPA	Economic Partnership Agreements
EST	Environmentally Sound Technology
EU	European Union
EUREP	Euro-Retailer Produce Working Group
Eurostat	Statistical Office of the European Union
EVI	Economic Vulnerability Index
FAO	Food and Agriculture Organization
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GEN	Global Eco-labelling Network
GHG	Greenhouse Gas
GMO	Genetically Modified Organism
GNI	Gross National Income
GSP	Generalised System of Preferences
HACCP	Hazard Analysis Critical Control Point
HAI	Human Asset Index
HS	Harmonised System
ICAC	International Cotton Advisory Committee
ICC	Information, Computer and Communications
ICJ	International Court of Justice
ICT	information and communications technology
ICTSD	International Centre for Trade and Sustainable Development
IF	Integrated Framework
IFPRI	International Food Policy Research Institute
ILA	International Law Association
ILO	International Labour Organization
IMF	International Monetary Fund

IPOA	Istanbul Plan of Action
IPPC	International Plant Protection Convention
IPR	Intellectual Property Rights
IRA	Import Risk Analysis
ISO	International Organisation for Standardisation
ITC	International Trade Centre
ITO	International Trade Organization
IUCN	International Union for Conservation of Nature and Natural Resources
JITAP	Joint Integrated Technical Assistance Programme
JPOI	Johannesburg Plan of Implementation
LDCs	Least Developed Countries
MDGs	Millennium Development Goals
MEA	Multilateral Environmental Agreement
MFA	Multi-Fibre Agreement
MFN	Most Favoured Nation
MNC	Multinational Corporation
MTN	Multilateral Trade Negotiations
NAFTA	North American Free Trade Agreement
NAMA	Non-Agricultural Market Access
NFIDCs	Net Food-Importing Developing Countries
NGMA	Negotiating Group on Market Access
NGO	Non-Governmental Organisation
NT	National Treatment
NTBs	Non-Tariff Barriers
NTMs	Non-Tariff Measures
ODA	Official Development Assistance
OECD	Organization on Economic Cooperation and Development
OIE	International Office of Epizootics
OPEC	Organization of the Petroleum Exporting Countries
OTDS	Overall Trade-Distorting Domestic Support
PCP	Pentachlorophenol
PPMs	Process and Production Methods
PRSPS	Poverty Reduction Strategic Papers

RMG	Ready-Made Garment
RTA	Regional Trade Agreement
S&DT	Special and Differential Treatment
SAARC	South Asian Association for Regional Cooperation
SCM	Subsidies and Countervailing Measure
SIA	Sustainable Impact Assessment
SMEs	Small and Medium Enterprises
SPS Agreement	Agreement on Sanitary and Phytosanitary Measures
SSA	Sub-Saharan Africa
SSG	Special Safeguard
SSM	Special Safeguard Mechanism
STEs	State Trading Enterprises
T&C	Textile and Clothing
TBT Agreement	Agreement on Technical Barriers to Trade
TMNP	Temporary Movement of Natural Persons
TPR	Trade Policy Review
TREMs	Trade Related Environmental Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRQ	Tariff-Rate Quota
UN LDC-IV	Fourth United Nations Conference on LDCs
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
US	United States
USFDA	United States Food and Drug Administration
USITC	United States International Trade Commission
USTR	United States Trade Representative
WCED	World Commission on Environment and Development
WCS	World Conservation Strategy
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

WWF	World Wide Fund for Nature

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Chapter One:
Espousing Market Access for Sustainable Development of LDCs: A Prologue*

1 Introduction

Sustainable development was introduced as an objective of the World Trade Organization (WTO) through the Preamble of the *Marrakesh Agreement Establishing the WTO* in 1994 (hereinafter the *WTO Agreement*).[1] The introduction of the notion of sustainable development into the global trade agenda was met with a great deal of cynicism by a number of developing countries.[2] They apprehended that sustainable development would incorporate the ideology of developed countries in the pretext of disguised protectionism. Developed and developing countries are in juxtaposition in the trade–sustainable development debate. Developed countries' concern for sustainable development comes from their interest in upholding higher health, environmental and labour standards. Conversely, developing countries allege that environmental and social policies currently being promoted by developed countries are actually protectionism in 'green wrapping paper' and veiled attempts to deny them market access.[3] In fact, the language of the WTO Preamble is given more importance where Members are urged for

* A part of this chapter was presented as 'Re-examining the Unfairness of International Trading Regime: From the Perspective of Justice Theories and Fairness Discourse'in the 13th Biennial Conference of the International Society for Justice Research (ISJR) in Banff, Alberta on 21-24 August 2010.

[1] *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS I-31874 (1995) (entered into force 1 January 1995) 154 <http://treaties.un.org/untc//Pages//doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf> at 10 June 2011 (hereinafter, the *WTO Agreement*).

[2] Magda Shahin, 'Trade and Environment: How Real is the Debate?' in Gary P Sampson and W Bradnee Chambers (eds), *Trade, Environment, and the Millennium* (2nd ed, 2002) 45, 46.

[3] Kamal Nath, 'Trade, Environment and Sustainable Development' in Veena Jha, Grant Hewison and Maree Underhill (eds), *Trade, Environment and Sustainable Development: A South Asian Perspective* (1997) 15, 17; Daniel Bodansky and Jessica C Lawrence, 'Trade and Environment' in Daniel Bethlehem et al (eds), *The Oxford Handbook of International Law* (2009) 505, 507; see also World Growth, *Green Protectionism: The New Tools Against Forestry in Developing Countries* (June 2010) <http://www.worldgrowth.org/assets/files/WG_Green_Protectionism_Forestry_Report_6_10.pdf> at 7 July 2011.

'the optimal use of the world's resources in accordance with the objective of sustainable development ... to protect and preserve the environment'.[4] In contrast, the latter part of the sentence is mostly ignored. It states that objective of sustainable development is to be pursued by Members 'in a manner consistent with their respective needs and concerns at different levels of economic development'.[5] As articulated in the fundamental document of sustainable development, the *1987 Brundtland Report*[6] (commonly known as *Our Common Future*)[7], sustainable development is an embodiment of two concepts:

1. the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
2. the idea of limitations imposed, by the state of technology and social organisation, on the environment's ability to meet present and future needs.[8]

The WTO commands membership of 153 countries[9] from 'divergent historical, economic, and political realities'[10] and operates in 'a global human society based on poverty for many and prosperity for a few'.[11] One-fifth of its membership comprises of the least developed countries (LDCs) with less than a 0.6 per cent collective share in world exports.[12] Developed and LDC Members of the WTO are far removed from each

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[4] *The WTO Agreement* Preamble, para 1.

[5] Ibid.

[6] This report is named *Brundtland Report* by the name of the Chairman of the World Commission on Sustainable Development and Norwegian Prime Minister Gro Harlem Brundtland.

[7] World Commission of Environment and Development, *Our Common Future* (Australian ed, 1987) (hereinafter *Our Common Future*).

[8] Ibid 87.

[9] *Understanding the WTO: The Organisation: Members and Observers*, (undated) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> at 8 August 2011.

[10] Lavanya Rajamani, *Differential Treatment in International Environmental Law,* Oxford Monographs in International Law (2006) 1.

[11] South African President Thabo Mbeki phrased it at his opening speech at the WSSD 2002: *Address of the President of the Republic of South Africa, Thabo Mbeki, at the Opening of the World Summit for Sustainable Development*, Johannesburg, 26 August 2002, Official website of the International Relations and Cooperation: Republic of South Africa <http://www.dfa.gov.za/docs/speeches/2002/mbek0826.htm> at 22 July 2011.

[12] Posh Raj Pandey, 'Hong Kong Duty-Free Quota-Free Market Access Decision: Implications for South Asian LDCs' in CUTS International (ed), *South Asian Positions in the WTO Doha Round: In Search of A True Development Agenda* (2007) vol 2, 201, 201.

other in relation to their economic, social and environmental policies. This wide gap makes it challenging to pursue sustainable development, which requires balancing the objectives of economic growth, environmental protection and social development. This challenge becomes obvious, for instance, in the conflict between the aspiration of LDCs to promote market access by reducing non-tariff barriers (NTBs) and trade-distorting policies, and the desire of developed Members to protect their environment- and health-related standards.[13] In the interface between trade and sustainable development market access plays a central role. For instance, it is market access that is first and foremost inhibited by the implementation of environmental or social policies through trade measures.

LDCs express their concern that developed countries emphasise environmental protection over the lives of the world's poor and ignore problematic aspects of their own policies such as agricultural subsidies.[14] They articulate sustainable development as giving paramount importance to eradication of poverty, strengthening special and differential treatment (S&DT) provisions and substantially enhancing market access opportunities for their exports.[15] Improved market access has been a high priority on the negotiating agenda of LDCs in the Doha Round.

Against this multifaceted milieu, this thesis explores the significance of market access in the achievement of sustainable development for LDCs. It examines the market access

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[13] Ulrich Hoffmann and Tom Rotherham, 'Environmental Requirements and Market Access for Developing Countries: Promoting Environmental—Not Trade—Protection' in UNCTAD (ed), *Trade and Environment Review 2006* (2006) 1, 1.

[14] Bodansky and Lawrence, above n 3, 522.

[15] This has been expressed in the proposals of a number of developing countries in the lead-up to the 1999 Seattle Ministerial Conference: WTO General Council, *Preparations for the 1999 Ministerial Conference—Trade, Environment and Sustainable Development, Paragraph 9(d) of the Geneva Ministerial Declaration,* WTO Doc WT/GC/W/387 (15 November 1999) (Communication from Cuba); WTO General Council, *Preparations for the 1999 Ministerial Conference, Negotiations on Agriculture*, WTO Doc WT/GC/W/163 (9 April 1999) (Communication from Cuba, Dominican Republic, El Salvador, Honduras, Nicaragua and Pakistan); WTO General Council, *Preparations for the 1999 Ministerial Conference, the Future WTO Work Programme, under Paragraph 10 of the Geneva Ministerial Declaration*, WTO Doc WT/GC/W/255 (16 July 1999) (Communication from Dominican Republic, Honduras and Pakistan); similar other proposals are: Kenya (WT/GC/W/233), Bangladesh (WT/GC/W/251), Pakistan (WT/GC/W/126): WTO, *Preparations for the 1999 Ministerial Conference: Compilation of the Proposals Submitted in Phase 2 of the Preparatory Process*, WTO Doc JOB(99)/4797/Rev.3(6986) (18 November 1999) (Informal Note by the Secretariat).

regime for LDCs in the hindsight of S&DT as its underlying principle. It ferrets out the pragmatism for adopting a sustainable development approach in its analysis of LDCs' market access regime in trade in goods—agricultural and non-agricultural—and services.

2 Problem Statement

2.1 Why Market Access?

International trade, in essence, deals with access to the markets of other trading partners. Such market access in this literal sense is regulated by the dominant economic theory of comparative advantage. The nineteenth century classical economists David Ricardo and John Stuart Mill propounded the theory of comparative advantage[16] in which they argued that if each nation produces what it can with the greatest efficiency and then trades it with another country for a product that the other country can produce more efficiently, everyone would be better off by increasing the world's economy.[17] Samuelson et al stated that 'the theory of comparative advantage does provide an important demonstration of the benefits that can flow from the free exchange of goods and services between individuals, regions and countries'.[18] As Paul R. Krugman and Maurice Obstfeld observed, the theory asserts that international trade liberalisation will facilitate economy-wide specialisation in production, leading to improvements in productivity and national income.[19]

In the early 1950s, development economists Raul Prebisch and Hans Singer in two parallel works[20] simultaneously challenged the theory of comparative advantage. They

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[16] David Ricardo, *On the Principles of Political Economy and Taxation* (1817); John Stuart Mill, *Principles of Political Economy* (1848).

[17] Bartram S Brown, 'Developing Countries in the International Trade Order' (1993) 14(2) *Northern Illinois University Law Review* 347, 356.

[18] Paul A Samuelson et al, *Economics* (3rd Australian ed, 1992) 645.

[19] Paul R Krugman and Maurice Obstfeld, *International Economics: Theory and Policy* (5th ed, 2000) 12; see also Andreas F Lowenfeld, *International Economic Law* (1st ed, 2002) 4–5.

[20] Raul Prebisch, *The Economic Development of Latin America and its Principal Problems* (1950); UN, *Economic Survey of Latin America* (1949); Hans W Singer, 'The Distribution of Gains between Investing and Borrowing Countries' (1950) 40(2) *American Economic Review: Papers and Proceedings of the Sixty-second Annual Meeting of the American Economic Association* 473.

argued that countries specialising in the production and export of primary commodities had been facing long-term decline in terms of trade; hence, trade in these products could not function as an engine of growth. Underdeveloped countries specialising in the production and export of primary products face this deterioration of terms of trade whilst trading with developed capitalist economies. This argument, known as the Prebisch-Singer thesis, played an important role in highlighting the link between the structure of international trade and development.[21]

Their work inspired the inclusion of Part IV in the *General Agreement on Tariffs and Trade (GATT)*,[22] which embodies a number of aspirational provisions recognising the need for the market access of developing countries. Contracting parties considered that 'export earnings of the less-developed contracting parties can play a vital part in their economic development'.[23] Part IV recognises the 'need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties'.[24] It also agrees to the need for favourable conditions of access to world markets for both primary products and processed and manufactured products.[25] Since services were not within the ambit of the GATT 1947,[26] there are no provisions on services trade in Part IV. The

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[21] Diana Tussie, *The Less Developed Countries and the World Trading System: A Challenge to the GATT* (1987) 21. The work of Prebisch and Singer laid the foundation of the 'structuralist school', which argued that the true development path lies in concentrating on industrialisation and production of manufactured products. This is known as the 'import-substitution' theory of Prebisch-Singer. The objective of import-substitution was to avail market access in industrial products, which is more profitable than market access in primary commodities: Hans W Singer, *The Structure of International Development: Essays on the Economics of Backwardness* (1978); Raul Prebisch, 'Commercial Policy in the Underdeveloped Countries' (1959) 49(2) *The American Economic Review* 251.

[22] *Part IV*, GATT BISD, 13th Supp, 1–12 (1965); *A Chronology of Principal Provisions, Measures and Initiatives in Favour of Developing and Least Developed Countries in the GATT and The WTO* <http://www.wto.org/english/tratop_e/devel_e/d2legl_e.htm> at 5 September 2009. See Chapter Three s 2.4.1.

[23] *General Agreement on Tariffs and Trade 1994*, Part IV, art XXXVI:1(b) (hereinafter GATT 1994).

[24] Ibid art XXXVI:2.

[25] Ibid arts XXXVI:4, XXXVI:5.

[26] *General Agreement on Tariffs and Trade (Geneva),* opened for signature 30 October 1947, 55 UNTS 187 (entered into force provisionally since 1 January 1948 under *the 1947 Protocol of Application,* 55 UNTS 308).

General Agreement on Trade in Services (GATS),[27] which emerged out of the Uruguay Round, desires to facilitate expansion of developing countries' services exports, but without linking it to any development clause.[28]

Enhanced market access for LDCs, by leading to economic growth and development, can go a long way towards helping them achieve the goals set out in the *UN Millennium Declaration*[29] to reduce extreme poverty by the year 2015.[30] A WTO booklet entitled the *WTO and the Millennium Development Goals*[31] underlines the significance of increased market access for developing countries and LDCs in the achievement of Millennium Development Goal (MDG) 8, a global partnership for development. However, the booklet also emphasises the relevance of enhanced market access to MDG 1, the aim of which is to eradicate extreme poverty and hunger.[32]

2.2 Why LDCs?

LDCs are the world's poorest countries with the lowest indicators in terms of income per capita, human resources (such as education, nutrition, health, and adult literacy), and overall economic and environmental vulnerability.[33] These low-income developing Members face severe structural impediments to growth.[34] The *Least Developed*

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[27] *General Agreement on Trade in Services*, reproduced in WTO, *The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 284.

[28] *GATS* Preamble, para 5.

[29] *We Can End Poverty 2015: Millennium Development Goals: A Gateway to the UN System's Work on the MDGs* <http://www.un.org/millenniumgoals/> at 8 August 2011.

[30] WTO, *The WTO and the Millennium Development Goals* [1] <http://www.wto.org/english/thewto_e/coher_e/mdg_e/mdg_e.pdf> at 7 July 2011, 4–5 (hereinafter *WTO and MDGs*).

[31] Ibid 4-5.

[32] Ibid.

[33] Antoine Bokuet, David Laborde and Simon Mevel, *What Can Least Developed Countries Really Expect from the Doha Development Agenda?* (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162941> at 29 November 2009.

[34] The Committee for Development Policy and UN Department of Economic and Social Affairs, *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures* (2008) [1] <http://www.un.org/en/development/desa/policy/cdp/cdp_publications/2008cdphandbook.pdf> at 5 July 2011.

Countries Report 2010 found the 'all-pervasive and persistent nature of poverty in these LDCs', characterising it as 'mass poverty'.[35] It was appreciated no later than the second half of the 1960s that the term 'developing countries', viewed as a homogenous group of countries, in reality includes a wide range of countries that have significant differences among them and some of them are more disadvantaged than others. By the time of the first United Nations (UN) Conference on Trade and Development (UNCTAD I) in Geneva in 1964, it became necessary to make a separate category of developing countries to address their grave situation and alleviate their problems of underdevelopment. The UNCTAD I drew special attention to the 'less developed' of the developing countries 'as an effective means of ensuring sustained growth with equitable opportunity for each developing country'.[36]

From the time of the UNCTAD II, held in New Delhi in 1968, the notion of the 'least developed country' was gradually established as an official designation, but without an agreed list of LDCs.[37] In 1971, the UN General Assembly established the first list of LDCs by endorsing a list of 25 LDCs,[38] prepared by the Committee for Development Planning.[39] The list is reviewed by the Committee for Development Policy[40] every three years. Three criteria are used to classify countries as least developed. First, the Gross National Income (GNI) per capita must be below a certain level. The second criterion is the Human Asset Index, a composite Index based on variables that measure the per

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[35] UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs* (2010).

[36] *Final Act and Report of the United Nations Conference on Trade and Development* (Geneva, 1964), (UN publication, Sales No 64.II.B.11), Annex A.1.1, General Principle 15. It is to be noted that UNCTAD I recommended 15 'General Principles' (and 13 'Special Principles') for governing international trade relations and trade policies conducive to development: The Committee for Development Policy and UN Department of Economic and Social Affairs, above n 34; Jess Pilegaard, 'An LDC Perspective on Duty-free and Quota-free Market Access' in Gerrit Faber and Jan Orbie (eds), *European Union Trade Politics and Development: 'Everything but Arms' Unravelled* (2007) 135, 136.

[37] Pilegaard, above n 36, 136.

[38] *Identification of the Least Developed among the Developing Countries*, GA Res 2768 (XXVI), 26th sess, 1988th plen mtg, [52] (18 November 1971) <http://www.integranet.un.org/esa/policy/devplan/profile/ga_resolution_2768.pdf> at 11 September 2009.

[39] The Committee for Development Planning was established by Economic and Social Council Resolution 1079 (XXXIX) of 28 July 1965 as a subsidiary body of the Council.

[40] Committee for Development Policy is the successor of the Committee for Development Planning.

capita calorie intake, child mortality rate, secondary school enrolment and adult literacy rate. The third one is the Economic Vulnerability Index (EVI), which again incorporates seven indicators of population size,[41] remoteness, merchandise export concentration, share of agriculture, forestry and fishery in Gross Domestic Product (GDP), homelessness owing to natural disasters, instability of agricultural production and instability of exports of goods and services.[42]

Currently, there are 48 LDCs on the UN list,[43] of which 31 are WTO Members,[44] and 12 more are in the process of accession.[45] The WTO website mentions that there are no WTO definitions of 'developed' or 'developing' countries. Developing countries in the WTO are designated on the basis of self-selection.[46] In the GATT period, developing countries were also addressed as 'less-developed countries'.[47]

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[41] In order to classify as an LDC according to these criteria, the population must not exceed 75 million. The exception is Bangladesh, which was included on the original list of LDCs before the introduction of the population ceiling: Sheila Page and Adrian Hewitt, 'The New European Trade Preferences: Does the "Everything but Arms" help the Poor?' (2002) 20(1) *Development Policy Review* 91, 99.

[42] The Committee for Development Policy and UN Department of Economic and Social Affairs, above n 34, 37–55.

[43] The 48 LDCs are: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao People's Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Sudan, Timor-Leste, Togo, Tuvalu, Uganda, United Republic of Tanzania, Vanuatu, Yemen and Zambia: *UN List of Least Developed Countries* <http://www.unctad.org/Templates/Page.asp?intItemID=3641&lang=1> at 8 August 2011. Since the establishment of the category in 1971, only three countries have graduated from the list: Botswana in 1994, Cape Verde in 2007 and Maldives on 1 January 2011. Samoa is set to graduate in 2014: *Fourth United Nations Conference on the Least Developed Countries: 9-13 May, Istanbul, Turkey* <http://www.un.org/wcm/content/site/ldc/home/Background/quick_facts#11132> at 8 August 2011.

[44] WTO LDC Members are: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Haiti, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Togo, Uganda, United Republic of Tanzania and Zambia: *Understanding the WTO: The Organisation: Least Developed Countries* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> at 8 August 2011.

[45] These are: Afghanistan, Bhutan, Comoros, Equatorial Guinea, Ethiopia, Laos, Liberia, Sao Tome and Principe, Samoa, Sudan, Vanuatu and Yemen. Ibid.

[46] Ibid.

[47] Part IV of the GATT 1994 retains the term 'less developed countries'. Academic literature also used the term 'less developed countries'. See, e.g., Tussie, above n 21.

Chapter Three of the thesis depicts how the GATT instruments fully acknowledge the need to integrate LDCs within the trading regime by according them preferential market access with more favourable terms than other developing countries. Developing countries' position in the trading regime took a new dimension during the Uruguay Round through their undertaking of commitments in all aspects of the negotiations. Conversely, the LDC category confers upon the designated countries special measures in relation to international trade: (a) preferential market access, (b) special treatment regarding the WTO obligations and (c) trade-related capacity building.[48]

The WTO Preamble categorically recognised the 'need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'.[49] The *2001 Doha Ministerial Declaration*[50] makes stronger commitments for LDC, followed by the *2005 Hong Kong Ministerial Declaration*[51] in which Members unequivocally agree on duty-free, quota-free (DFQF) treatment for LDCs.[52] LDCs are altogether exempt from any substantive commitments,[53] and showered with promises for technical assistance and capacity building both in the WTO agreements[54] and Doha Round instruments.[55] As expressed in the *WTO and the*

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[48] The Committee for Development Policy and UN Department of Economic and Social Affairs, above n 34, 15.

[49] *WTO Agreement* Preamble, para 2.

[50] *Ministerial Declaration*, WTO Ministerial Conference, 4th sess, Doha, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) (adopted on 14 November 2001) (hereinafter *Doha Ministerial Declaration*).

[51] *Doha Work Programme, Ministerial Declaration*, WTO Ministerial Conference, 6th sess, Hong Kong, WTO Doc WT/MIN(05)/DEC (22 December 2005) (adopted on 18 December 2005) (hereinafter *Hong Kong Ministerial Declaration*).

[52] Ibid para 47 and Annex F: *Special and Differential Treatment: Para 36, Decision on Measures in Favour of Least-Developed Countries*.

[53] Ibid Annex F: *Special and Differential Treatment: Para 38, Decision on Measures in Favour of Least-Developed Countries*.

[54] For instance, *Agreement on Sanitary and Phytosanitary Measures*, art 9, 10; *Agreement on Technical Barriers to Trade*, art 11.

[55] For instance, *Doha Ministerial Declaration*, paras 16, 21, 24, 26, 27, 33, 42, 43; *Hong Kong Ministerial Declaration*, paras 47, 57. For details, see Chapter Three, Section 4.2.

Millennium Development Goals,[56] 'duty-free and quota-free (DFQF) market access for products originating in LDCs has been a long-standing aspiration of LDCs in the multilateral trading system and is a shared objective of the international community'.[57] Despite these lofty commitments, LDCs are unable to reap the benefits of their participation in the WTO, particularly by increasing their exports, to achieve sustainable development. Unfortunately, the products of particular export interest to LDCs also happen to be particularly sensitive for developed-country Members, such as cotton, sugar, fish products and textiles and clothing (T&C).[58] Likewise, temporary movement of semi-skilled labourers in which LDCs have comparative advantage is a sensitive issue for developed countries (see Chapter Six).

Though not the main focus of the thesis, it can summarily be observed here that LDCs stand in an atypical position with other developing countries, having both similar and divergent interests. For instance, their interests converge when their market access is impeded by the protectionism of developed countries in trade in agricultural products or by the imposition of health and environment related standards or trade related environmental measures (Chapter Two and Four). However, LDCs do not share the concerns of other developing countries in claiming extensive product coverage for Special Products since, as mentioned in Chapter Four, they are exempt from tariff reduction commitments (Chapter Four). Also, in non-agricultural market access (NAMA) negotiations, LDCs' interests are totally different from those of other developing countries. While developing countries are in disagreement with developed countries over tariff reduction formula and sectoral negotiations, LDCs are concerned about securing their DFQF market access and unified and harmonised rules of origin (Chapter Five). Moreover, unlike advanced developing countries LDCs lack the capacity to take advantage of the existing structure of the GATS. Advanced developing countries, such as the Republic of Korea, India, China, Brazil, Egypt, Thailand and Malaysia have gained expertise in outsourcing, tourism, temporary movement of professionals, trade in business, telecommunication and financial services, social services such as education and medical treatment. They are acquiring advanced

[56] *WTO and MDGs*, above n 30.

[57] Ibid.

[58] Andrew D Mitchell, *Legal Principles in WTO Disputes*, Cambridge Studies in International and Comparative Law (2008) 247.

technology and expertise in having comparative advantage in services trade. On the other hand, LDCs' comparative advantage in services trade is still concentrated in the supply of semi-skilled labourers. In the Doha Round, LDC issues – though gained widespread support – are entangled in the hairsplitting bargain among the US, EU, Brazil, China and India, who have used specific terminology to advance their narrow agendas which are distinct from those of LDCs.[59] LDC issues have long been kept in halt until developed and other developing countries come to an agreement in the 'inflammatory agriculture and NAMA negotiations'.[60]

The foregoing discussion depicts a background for examining the adequacy of the relevant WTO provisions and developed Members' practice for LDCs' market access. Equally important is to examine the challenges faced by LDCs in fully exploiting their market access opportunities.

2.3 Why Sustainable Development?

With the expansion of the scope of the trading regime, trade has penetrated into social, environmental, cultural, political and human rights aspects. There has been burgeoning academic literature making the linkage of trade and environment,[61] trade and human rights,[62] and trade and culture.[63] Within these broader groups, trade is being linked with

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[59] Raj Bhala, 'Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too' (2009) 45 *Texas International law Journal* 1, 5; Raj Bhala, 'Doha Round Betrayals' (2010) 24 *Emory International Law Review* 147, 150.

[60] Sonia E. Rolland, 'Redesigning the Negotiation Process at the WTO' (2010) 13(1) *Journal of International Economic Law* 65, 75.

[61] See, e.g., Bodansky and Lawrence, above n 3; Steve Charnovitz, 'A New WTO Paradigm for Trade and the Environment' (2007) 11 *Singapore Yearbook of International Law* 15; Matthew Stilwell, 'Trade and Environment in the Context of Sustainable Development' in Markus W Gehring and Marie-Claire Cordonier Segger (eds), *Sustainable Development in World Trade Law*, Global Trade and Finance Series (2005) 27; P. K. Rao, *The World Trade Organization and the Environment* (2000).

[62] See, e.g., Lorand Bartels, 'Trade and Human Rights' in Daniel Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (2009) 571; Ernst-Ulrich Petersmann, 'Trade and Human Rights I' in Patrick F J Macrory, Arthur E Appleton and Michael G Plammer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (2005) vol 2: Economic, Political and Regional Issues, 623; Sheldon Leader, 'Trade and Human Rights II' in Patrick F J Macrory, Arthur E Appleton and Michael G Plammer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (2005) vol 2: Economic, Political and Regional Issues, 663; Hoe Lim, 'Trade and Human Rights: What's Issue?' (2001) 35(2) *Journal of World Trade* 275; Sarah Joseph, David Kinley and Jeff Waincymer (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (2009); Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (2011).

climate,[64] health,[65] right to food[66] and labour rights.[67] The study of topics entitled 'Trade and …', by now, has become a cliché of understanding the impact of trade on other segments of our economy, society and environment.[68] The literature is only a timely response to the reality of the world when trade has an overwhelming influence.

Part IV of the GATT 1994, when it was included in the GATT in 1965, recognised international trade 'as a means of achieving economic and social advancement'.[69] The Preamble of the *1994 WTO Agreement* adopted sustainable development as its objective probably because it was inspired by the contemporary development in international

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[63] See, e.g., Mira Burri-Nenova, 'Trade and Culture in International Law: Paths to (Re)conciliation' (2010) 44(1) *Journal of World Trade* 49; Rostam J Neuwirth, 'The Culture and Trade Debate Continues: The UNESCO Convention in Light of the WTO Reports in *China—Publications and Audiovisual Products: Between Amnesia or Déjà Vu?* (2010) 44(6) *Journal of World Trade* 1333; Tania Voon, *Cultural Products and the World Trade Organization* (2007).

[64] See, e.g., Robert Howse and Antonia L Eliason, 'Domestic and International Strategies to Address Climate Change: An Overview of the WTO Legal Issues' in Olga Nartova and Sadeq Z Bigdeli Thomas Cottier (eds), *International Trade Regulation and Mitigation of Climate Change* (2009) 48; Gary N Horlick, 'WTO and Climate Change "Incentives"' in Thomas Cottier, Olga Nartova and Sadeq Z Bigdeli (eds), *International Trade Regulation and Mitigation of Climate Change* (2009) 193; World Bank, *International Trade and Climate Change: Economic, Legal and Institutional Perspectives,* Environment and Development (2008); Duncan Brack, Michael Grubb and Craig Windram, *International Trade and Climate Change Policies* (2000).

[65] See, e.g., Jeffery Atik, 'Trade and Health' in Daniel Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (2009) 597; Maya Prabhu and Kathryn Garforth, 'International Public Health and Trade Law' in Markus W Gehring and Marie-Claire Cordonier Segger (eds), *Sustainable Development in World Trade Law*, Global Trade and Finance Series (2005) 553.

[66] See, e.g., Baris Karapinar and Christian Haberli (eds), *Food Crisis and the WTO* (2010); Kevin R Gray, *Right to Food Principles vis a vis Rules Governing International Trade* (2003) British Institute of International and Comparative Law <http://www.redsan-palop.org/doc01/013.pdf> at 23 July 2011; Christina L Davis, *Food Fights over Free Trade: How International Institutions Promote Agricultural Trade Liberalisation* (2003).

[67] Friedl Weiss, 'Internationally Recognised Labour Standards and Trade' in Friedl Weiss, Erik Denters and Paul de Waart (eds), *International Economic Law with a Human Face* (1998) 79; Gabrielle Marceau, 'Trade and Labour' in Daniel Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (2009) 539; Michael J Trebilcock and Robert Howse, 'Trade Policy and Labour Standards' (2004–5) 14(2) *Minnesota Journal of Global Trade* 261; Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 *International Labour Review* 565; Christopher McCrudden and Anne Davies, 'A Perspective on Trade and Labour Rights' in Markus W Gehring and Marie-Claire Cordonier Segger (eds), *Sustainable Development in World Trade Law*, Global Trade and Finance Series (2005) 103.

[68] American Journal of International Law devotes a special issue to the scholarly works on the linkage of trade with non-trade issues. The issue is entitled 'Symposium: the Boundaries of the WTO': 96 American Journal of International Law Issue 1 (2002).

[69] *GATT 1994* Part IV, art XXXVI:1(e).

environmental law. A UN General Assembly report entitled *Harmony with Nature*[70] states that 'sustainable development has become part of the international lexicon' and 'has been at the forefront of world institutions and organisations working in the economic, social and environmental sectors'.[71] The concept originated in the understanding that economic growth policies, if unaccompanied with environmental and social policies, can have irretrievable environmental and social costs. Therefore, trade, though basically an engine of economic growth, has its environmental and social aspects too. This leads to the inevitable conclusion that trade is linked with the concept of sustainable development.

Existing literature broadly indicates a two-fold interaction between trade and sustainable development. One is inevitable and the other is aspirational. There are various ways in which international trade regime intersects with international and domestic environmental and social regimes in many important areas.[72] Inevitable linkage is found in the cross-sectoral impact of international trade, where a trade policy of one country can affect the environmental and social policy of another country in the same way an environmental or social policy can affect the trade policy. In particular, the interaction of trade and environment is a complex one giving rise to polarised debate between environmentalists and free trade proponents. While the environmentalists argue that trade liberalisation results in pollution, resource depletion, and unsustainable environmental practices, the free trade proponents contend that trade as an engine of economic growth creates resources and means for environmental protection and management.[73] Trade policy is thus intricately linked with social and environmental policy. Thus, a sustainable development approach is inevitable to achieve an appropriate balance between these interconnected policies.

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[70] UNGA, *Harmony with Nature: Report of the Secretary General* UN Doc A/65/314 (2010) [4] <http://www.un.org/esa/dsd/resources/res_pdfs/res_ga65_unedited/SGReportHwNEnglish.pdf> at 22 July 2011 (hereinafter *Harmony with Nature*).

[71] Ibid.

[72] Marie-Claire Cordonier Segger, 'Integrating Social and Economic Development and Environmental Protection in World Trade Law' in Markus W Gehring and Marie-Claire Cordonier Segger (eds), *Sustainable Development in World Trade Law* (2005) 133, 152.

[73] M Rafiqul Islam, *International Trade Law of the WTO* (2006) 513.

The aspirational trend of the trade–sustainable development interface is to develop WTO rules that deliberately promote sustainable development. This trend is visible in some scholarly articles that focus on a sustainable development approach in each substantive area of trade law, including market access, trade in goods, services, subsidies, intellectual property rights (IPRs), environmental- and health-related standards, agriculture and textiles.[74] Chapter Two of the thesis investigates of the avenues in which market access is directly implicated in the nexus between trade and sustainable development.

2.4 Pulling the Threads Together

The foregoing discussion sets the backdrop for the core argument of the thesis that LDCs as a vulnerable group of developing countries are in need of enhanced market access that will contribute to their sustainable development. Two notes of caution deserve special attention.

First, scholars warned against the blind- and over-emphasis on market access. B.S. Chimni stated 'simple market access (be it in the agriculture or textile sector) and better formulation and implementation of S&DT will not turn WTO into an organization that promotes the development of the Third World'.[75] A similar argument is made by Dani Rodrik, 'as long as the issues are viewed in market-access terms, developing countries will remain unable to make a sound and principled defence of their legitimate need for manoeuvring space'.[76] Though Rodrik was critical about a market access agenda, he emphasised the importance of a one-sided DFQF market access for LDCs.[77]

The arguments posed here are very significant. Hence, in articulating the market access agenda for LDCs, the thesis argues for LDC waiver to exempt them from substantive

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[74] Segger, above n 72, 152–3.

[75] B S Chimni, 'The World Trade Organization, Democracy and Development: A View From the South' (2006) 40(1) *Journal of World Trade* 5, 31.

[76] Dani Rodrik, *The Global Governance of Trade as if Development Really Mattered* (2001) (Background Paper for Trade and Sustainable Human Development Project, UNDP) [4] <http://gopher.mtholyoke.edu/courses/epaus/econ213/rodrikgovernance.PDF> at 23 July 2011.

[77] Ibid 33–4.

commitments, technical and financial assistance, and capacity building so that they can fully utilise the market access benefits for their sustainable development needs. *Our Common Future* calls for improved market access, technology transfer and international finance to help developing countries to diversify economic and trade bases and to build self-reliance.[78]

Second, the concept of sustainable development is widely criticised for its lack of a concrete definition and uniform idea.[79] Elliott succinctly poses the questions: 'What normative assumptions are embedded in the idea of sustainable development? Is sustainable development locked into a development discourse and ideology of growth or is it informed by an ecological ethic?'[80] The answers to these questions, to a large extent, depend on the context in which the concept is employed given that certain basic features of the concept are present in the context. Chapter Two deals with these features, elements and legal status of the concept in detail. In employing this concept in the context of international trade, one must also consider the divide between developed and developing countries. Since this thesis argues for LDCs' market access, it acknowledges that poverty is the main challenge for LDCs and that inequality in international trade exacerbates this poverty.[81]

Poverty eradication is regarded as an essential prerequisite of sustainable development in *Our Common Future*,[82] Principle 5 of the *Rio Declaration on Environment and Development* (hereinafter the *Rio Declaration*),[83] and Chapter Three of the *Agenda 21*.[84]

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[78] *Our Common Future*, above n 7, 133.

[79] Lorraine Elliott, *The Global Politics of the Environment* (2nd ed, 2004) 157.

[80] Ibid 157–8.

[81] Lorraine Elliott argued that the inequitable trading relationship between the rich and poor countries contributed to environmental degradation and the underdevelopment of poor countries; he claimed that Agenda 21 accepts this fact: Ibid 71.

[82] *Our Common Future*, above n 7, 73, 93-4, 113.

[83] UN, *Report of the United Nations Conference on Environment and Development*: *Rio Declaration on Environment and Development (Annex I)* (1993), [2–8], UN Doc A/CONF.151/26/Rev.1 (Vol I) (*Rio Declaration* was adopted on 12 August 1992), Principle 5.

[84] UN, *Report of the United Nations Conference on Environment and Development*: *Agenda 21 (Annex II)*, [9–479], UN Doc A/CONF.151/26/Rev.1 (Vol I) (Agenda 21 was adopted on 12 August 1992), ch 3.

The *World Conservation Strategy*, regarded by a United Nations General Assembly (UNGA) report as 'a precursor to the concept of sustainable development',[85] asserts that conservation of nature cannot be achieved without development to alleviate the poverty and misery of hundreds of millions of people.[86] For LDCs, poverty is the dominant factor for environmental degradation since poverty causes economic pressure to exploit environmental resources through unsustainable development.[87] In contrast, economic growth provides greater resources (in more favourable attitudes) for environmental protection.[88] As a tool to overcome poverty, economic growth operates as an essential requirement if development is to be made sustainable.[89] At the same time, the basic notion is that economic growth must be sustainable for the benefit of future generations,[90] and at a minimum, development must not endanger the overall integrity of the ecosystem.[91] Hence, it can be argued that in LDCs where poverty is the upmost policy priority and the most significant obstacle to environmental protection,[92] enhanced market access for their exports, complemented by the capacity building programmes and technical and financial assistance are essential for generating resources that they need for sustainable development.

3 Organising Principles

3.1 Core Legal Principles of the GATT/WTO

Two basic tenets of the GATT/WTO system are the principle of non-discrimination and reciprocity. Hilf and Goettsche argued that these 'classical' GATT/WTO principles,

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[85] *Harmony with Nature*, above n 70.

[86] International Union for Conservation of Nature and Natural Resources (IUCN), UNEP and World Wide Fund for Nature (WWF), *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (1980).

[87] Bodansky and Lawrence, above n 3, 509.

[88] Kenneth W Abbot, '"Economic" Issues and Political Participation: The Evolving Boundaries of International Federalism' (1996–7) 18 *Cardozo Law Review* 971, 979.

[89] Elliott, above n 79, 159.

[90] Abbot, above n 88, 979.

[91] *Our Common Future*, above n 7, 89-90.

[92] Islam, above n 73, 525.

though gaining their legal form in the GATT 1947, can be traced to the interregional commerce of ancient and medieval times.[93] The non-discrimination principle has been articulated in two different but complementary rules: the Most Favoured Nations (MFN) rule and National Treatment (NT) rule. The MFN rule requires the same treatment be given to all trading partners, that is, when a country gives any advantage to another trading partner, the same must be given to all others. The NT rule requires that foreign goods—once they have satisfied border measures—be treated no less favourably in terms of taxes and other equivalent measures than domestic goods.[94] The principle of non-discrimination is embodied in a series of WTO provisions. For instance, the MFN rule is contained in Article I of the GATT 1994, Article II of the GATS, Article 9.2 of the *Anti-dumping Agreement*,[95] Article 2.2 of the *Agreement on Safeguards*,[96] Article 4 of the *Agreement on Trade–related Aspects of Intellectual Property Rights* (TRIPS).[97] The NT rule is contained in Article III of GATT 1994, Article XVII of the GATS, Article 3 of the TRIPS, and Article 2 of the *Agreement on Trade-Related Investment Measures*.[98]

The principle of reciprocity is one of the most vital concepts in GATT practice as a fundamental element of multilateral trade negotiations (MTNs).[99] It has been devised to minimise free riding that may arise because of the MFN rule.[100] Reciprocity requires a country to grant an equivalent concession when it requests some concession from the

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[93] Meinhard Hilf and Goetz J Goettsche, 'The Relation of Economic and Non-Economic Principles in International Law' in Stefan Griller (ed), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order* (2003) 1.

[94] Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: From GATT to WTO* (1995) 26.

[95] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, reproduced in WTO, *The Legal Texts*, above n 27, 147.

[96] *Agreement on Safeguards*, reproduced in WTO, *The Legal Texts*, above n 27, 275.

[97] *Agreement on Trade–related Aspects of Intellectual Property Rights*, reproduced in WTO, *The Legal Texts*, above n 27, 321.

[98] *Agreement on Trade-Related Investment Measures*, reproduced in WTO, *The Legal Texts*, above n 27, 143.

[99] Hoekman and Kostecki, above n 94, 50.

[100] Ibid 27.

other.[101] This principle is reflected in the Preamble of the *WTO Agreement*, which refers to 'entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'.[102] Andrew D. Mitchell argued that the notion of reciprocity might have a remarkable impact on trade negotiations as a matter of practice and policy rather than as a legal principle.[103]

However, these equitable rules of non-discrimination and reciprocity have turned out to be inequitable for developing countries. These countries are not situated on equal footing with their developed counterparts and thus do not benefit equally from the same set of rules. Since developing countries have nothing substantial to offer, high trade barriers remain in relation to products of their interest. Hence, the inevitable reality of the mercantilist underpinnings of the WTO is that LDCs are inherently disadvantaged in the reciprocity process because their markets are not attractive enough to trading partners to offer them better market access in return.[104] The inadequacy of GATT principles to address developing countries' concerns demonstrates that developing countries are regulated by different rules in their integration within the GATT/WTO system.

3.2 Principles of Developing Countries' Integration within the GATT/WTO

Given the ineffectiveness of reciprocity dynamics in relation to developing countries, LDCs advocated to be regulated in international trade by the principle of non-reciprocity and preferences. The concept of non-reciprocity was formally recognised by Article XXXVI of the GATT 1947 (now in GATT 1994) as follows:

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[101] Tussie, above n 21, 23.

[102] *WTO Agreement*, above n 1, Preamble, para 3.

[103] Mitchell, above n 58, 42.

[104] Aaditya Mattoo and Arvind Subramanian, 'The WTO and the Poorest Countries: The Stark Reality' (2004) 3(3) *World Trade Review* 385, 393.

> The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.[105]

This non-reciprocity principle became subject to an elaboration by a GATT Committee, which observed that it was really a question of less than full reciprocity on the part of developing countries rather than none at all, as some were seeking.[106] This implied that developing countries could be expected to undertake not equivalent tariff commitments but commitments commensurate with their individual levels of development.[107] This idea is reflected in addendum to Paragraph 8 of Article XXXVI, which states that:

> The less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade development.[108]

The *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, known as the *1979 Enabling Clause*,[109] repeats the provision of Paragraph 8 of Article XXXVI verbatim.[110] Regarding non-reciprocity for LDCs, it mentions that 'the least developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems'.[111] Further, the *Decision on Measures in Favour of Least-Developed Countries*[112] precisely states that 'the least developed countries ... will only

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[105] *GATT 1994*, art XXXVI, para 8.

[106] The Committee on Legal and Institutional Framework took up the task of further elaboration of the concept of non-reciprocity: Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO* (2001) 57.

[107] Ibid.

[108] *GATT 1994*, Ad Article XXXVI, para 8.

[109] *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of 28 November 1979, (L/4903), GATT BISD, 26th Supp, 203–18 (1980) (hereinafter *the Enabling Clause*).

[110] Ibid para 5.

[111] Ibid para 6.

[112] *Decision on Measures in Favour of Least-Developed Countries*, 1867 UNTS, I-31874 (1995) [42] <http://treaties.un.org/untc//Pages//doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf> at 10 June 2011.

be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities'.[113]

As to preferences, John H. Jackson[114] defined the concept most precisely:

> 'preference' generally refers to tariff preferences. The basic idea is that products from less-developed countries that are to be imported into an industrialised nations would be subject to a tariff rate by the industrialised nations that would be less than the rate applied to products from a source other than a less-developed country.[115]

The fundamental purpose of trade preferences is to provide developing countries with better opportunities to achieve a self-sustained improvement of their economic, social and political life. However, Chapter Three demonstrates that the 'overall picture of preferential schemes is of a web of discrimination',[116] generating instability and unpredictability to such an extent that rich countries' 'generosity'[117] has been seriously questioned.

The principle of non-reciprocity and preferences do not wholly cover developing countries' relation with the WTO, since, for instance, there is no preferences in trade in services. This can be embraced within the principle of S&DT.

3.3 Special and Differential Treatment

3.3.1 Understanding the Principle

For a conceptual clarity of S&DT principle, this thesis is influenced by two seminal works on differential treatment under the same title *Differential Treatment in*

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[113] Ibid para 1.

[114] John H Jackson, *World Trade and the Law of GATT* (1969).

[115] Ibid 661.

[116] Robert E Hudec, *Developing Countries in the GATT Legal System* (1987) 210.

[117] The term 'generosity' in this context is inspired by Raj Bhala, 'Generosity and America's Trade Relations with Sub-Saharan Africa' (2006) 18 *Pace International Law Review* 133.

International Environmental Law, by Philippe Cullet[118] and Lavanya Rajamani.[119] Regarding differential treatment, Cullet refers to 'instances where, because of pervasive differences or inequalities among states, the principle of sovereign equality is sidelined to accommodate extraneous factors, such as divergences in levels of economic development or unequal capacities to tackle a given problem'.[120] Rajamani refers to 'the use of norms that provide different, presumably more advantageous, treatment to some States appreciating the real differences that exist among these States: historic, economic, political, and other aspects'.[121] Both the authors agree that differential treatment is based on the notions of partnership and solidarity.[122] Within her discussion of differential treatment, Rajamani includes not only differential treatment that augments equality, but also that which fosters inequality, such as the power of handful of developed countries in the UN Security Council,[123] while Cullet excludes this type of treatment from his articulation of differential treatment.[124] To him, '[d]ifferential treatment does not include non-reciprocal arrangements which tend to increase disparities and inequalities'.[125]

This thesis differs from the approach of Cullet on two points. First, he perceived differential treatment to be 'intrinsically linked to the notion of equity which comes into play when law does not give justice'.[126] He continued, 'this approach excludes permanent exceptions but provides remedial measures to the harsh consequences of the application of a rule of law applying to all in a similar way'.[127] This thesis argues that differential treatment in international trade law should not be a temporary measure,

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[118] Philippe Cullet, *Differential Treatment in International Environmental Law* (2003).

[119] Rajamani, above n 10.

[120] Cullet, above n 118, 15.

[121] Rajamani, above n 10, 1.

[122] Cullet, above n 118, 1; Rajamani, above n 10, 7.

[123] Rajamani, above n 10, 48.

[124] Cullet, above n 118, 15.

[125] Ibid 15.

[126] Ibid 29.

[127] Ibid.

rather it should be made a permanent tool to facilitate sustainable development of LDCs. Second, Cullet maintained a distinction between preferential treatment and differential treatment. He holds that unlike preferential treatment, differential treatment does not require the establishment of a 'new' legal order but seeks to achieve more equitable and effective results within the existing system.[128] The thesis doubts whether such a distinction exists.

Rajamani argued that differential treatment in international trade law means more favourable treatment for developing countries and LDCs. Conceptually, this thesis agrees with Rajamani. However, pragmatically, this thesis observes that in the WTO law, treatment that is more favourable to developed countries has been made rules equally applicable for all countries formally, while in reality, it is only developed countries that can benefit from these equally applicable rules due to their financial capability, such as the provision of domestic support in the *Agreement on Agriculture* (AoA).[129] Rajamani argued that differential treatment is justified by the existence of 'relevant differences' and subject to review. Therefore, the time-bound elements should in principle drop away when relevant differences ceased to exist.[130] This thesis agrees with this argument. However, it observes that relevant differences might wither away in relation to advanced developing countries, but not in relation to LDCs.

3.3.2 Philosophical Basis

In looking for a justification of and philosophical basis for S&DT, the thesis looks into the Difference Principle of John Rawls, the Fairness Discourse of Thomas Franck, and the Global Justice theory of Thomas Pogge.

In his *A Theory of Justice*, John Rawls argues that there should be 'equal liberty for all, including equality of opportunity, as well as equal distribution of income and wealth'.[131] He conceptualises 'justice as fairness' in a single idea requiring 'all social primary

[128] Cullet, above n 118, 15.

[129] Agreement on Agriculture, reproduced in WTO, *The Legal Texts*, above n 27, 33.

[130] Rajamani, above n 10, 254.

[131] John Rawls, *A Theory of Justice* (1971) 151.

goods be distributed equally unless an unequal distribution would be to everyone's advantage'.[132] This principle is known as the Difference Principle in which Rawls stresses the need for permitting inequality when these inequalities are in the basic structures that 'work to make everyone better off in comparison to the benchmark of initial equality'.[133] He makes an effort to work out a justification for inequalities only when this inequality works to the advantage of the least-favoured. To Rawls, 'inequalities are permissible when they maximise, or at least contribute to the long-term expectations of the least fortunate group in society'.[134]

Frank J. Garcia engaged Rawls' Difference Principle of distributive justice in international trade law.[135] In particular, she found a reflection of Rawl's Difference Principle in the S&DT provisions of the WTO.[136] While this thesis agrees with Garcia in finding this reflection, it rejects Rawls' conception of international justice on an analogy that he refers to as the 'veil of ignorance'.[137] Rawls himself refuses to extend the argument of *A Theory of Justice* to international distributive problems,[138] rather he bases his conception of international justice on his idea of 'veil of ignorance'.[139] Under this concept, societies would enter into international agreements behind a veil of ignorance that would hide their differences in terms of territorial size, strength, natural

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[132] Ibid 150.

[133] Ibid 151.

[134] Ibid.

[135] Frank J Garcia, 'Trade and Inequality: Economic Justice and the Developing World' (Boston College Law School, 2000); Frank J Garcia, 'Beyond Special and Differential Treatment' (Boston College Law School, 2004); Frank J Garcia, 'Justice, The Bretton Woods Institutions and the Problem of Inequality' (Boston College of Law, 2008); Frank J Garcia, 'Global Justice and the Bretton Woods Institutions' (2007) 10(3) *Journal of International Economic Law* 461.

[136] Garcia, 'Beyond Special and Differential Treatment', above n 135.

[137] In the words of Rawls: 'The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles of justice are the result of a fair agreement or bargain.': Rawls, above n 131, 12.

[138] Ibid 8.

[139] Simon Caney, *Justice Beyond Borders: A Global Political Theory* (2005) 78–85, cited in James Thuo Gathii, 'International Justice and the Trading Regime' (2005) 19(3) *Emory International Law Review* 1407, 1414.

resources, and economic development.[140] In other words, he emphasises formal equality among the countries.

In seeking an answer to the question of whether international law is fair, Thomas Frank depicts his fairness discourse as the process by which law, and those who make law, seek to integrate two independent variables: legitimacy and distributive justice.[141] Franck associates legitimacy with the procedural aspects of fairness and distributive justice with substance and equity of outcomes. While legitimacy holds that for a rule to be fair, it must be based on a framework of formal requirements of making, interpreting and applying rules, fairness in relation to distributive justice considers the consequential effects of the law.[142]

Amrita Narlikar applied Franck's conception of fairness in examining the fairness discourse in international economic institutions, in particular the WTO.[143] In her findings, the WTO gives considerable attention to questions of fairness but a closer examination of the norms underlying the rules of the WTO reveals that they are dedicated to fair process, order and legitimacy articulated in the principles of non-discrimination and reciprocity, whereas the commitments to distributive justice are very limited.[144] This severely undermines developing countries' interest and thus, on the whole, downplays the distributive justice element of fairness.[145] Naturally, when the principle of non-reciprocity for developing countries was introduced by Part IV of the GATT, it was thought to successfully recognise the importance of equity of outcomes. However, the inbuilt loopholes in preferential market access schemes soon made it clear that it was no more than permission to have a temporary exception to the norm of reciprocal trade liberalisation.[146]

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[140] Caney, above n 139, 78–85.

[141] Thomas M Franck, *Fairness in International Law and Institutions* (1995) 7.

[142] Ibid 8.

[143] Amrita Narlikar, 'Fairness in international Trade Negotiations: Developing Countries in the GATT and WTO' (2006) 29(8) *The World Economy* 1005.

[144] Ibid 1009.

[145] Ibid.

[146] Ibid 1017.

Thomas Pogge analyses the international trading system from his Global Justice approach. Pogge argues that existing global inequality is in part traceable to rules promulgated by international organisations that benefit rich countries at the expense of poor countries.[147] He argues that the affluent states, having played the dominant role in the architecture of the trade regime, control most of the global product as well as access to their markets and thus have a huge advantage over the rest in terms of bargaining power, information and expertise. They are able successfully to push for open markets that are to their advantage and equally successfully to resist open markets that are not. Pogge asserts that the way the WTO rules are affecting developing countries makes it evident that the causes of persistence of severe poverty do not lie solely in the poor countries themselves. In his opinion, world poverty is exacerbated by the special prerogatives the rich countries gave themselves under WTO rules to favour their own firms through tariffs, quotas, anti-dumping duties and subsidies.[148]

3.3.3 Special and Differential Treatment in the WTO

Robert Howse regards S&DT as a basic tenet of the international economic legal order.[149] There are 145 provisions embodying S&DT for developing countries spread across the different WTO agreements.[150] The WTO Secretariat has classified them into six broad categories:

- measures to increase trading opportunities for developing country Members;[151]

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[147] Thomas Pogge, '"Assisting" the Global Poor' in Deen K Chatterjee (ed), *The Ethics of Assistance: Morality and the Distant Needy* (2004) 260.

[148] Thomas W Pogge, *"Assisting" the Global Poor* (2003) <http://www.scu.edu.tw/hr/forum/pogge.pdf> at 8 June 2009.

[149] Robert Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalised System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy' (2003) 4(2) *Chicago Journal of International Law* 385, 390.

[150] WTO Committee on Trade and Development, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions* (Note by the Secretariat), WTO Doc WT/COMTD/W/77 (25 October 2000) 3.

[151] There are 12 such provisions: ibid 4–6.

- provisions requiring all WTO Members to safeguard the trade interest of developing country Members;[152]
- flexibility of commitments, and actions, and use of policy instruments;[153]
- longer time periods for implementing agreements and commitments;[154]
- provisions providing for technical assistance;[155] and
- provisions related to LDCs.[156]

The main debate in the WTO regarding S&DT is on the efficacy of S&DT principle for bringing about development for developing countries and LDCs, on whether the S&DT provisions should be made operational, and if so, how. The *2001 Doha Ministerial Declaration*[157] reaffirms that provisions on S&DT are 'an integral part of the WTO agreements and it pledges to review S&DT provisions for strengthening them and 'making them more precise, effective and operational'.[158] The Doha Implementation Decision instructs the Committee on Trade and Development (CTD) to 'identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions'.[159]

Andrew D. Mitchell identified a hierarchy of principles of WTO law where he placed the principle of non-discrimination above the principle of S&DT.[160] As one of the

[152] There are 49 such provisions: ibid.

[153] There are 30 such provisions: ibid.

[154] There are 18 such provisions: ibid.

[155] There are 14 such provisions: ibid.

[156] There are 22 such provisions: ibid.

[157] *Ministerial Declaration*, WTO Ministerial Conference, 4th sess, Doha, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) (adopted on 14 November 2001) (hereinafter *Doha Ministerial Declaration*).

[158] Ibid para 44.

[159] *Implementation-related Issues and Concerns,* WTO Ministerial Conference, 4th sess, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) para 12.1(i) (adopted on 14 November 2001) (Doha Implementation Decision).

[160] Mitchell, above n 58, 245.

reasons for identifying this relationship, he referred to *EC—Tariff Preferences*,[161] where the Appellate Body (AB) held that the *Enabling Clause* is an exception to the MFN principle in Article I:1 of the GATT 1994.[162] However, it can be argued that the AB's findings resulted from a textual analysis of the *Enabling Clause*.[163] This finding in no way directs the placement of S&DT in a subordinate position to the non-discrimination principle. Rather, they might stand as parallel principles where the non-discrimination principle applies to developing countries, or to developed countries, while the S&DT principle applies between developed countries and developing countries, or developing/developed countries and LDCs.

Mitchell argued that the S&DT provisions of the WTO are incoherent,[164] temporary,[165] conditional, voluntary,[166] devoid of textual specificity,[167] and therefore incapable of being an independent interpretative principle.[168] However, it can be argued that just because the provisions embodying the S&DT principle are non-mandatory and vague, they do not lead to the conclusion that S&DT is also a vague or secondary principle. Rather, the problem lies with the drafters of the WTO texts in deliberately drafting S&DT provisions with these characteristics. Vagueness of the provisions makes the role of the WTO DSB more important in interpreting these principles to uphold LDC's interest. As argued by Maureen Irish, when S&DT provisions are interpreted by the WTO panels and the AB in accordance with the objective of sustainable development, the resulting jurisprudence strengthens existing obligations in favour of developing countries.[169] This thesis argues that WTO provisions regarding the market access of

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[161] *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R, AB-2004-1 (2004) (Report of the Appellate Body).

[162] Ibid para 90; Mitchell, above n 58, 261.

[163] In particular, the AB focused on the word 'notwithstanding' in Paragraph 1 of the Enabling Clause.

[164] Mitchell, above n 58, 239.

[165] Ibid 244.

[166] Ibid 247.

[167] Ibid 253.

[168] Ibid 262.

[169] Maureen Irish, 'Special and Differential Treatment, Trade and Sustainable Development' (2011) 4(2) *The Law and Development Review* 71, 72.

LDCs are by and large based on the S&DT principle, and they need to be interpreted from a sustainable development objective.

4 Research Questions

The primary research question of the thesis is to examine the legal and policy issues of market access regime of LDCs under the WTO. It aims to determine whether improved market access for exports of LDCs is one of the significant means for achieving sustainable development through trade and whether LDCs face challenges in achieving their sustainable development in the existing market access regime. This primary research question is addressed in the thesis by investigating the following issues:

1. whether there is any nexus between market access and sustainable development. If so, how LDCs are entangled in this nexus
2. whether DFQF treatment provides LDCs effective market access or whether it is subject to the same loopholes of generalised system of preference (GSP) schemes
3. whether market access regime for agriculture, non-agricultural products and services are auspicious for LDCs' greater market access to enable them to achieve sustainable development
4. whether LDCs can enforce their market access through the dispute settlement system of the WTO. If not, what obstacles are faced by them and how can those be addressed?

In summary, the thesis examines how market access of LDCs is affected by developed countries' protectionism condoned by the unjust rules of the WTO, which create obstacles for LDCs in achieving sustainable development.

5 Research Methodology

This research in the area of international trade law examines the core instruments of the WTO. It examines the market access issues of LDCs throughout the WTO texts, proceedings, cases, developed countries' policies and rules by adopting a sustainable development approach. It takes stock from the literature of law, economics and political

philosophy. However, its main area is law, with reference to the literature of economics and philosophy to strengthen its legal arguments.[170] This thesis bears the features of both doctrinal research and reform-oriented research.[171] As doctrinal research, it provides a systematic exposition of the WTO rules having an effect on LDCs' market access, analyses the relationship between rules, explains areas of difficulty and pertinently refers to the WTO cases in which the rules have been interpreted.[172] As reform-oriented research, it extensively evaluates the adequacy of existing WTO rules regulating LDCs' market access, analyses the current development in the ongoing Doha Round, proposes rules in the area of LDCs' market access and throws light on reforms, which negotiators might focus on.[173] Since this thesis examines the legal and policy issues relating to the interface between market access and sustainable development, it could be considered policy research. While sharing his thoughts on the most effective research approach in international economic law, John H. Jackson expressed his preference for policy research over theoretical research.[174] As policy research, this thesis analyses a fundamental socio-economic problem that could provide trade negotiators 'pragmatic, action-oriented recommendations for alleviating problems'.[175]

The thesis examines both primary and secondary materials. The primary materials include WTO agreements, Doha Round Ministerial Declarations, GATT/WTO cases, ICJ cases, multilateral environmental agreements and declarations, statistics from the WTO, UNCTAD and the World Bank, Trade Policy Reviews of Members, Notes of the Secretary of Different Committees, Notes of the Chairperson of the different negotiating

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[170] The Dean of the Yale Law School, Harry Wellington, once uttered in a speech that 'to get a grip on the limits of law, an academic must work in political philosophy; so, too, if he is interested in distributive justice. Nor can he fail to know economics, and he is delinquent if he ignores history.' Yale Law Report, Winter 1978–1979, 7–8 in Richard A Posner, 'The Present Situation in Legal Scholarship' (1981) 96(5) *The Yale Law Journal* 1113.

[171] Terry Hutchinson, *Researching and Writing in Law* (3rd ed, 2010) 7.

[172] This is influenced by the definition of doctrinal research in ibid 7.

[173] This is influenced by the definition of reform-oriented research in ibid 7. It is to be mentioned that a report published by a Committee, entitled the 'Pearce Committee' categorised legal research into three categories: doctrinal research, reform-oriented research and theoretical research: ibid 7.

[174] John H Jackson, 'Reflections on International Economic Law' (1996) 17(2) *University of Pennsylvania Journal of International Economic Law* 17.

[175] Ann Majchrzak, *Methods for Policy Research* (1984) 12, cited in Hutchinson, above n 171, 24.

groups, and proposals from the Members. For secondary materials, it mainly relies on books, journal articles, working papers/reports, newsletters, newspaper articles and non-governmental organisation (NGO) briefings. It incorporates the development of the Doha Round until July 2011.

6 Objectives and Limitations

The thesis proposes a change of outlook in dealing with the impediments LDCs are confronting in the WTO's market access regime. Through an in-depth analysis of the landscape of LDCs' market access it suggests a sustainable development approach in making market access meaningful for them. It does not advocate for something that is atypical to the WTO, rather it puts forward its argument to give effect to the aspirational language of the WTO Preamble and the Doha Round Declarations where the Members pledge for 'positive efforts' for the least developed among them.[176]

Since this is a study from a broader perspective, it is susceptible to some obvious limitations. Being cognisant of the fact that market access in other developing countries is gaining increased significance for LDCs, the thesis does not address the issue. The thesis does not address LDCs' market access under the regional trade agreements (RTAs). Neither does it address the situation of LDCs in the process of Accession to WTO Membership. These are potential areas for further study.

7 Overview of the Thesis

The thesis is organised into eight chapters. Chapter One depicts the landscape of and rationale for the thesis. An examination of the market access regime of LDCs from a sustainable development approach requires establishing the well-founded linkage between market access and sustainable development. This vital task is undertaken in Chapter Two which covers wide-ranging issues in the trade–sustainable development debate where market access plays a crucial role, and examines the constituent principles embodied in the concept of sustainable development to find linkages of market access

[176] *The WTO Agreement* Preamble.

with them. This chapter investigates into the poverty dimension of sustainable development by establishing its linkage with market access of LDCs.

Chapter Three examines the evolution and effectiveness of LDCs' market access and ties market access with technical and financial assistance and capacity building programmes for LDCs. The unique contribution of this chapter is that it makes a comparative analysis of their market access under the GSP and DFQF treatment to examine whether DFQF substantially improves the situation. The ideas proposed in first three chapters are analysed in-depth in Chapters Four, Five and Six. The central research question for each of these chapters is: do LDCs have effective market access and how does market access (in terms of having it or not having it) have a bearing on their sustainable development challenges? However, in the course of the analysis, the chapters are organised differently, on the basis of the WTO agreements applicable to them.

Chapter Four examines the significance of market access in agricultural products for sustainable development of LDCs. It examines LDCs' position in agricultural trade from a historical context and the current state of negotiations. It undertakes a thorough analysis of the three pillars of the AoA – market access, domestic support and export subsidies – to find their impact on sustainable development of LDCs. This chapter emphasises on non-tariff barriers (NTBs), in particular Sanitary and Phytosanitary (SPS) measures and food security concerns of LDCs. It highlights the importance of removing trade-distorting agricultural protectionism of developed countries and the need for technical and financial assistance for LDCs.

Chapter Five examines the particular areas of interests of LDCs in respect of market access in non-agricultural products. Besides DFQF treatment, it examines the current state of NAMA negotiations regarding NTBs and preference erosion. The chapter undertakes an evaluation of textile and clothing sectors with a view to identifying the challenges faced by LDCs. These examinations are made with the hindsight of establishing the importance of market access in non-agricultural products for the sustainable development of LDCs.

Chapter Six examines the linkage between services trade and sustainable development. It examines the provisions of the GATS and Doha Round instruments from the perspectives of LDCs' market access, LDC waiver, and technical assistance and capacity building. It scrutinises the GATS provisions regarding temporary movement of natural persons and examines that challenges faced by LDCs in this particular mode of services trade, particularly with regard to their semi-skilled workers.

The analysis of market access remains essentially incomplete without assessing their enforcement mechanism. Hence, Chapter Seven examines the state of LDCs' participation in the dispute settlement system of the WTO to enforce their market access rights. Finally Chapter Eight highlights the key points of the thesis based on the issues discussed in all chapters with specific recommendations for improving LDCs' market access regime.

8 Contribution of the Thesis

This thesis focuses on one of the vital areas of international trade. Indeed LDC issues have come to the core of the Doha Round negotiations where the future of the round depends on the settlement of LDC issues. As expressed by the trade negotiators on 26 July 2011,[177] the credibility of the WTO will be undermined by its inability to reach an agreement on implementation of LDC issues in the WTO Ministerial Meeting in December 2011.[178] More specifically the Ambassador from China Yi Xiaozhun urged that 'if [the eighth ministerial] has nothing to deliver on Doha, not even on the needs of the LDCs, the credibility of the WTO will be jeopardised'.[179] In this context this thesis is topical in articulating LDC issues in a comprehensive manner.

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[177] This was the last meeting of the Trade Negotiating Committee before the August break of the WTO.

[178] *Members to Think About 'What Next for Doha, WTO' for December Meeting*, (26 July 2011) WTO: 2011 News Items <http://www.wto.org/english/news_e/news11_e/tnc_infstat_26jul11_e.htm> at 15 August 2011.

[179] ICTSD, 'Troubled State of Doha Talks Causing WTO "Paralysis," Says Lamy; Focus for December Ministerial Shifts' (28 July 2011) 15(28) *Bridges Weekly Trade News Digest* 1, 2.

There is no dearth of literature on trade-sustainable development issues.[180] But very few of them emphasised LDCs' market access issues in their articulation of the North-South debate. In their generalised concern for developing countries, they mentioned about LDCs cursorily. The bulk of the literature on market access addressed market access only in respect of market access barriers. Again literatures on market access study developing countries' and LDCs' market access only under preferential market access schemes without addressing trade-distorting policies of developed countries. This thesis comes into this gap by identifying the holistic market access concerns of LDCs which are in many cases divergent from other developing countries. The originality of the thesis lies in dealing with LDCs' market access issues in a comprehensive manner which has hitherto been done in a compartmentalised way. The thesis makes contribution to the existing literature by suggesting a sustainable development approach, with clear emphasis on poverty alleviation in addressing LDCs' market access.

[180] Konrad Von Moltke, 'Trade And Sustainable Development in The Doha Round' in Mike Moore (ed), *Doha And Beyond: The Future of The Multilateral Trading System* (2004) 1; Mark Halle, 'Trade and Environment: Looking beneath the Sands of Doha' (2006) 2 *Journal of European Environmental and Planning Law* 107; Mark Halle and Ricardo Melendez-Ortiz, 'The Case for a positive Southern Agenda on Trade and Environment' in Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (eds), *Envisioning a Sustainable Development Agenda for Trade and Environment* (2007) 9; Adil Najam and Nick Robins, 'Seizing the Future: The South, Sustainable Development and International Trade' in Kevin P Gallagher and Jacob Werksman (eds), *The Earthscan Reader on International Trade and Sustainable Development* (2002) 164; Shawkat Alam, *Sustainable Development and Free trade,* Routledge Studies in Development Economics (2007); Gary P. Sampson, *The WTO and Sustainable Development* (2005); Jurgen Wiemann, 'Impacts for Developing Countries'in Nagesh Kumar and Sachin Chaturvedi (eds), *Environmental Requirements and Market Access: Reflections from South Asia* (2007) 29; Nath, above n 3, 15; Steve Charnovitz, 'An Introduction to the Trade and Environment Debate' in Kevin P. Gallagher (ed), *Handbook on Trade and the Environment* (2008) 237; Ramon Lopez and Michael A. Toman (eds), *Economic Development and Enviromental Sustainability: New Policy Options* (2006); J. Owen Sanders (ed), *The Legal Challenge of Sustainable Development* (1990); Clive George and Colin Kirkpatrick, 'Trade and Development: Assessing the Impact of Trade Liberalisation on Sustainable Development' (2004) 38(3) *Journal of World Trade* 441; Sandford E. Gaines, 'International Trade, Environmental Protection and Development as a Sustainable Development Triangle' (2002) 11(3) *Review of European Community and International Environmental Law* 259; Diana Tussie, 'The Environment and International Trade Negotiations: Open Loops in the Developing World' in Diana Tussie (ed), *The Environment and International Trade Negotiations: Developing Country Stakes*, International Political Economy (2000) 225.

Chapter Two:

Nexus between Market Access and Sustainable Development*

1 Introduction

Sustainable development as a leading concept emerged recently in the collective consciousness of the international community. It plays a centripetal role in the international legal order, particularly at the intersection of international trade, development, environmental law and human rights law.[1] The concept of sustainable development synthesises the inevitable interaction between economic and social development and environmental protection. As Chapter One explained, in analysing market access provisions of LDCs, the thesis examines the interface between market access in goods and services, and sustainable development from the perspective of LDCs. This chapter establishes the nexus between market access and sustainable development.

This chapter proposes five steps in establishing the linkage. The first step is to conceptualise sustainable development and market access (Sections 2 and 3). The second step is to analyse the constituent principles of sustainable development to understand their linkage with the market access agenda of LDCs (Section 4). As the third step, the chapter addresses poverty as one of the major impediments to sustainable development and argues that ensuring greater market access for LDCs contributes to the alleviation of poverty (Section 5). The fourth step is to examine the institutional approach of the UN and the GATT/WTO towards the trade–sustainable development debate, with an emphasis on market access issues (Section 6). As the final step, the chapter underscore the developed and developing countries' stance in the trade–

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* This chapter was presented as 'Interface between Market Access and Sustainable Development: In the Context of the Economic Crisis' in the 17th ANZSIL Conference in Wellington on 2-4 July 2009. The chapter was also given as a lecture in Trade and Environment Law (Law 852), offered by the Department of Environmental Law, Macquarie University on 21 April 2009.

[1] Georges Abi-Saab, 'Foreword' in Markus W Gehring and Marie-Claire Cordiner Segger (eds), *Sustainable Development in World Trade Law* (2005) xxxi, xxxiii.

sustainable development debate, including their conflicting perception about the concept of sustainable development within trade arena. This covers the specific issues emanating from the debate, with emphasis on how market access plays a vital role in those issues (Section7).

2 Conceptualisation of Sustainable Development

2.1 Evolution

The existing literature is not unanimous regarding the historical trace of the concept of sustainable development. For instance, Philippe Sands tracked the origin of the concept in the early conservation agreements[2] and arbitral awards,[3] while H. E. Judge Christopher G. Weeramantry[4] traced it to such events as the Founex meeting of experts in Switzerland in June 1971[5] and the *United Nations General Assembly Resolution 2849 (XXVI).*[6] Alan Boyle and David Freestone[7] found its origin in more recent instrument:

[2] Some of these treaties intended to protect fisheries, flora and fauna are: *Convention between France and Great Britain Relative to Fisheries (Paris),* opened for signature 11 November 1867, 21 IPE 1 (entered into force 18 January 1868); *Treaty for the Regulation of the Police of the North Sea Fisheries (Overfishing Convention), 1882,* S.EX. Doc 106, 50 Congress, 2 Sess 97; *Convention for the Protection of Birds Useful to Agriculture (Paris),* opened for signature 19 March 1902, 4 IPE1615 (entered into force 20 April 1904); *Convention for the Protection of Migratory Birds in the United States and Canada (Washington),* opened for signature 16 August 1916, 4 IPE 1638; *Convention Relative to the Preservation of Fauna and Flora in their Natural State (London),* opened for signature 8 November 1933, 172 LNTS 241 (entered into force 14 January 1936): Philippe Sands, *Principles of International Environmental Law* (2nd ed, 2003) 27–8.

[3] For instance, in *Behreing Sea Fur Seals Arbitration (Great Britain v United States)* (1893), the Arbitral Tribunal adopted regulations on sealing, which incorporate some elements recognisable as a 'sustainable' approach to natural resource use: Philippe Sands, 'International Law in the Field of Sustainable Development' (1994) 65 *British Yearbook of International Law* 303, 306.

[4] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Jurisdiction)* [1997] ICJ Rep 7; *Separate Opinion of Vice-President Weeramantry*, 88, 92 <http://www.icj-cij.org/docket/files/92/7383.pdf> at 20 June 2008.

[5] The official website of the Stakeholder Forum comments that the 1971 seminar held in Founex, Switzerland and subsequent *Founex Report on Development and Environment* played a critical role in laying the groundwork for the 1972 Stockholm conference. Founex identified key environment-development objectives and relationships, and contributed to locating and bridging the policy and conceptual differences that separated developed and developing countries: *Earthsummit 2012* <http://earthsummit2012.org/historical-ngo-reports-and-papers/the-founex-report-on-development-and-environment> at 24 July 2011.

[6] *Resolution on Development and Environment, GA Res 2849 (XXVI)*, UN GAOR, 26th sess, 2026th plen mtg, UN Doc A/Res/2849 (1971) <http://www.un.org/documents/ga/res/26/ares26.htm> at 24 July 2011.

[7] Alan Boyle and David Freestone, 'Introduction' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development* (1999) 1.

the 1972 UN Conference on the Human Environment (hereinafter the Stockholm Conference).[8] Besides, Philippe Sands identified the concept in a number of treaties featuring a more integrated economic, social and environmental approach in international law.[9]

However, despite these minor differences, it is now universally accepted that the term 'sustainable development' was coined in the *1987 Brundtland Report*[10] adopted by the World Commission on Environment and Development (WCED) and published under the title of *Our Common Future.*[11] Shifting from the overriding importance on environment in the *1972 Stockholm Declaration on Human Environment*,[12] the *Brundtland Report* attempted to reconcile two themes that have long been in an antagonistic relationship with each other, namely environment and development.[13]

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[8] Ibid 5. The UN Conference on Human Environment was held on 5–16 June 1972, was attended by 114 States and a large number of international institution and non-governmental observers: Sands, *Principles of International Environmental Law*, above n 2, 36.

[9] *International Convention for the Regulation of Whaling (Washington)*, opened for signature 2 December 1946, 161 UNTS 72 (as amended 19 November 1956, 338 UNTS 336) (entered into force 10 November 1948); *General Agreement on Tariffs and Trade (Geneva),* opened for signature 30 October 1947, 55 UNTS 194 (entered into force provisionally since 1 January 1948 under the *1947 Protocol of Application,* 55 UNTS 308); *African Charter on Human and Peoples' Rights (Banjul)*, opened for signature 27 June 1981, 21 ILM 59 (1982) (entered into force 21 October 1986); *United Nations Convention on the Law of Sea (Montego Bay)*, opened for signature 10 December 1982, 21 ILM 1261 (1982) (entered into force 16 November 1994); *Association of South East Asian Nations Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur)*, opened for signature 9 July 1985, 15 EPL 64 (1985) (not in force) (the first treaty to refer to 'sustainable development'); *Single European Act* (Luxembourg), opened for signature 17 February 1986, 27 ILM 1109 (entered into force 28 May 1987); *Protocol on Substances that Deplete the Ozone Layer (Montreal)*, opened for signature 16 September 1987, 26 ILM 154 (1987) (entered into force 1 January 1989); *Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (Basel)*, opened for signature 22 March 1989, 28 ILM 657 (1989), entered into force 1992; *ILO Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries (Geneva)*, opened for signature 27 June 1989, 28 ILM 1382 (not yet in force); and *Agreement Establishing the European Bank for Reconstruction and Development (London)*, opened for signature 29 May 1990, 29 ILM 1077 (1990) (entered into force 1991): Sands, *Principles of International Environmental Law*, above n 2, 257–8; Sands, 'International Law in the Field of Sustainable Development', above n 3, 306–7.

[10] This report is named the *Brundtland Report* after the name of the Chairman of the World Commission on Sustainable Development and Norwegian Prime Minister Gro Harlem Brundtland.

[11] World Commission of Environment and Development, *Our Common Future* (Australian ed, 1987). (hereinafter *Our Common Future*).

[12] *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, UN Doc A/Conf.48/14/Rev (1973). Reprinted in 11 ILM 1416 (1972).

[13] The report, for the first time, calls for an integrated action among all areas of economic, social and environmental fields to face the one interlocking global crisis, rather than the various 'crises'. It asserts that environment and development are not separate challenges. Instead, they are inexorably linked in a complex system of cause and effect. The way development cannot subsist upon a deteriorating

Since the publication of *Our Common Future*, 'sustainability', coupled with the notion of 'development', has become a rhetorical talisman for our common present that is often compared with the dynamic goal of democracy.[14]

Following the Stockholm Conference, there were other initiatives that generated ideas, policies and rules acting as a catalyst for the 1992 UN Conference on Environment and Development (UNCED).[15] These include the *1980 World Conservation Strategy* (WCS)[16] the 1981 *World Charter for Nature*,[17] the *1987 Environmental Perspective to the Year 2000 and Beyond*,[18] and the 1991 *Caring for the Earth: a Strategy for Sustainable Living* (hereinafter *1991 Caring for the Earth*).[19] Two of the major outputs of the UNCED are the *Rio Declaration on Environment and Development*[20] and *Agenda 21*.[21] The *Rio Declaration* takes the concept of sustainable development one step further by embodying it in a single non-binding document. The principal concern of the *Rio Declaration* is to integrate the needs of economic development and environmental protection. *Agenda 21*, a 40 chapter programme of action, intends to promote the

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environmental resource base, the environment cannot be protected when growth does not take into account the costs of environmental destruction: *Our Common Future*, above n 11, 81.

[14] William M Lafferty and Oluf Langhelle, 'Sustainable Development as Concept and Norm' in William M Lafferty and Oluf Langhelle (eds), *Towards Sustainable Development: On the Goals of Development and the Conditions of Sustainability* (1999)1, 1.

[15] Sands, 'International Law in the Field of Sustainable Development', above n 3, 303. UNCED was held in Rio de Janeiro, on 3–14 June 1992, with representatives of 176 countries, more than 50 intergovernmental organisations and several thousand corporations and non-governmental organisations: Sands, *Principles of International Environmental Law,* above n 9, 52.

[16] IUCN, UNEP and WWF, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (1980) (hereinafter *World Conservation Strategy*).

[17] *World Charter for Nature*, GA Res 37/7, UN GAOR, 48th plen mtg, UN Doc A/Res/37/7 (1982) <http://www.un.org/documents/ga/res/37/a37r007.htm> at 24 July 2011.

[18] *Environmental Perspective to the Year 2000 and Beyond*, GA Res 42/186, UN GAOR, 42nd sess, 97th pln mtg (1987).

[19] IUCN, UNEP and WWF, *Caring for the Earth: a Strategy for Sustainable Living* (1991) (hereinafter *Caring for the Earth*).

[20] UN, *Report of the United Nations Conference on Environment and Development*: *Rio Declaration on Environment and Development (Annex I)* (1993), [2–8], UN Doc A/CONF.151/26/Rev.1 (vol I) (*Rio Declaration* was adopted on 12 August 1992) (hereinafter *Rio Declaration*).

[21] UN, *Report of the United Nations Conference on Environment and Development*: *Agenda 21 (Annex II)*, [9–479], UN Doc A/CONF.151/26/Rev.1 (vol I) (Agenda 21 was adopted on 12 August 1992) (hereinafter *Agenda 21*).

implementation of the concept.[22] In 1993, the Economic and Social Council established the Commission on Sustainable Development (CSD) to follow up on the implementation of *Agenda 21*. A follow-up conference of the UNCED, the 2002 World Summit for Sustainable Development (WSSD)[23] adopts *Johannesburg Declaration on Sustainable Development*,[24] which lays down the priorities, concrete deliverables, and instruments to implement the sustainable development agenda in partnership with all actors.[25] The WSSD agreed on *Johannesburg Plan of Implementation* (JPOI)[26] and further mandated the CSD to monitor the implementation of sustainable development. In fact, almost all the post-WCED documents are inspired by, and reflect acceptance of the concept of sustainable development.

2.2 Definitions

The concept of sustainable development has been intensely criticised for its imprecise definition. There is always debate about the actual ambit of the concept and always a tendency to stretch it. The idea has evolved into an 'essentially contested concept' that is open to tremendous diversity of definitions and interpretations.[27] Due to its amorphous nature, Jagdish Bhagwati observed that a vague concept should not be the goal of a multilateral trade organisation like the WTO because it can often create confusion.[28] Nevertheless, the concept retains a widespread moral appeal due to the concept's dual ethical foundation. By giving expression to both 'realist' (natural law)

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[22] Boyle and Freestone, above n 7, 1.

[23] *Johannesburg Declaration on Sustainable Development: Report of the World Summit on Sustainable Development*, [1–5] UN Doc A/CONF.199/20 (2002) <http://www.unctad.org/en/docs/aconf199d20&c1_en.pdf> at 24 July 2011 (hereinafter *Johannesburg Declaration*).

[24] The WSSD was held in Johannesburg, South Africa, 26 Aug to 4 Sept 2002.

[25] Marie-Claire Cordonier Segger, 'Significant Developments in Sustainable Development Law and Governance: A Proposal' (2004) 28 *Natural Resources Forum* 61, 61.

[26] *Plan of Implementation of World Summit on Sustainable Development: Report of the World Summit on Sustainable Development*, [6–72] UN Doc A/CONF.199/20 (2002) <http://www.unctad.org/en/docs/aconf199d20&c1_en.pdf> at 24 July 2011 (hereinafter *Johannesburg Plan of Implementation*).

[27] Lafferty and Langhelle, above n 14, 2.

[28] Jagdish Bhagwati, 'Afterword: The Question of Linkage' (2002) 96(I) *American Journal of International Law* 126, 133. He doubted the credibility of the concept of sustainable development.

and 'consensualist' (democratic) norms, it can claim support with respect to a broad spectrum of moral imperatives.[29] Hence, it is important to consider how international instruments and literary works defined the concept of sustainable development.

Though not precisely defined, the *1980 WCS* identifies three ecological goals that form the basis for sustainable development: (1) maintenance of essential ecological processes and life-support systems; (2) preservation of genetic diversity; and (3) ensuring the sustainable utilisation of species and ecosystems.[30] Similarly, the *1991 Caring for the Earth* defines sustainable development as 'improving the quality of human life while living within the carrying capacity of supporting ecosystems'.[31] Both of these instruments place great emphasis on ecological sustainability.

Our Common Future defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[32] Its emphasis on the essential needs of the world's poor[33] reflects a shift from the ecology-based concept of sustainable development to the socio-economic context of sustainable development.[34] The sustainability constraint in *Our Common Future* includes more than environmental sustainability since it identifies political, social, economic and cultural threats to future development.[35]

Though the impetus for the emergence of the concept has come from the desire to strengthen rules for the protection of environment,[36] now the linkage between

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[29] Lafferty and Langhelle, above n 14, 1.

[30] *World Conservation Strategy*, above n 16, 2.

[31] IUCN, UNEP and WWF, *Caring for the Earth*, above n 19, 10.

[32] *Our Common Future*, above n 11, 8.

[33] Ibid 87.

[34] W M Adams, *Green Development, Environment and Sustainability in the Third World* (2nd ed, 2001) 71.

[35] Lafferty and Langhelle, above n 14, 13. As Chapter Seven of this thesis analyses in detail, the AB in *US–Shrimp/Turtle* uses the concept of sustainable development in a way that leads us to consider that it emphasises an ecology-based definition of sustainable development.

[36] Sands, 'International Law in the Field of Sustainable Development', above n 3, 306.

environmental protection and social and economic development has become generally accepted.[37] This anthropocentric feature of the concept has been criticised as a Western bourgeois concept fashioned to uphold the Western capitalist agenda in the ploy 'to beat environmentalists at their own game' where environmental protection has been made subordinate to economic growth.[38] However, these criticisms do not take into account the fact that a society cannot survive only by protecting its environment. It has to carry on its developmental and social function as well.

Very recently, a distinct branch of law emerged from burgeoning literature, namely sustainable development law. Marie-Claire Cordonier Segger and Ashfaq Khalfan defined sustainable development law as a 'body of legal principles and instruments at the intersection of environmental, social and economic law, those which aim to ensure development that can last'.[39] In the international arena, a new branch—international law in the field of sustainable development—has been articulated. This comprises those principles and rules that are derived from the *lex specialis* of prior and emerging international law in three fields of international cooperation: economic development law, environmental law and social and human rights law.[40] However, the exact boundary of these principles and rules at the intersections mentioned above is still undetermined. There has been a recent trend to utilise the concept to achieve a plethora

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[37]Alios Mock and Maria Rauch-Kallat, 'Forward' in Winfried Lang (ed), *Sustainable Development and International Law* (1995) xiv, xiv.

[38]Timothy Doyle, 'Sustainable Development and Agenda 21: The Secular Bible of Global Free Markets and Pluralist Democracy' (1998) 19(4) *Third World Quarterly* 771, 772. Critics also argue that the concept of sustainable development, as shaped in the *Rio Declaration* and *WSSD*, has been embraced by the political mainstream because it represents a process of rehabilitation of the ideology of economic growth: William E Rees, 'The Ecology of Sustainable Development' (1990) 20(1) *The Ecologist* 18, 18; Marc Pallemaerts, 'International Law and Sustainable Development: Any Progress in Johannesburg?' (2003) 12(1) *RICIEL* 1, 9.

[39] Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (2004), 46–7, 368. In other words, they regard sustainable development law as a special type of norm that 'facilitates and requires a balance and reconciliation between conflicting legal norms relating to environmental protection, social justice and economic growth': at 47.

[40] Philippe Sands, 'International Law in the Field of Sustainable Development: Emerging Legal Principles' in Winfried Lang (ed), *Sustainable Development and International Law* (1995), 53, 53; Marie-Claire Cordonier Segger et al, 'Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation' (2003) 12(1) *RECIEL* 54, 54. International sustainable development law has also been described as 'a group of congruent norms, a corpus of international legal principles and treaties, which address the areas of intersection between international economic law, international environmental law and international social law in the interests of both present and future generations': Segger and Khalfan, above n 39, 47.

of economic, environmental and social goals, such as 'universal education, employment opportunity, universal health and reproductive care, equitable access to and distribution of resources, stable populations, and a sustained natural resource base'.[41]

2.3 Legal Status

As to the legal status of sustainable development, one view is that it is part of international law with normative status,[42] while the other view is that sustainable development, accepted by the international community as a 'modifying norm' in decision making, falls short of a binding principle of international law.[43] Referring to Principle 27 of the *Rio Declaration*, Philippe Sands argued that in calling for the 'further development' of 'international law in the field of sustainable development', the *Rio Declaration* makes it obvious that such a law already exists.[44] He maintained that the concept of sustainable development is now established in international law. Simultaneously, he admitted that it is still emerging and as such, it is neither coherent and comprehensive, nor free from ambiguity or inconsistency.[45]

The International Court of Justice (ICJ) does not seem to utilise the unique opportunity to develop the concept of sustainable development in the first environmental case receiving attention in the jurisprudence of the Court. The Court addresses the issue of

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[41] Philippe Cullet, *Differential Treatment in International Environmental Law* (2003) 11.

[42] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Jurisdiction)* [1997] ICJ Rep 7; *Separate Opinion of Vice-President Weeramantry*, 88, 88 <http://www.icj-cij.org/docket/files/92/7383.pdf> at 20 June 2008.

[43] Sumudu Atapattu, 'Sustainable Development Myth or Reality?: A Survey or Sustainable Development under International Law and Srilankan law' (2002) 14(2) *Georgetown International Environmental Law Review* 265, 279–81; Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development* (1999) 19, 31–35.

[44] Sands, 'International law in the Field of Sustainable Development: Emerging Legal Principles', above n 40, 53.

[45] Ibid 57–8. Howard Mann departed from Philippe Sands, arguing that principles of international law on sustainable development are not legal tenets that fall within Article 38(1)(c) of the Statute of the International Court of Justice, i.e. 'general principles of law recognized by civilized nations'. Rather, he considered them a 'goal' that we aspire to reach: Howard Mann, 'Comment on the Paper by Philippe Sands' in Winfried Lang (ed), *Sustainable Development and International Law* (1995) 67, 67, 71.

sustainable development in *Case Concerning the Gabcikovo-Nagymaros Project* (hereinafter *Gabcikovo-Nagymoros*):[46]

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing activities begum in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[47]

The juridical status of the concept of sustainable development is not clear in the above paragraph where the Court affirms that new norms and new standards have to be given proper weight. Such phrasing asserts that the norms do not bind as a rule of law, and the standards are not mandatory.[48]

Separate Opinion of Judge Weeramantry embodies an elaborate discussion of the legal status of sustainable development and regards it as 'more than a mere concept' and as a 'principle with normative value'.[49] It is worth quoting from the Separate Opinion itself:

> The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.
>
> The components of the principle come from well-established areas of international law—human rights, State responsibility, environmental law, economic and industrial law, equity,

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[46] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Jurisdiction)* [1997] ICJ Rep 7.

[47] Ibid para 140. The last line of the paragraph reconciles economic development and environmental protection within the concept of sustainable development. It does not mention social policies.

[48] Lowe, above n 43, 19, 20.

[49] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Jurisdiction)* [1997] ICJ Rep 7; *Separate Opinion of Vice-President Weeramantry*, 88, 88 <http://www.icj-cij.org/docket/files/92/7383.pdf> at 20 June 2008.

territorial sovereignty, abuse of rights, good neighbourliness—to mention a few. It has also been expressly incorporated into a number of binding and far-reaching international agreements, thus giving it binding force in the context of those agreements.[50]

Vaughan Lowe observed that the view of Judge Weeramantry gave rise to criticism on the ground that 'logical necessity' and 'global acceptance' are not enough to impart normative character on a concept where *opinio juris* is absent.[51] Vaughan Lowe claimed that the concept of sustainable development is not a binding norm of international law in the sense of the 'normative logic' of traditional international law as reflected in Article 38(1) of the *Statute of the International Court of Justice*.[52] He maintained that the concept has not attained the status of hard or soft law since it lacks inherent norm-creating character due to considerable uncertainty of its meaning and scope.[53] However, he ascribed other aspects of normativity to sustainable development. It can properly claim a normative status as an element of the process of judicial reasoning, rather than as rules of conduct. It is a 'metaprinciple, acting upon other legal rules and principles—a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other'.[54] He regarded sustainable development as a 'modifying norm' that establishes the relationships between other primary norms that carries the prescriptive charge.[55]

The predominant view on the legal status of sustainable development is that of Vaughan Lowe. In other words, it is neither 'a principle of customary international environmental

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[50] Ibid 95.

[51] Lowe, above n 43, 19.

[52] *Statute of the International Court of Justice*, art 38(1).

[53] Vaughan Lowe also considered that this norm-creating character is lacking in its components, such as 'inter-generational equity', 'intragenerational equity' and 'sustainable use' for their complicated enforceability: Lowe, above n 43, 26–30.

[54] Ibid 31.

[55] Ibid 33. Despite Vaughan Lowe's most systematic analysis of the legal character of sustainable development law, Judge Weeramantry still holds the same notion about sustainable development law. He expressed his belief that sustainable development is taking the same path human rights took in becoming hard law after its long journey from the Universal Declaration of Human Rights: Judge Christopher G Weeramantry, 'Forward' in Segger and Khalfan, above n 39, IX–X.

law' nor a 'meaningless notion',[56] rather it is an 'interstitial' norm that facilitates and requires reconciliation of other legal norms relating to environmental protection, social development and economic growth.[57] Both the WTO AB and Panel address sustainable development in the *US–Shrimp/Turtle* cases: *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter *US–Shrimp/Turtle*),[58] and *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia* (hereinafter *US–Shrimp/Turtle Article 21.5*).[59] They refer to sustainable development as a concept, rather than as a customary principle of environmental law.[60] This thesis also stands by this characterisation of sustainable development and thus addresses it as a 'concept' throughout the thesis.

3 Conceptualisation of Market Access

The term 'market access', idiosyncratic jargon in the GATT/WTO system, functions through the commitments of the WTO Members to undertake certain measures, such as reducing or eliminating tariff and NTBs, to create favourable situation for foreign imports. These are usually reciprocal commitments among countries. Fiona Smith articulated market access as composing of five elements: the market (the nature of markets: product and/or geographic); the entities involved (states, corporations); the impediments to access; how these impediments are perceived; and how these four elements fit together to form a coherent whole.[61] Kyle Bagwell, Petros C. Mavroidis and Robert W. Staiger conceptualised market access as reflecting the competitive

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[56] Segger and Khalfan, above n 39, 50.

[57] Ibid.

[58] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (1998) [footnote 107] (Report of the Appellate Body).

[59] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW, 01-2854 (2001) [footnote 202] (Report of the Panel). See this chapter, s 4.2.

[60] Marie-Claire Cordonier Segger, 'Integrating Social and Economic Development and Environmental Protection in World Trade Law' in Markus W Gehring and Marie-Claire Cordonier Segger and (eds), *Sustainable Development in World Trade Law* (2005) 134, 136.

[61] Fiona Smith, *Agriculture and the WTO: Towards a New Theory of International Agricultural Trade Regulation,* Elgar International Economic Law (2009) 81, 82.

relationship between imported and domestic products.[62] This competitive relationship can be altered in many ways that change the level of market access. Any tariff reduction commitment that increases market access can be curtailed by imposing anti-dumping duties and NTBs, by reducing the domestic labour or environmental standards of the importing countries or by adopting any other protectionism, such as subsidies and domestic support. The bulk of the work of the GATT/WTO revolves around solving this conundrum of market access. The purpose of the WTO is to enhance market access for all Members on the basis of the theory of free trade that allows states to utilise their comparative advantages and to become more competitive under the pressure of international competition.[63]

However, from the perspectives of developing countries, especially LDCs, market access operates in a different manner due to their distinctive position and difficulties. As noted in Chapters One and Three, LDCs' distinguished position has firmly been recognised in the GATT/WTO system. The mercantilist bargain in the trade negotiations for obtaining better access in other countries' markets in exchange of their own market access commitments is not present in providing market access to LDCs. Instead, LDCs' market access is regulated by the principle of non-reciprocity, preferences and S&DT.[64]

4 Search for a Linkage with Market Access in Sustainable Development Principles

Sustainable development embodies a number of distinct but overlapping principles—incorporated far and wide in the international instruments, mostly multilateral environmental agreeemnts (MEAs). This section explores the intersection of market access—exclusively a trade instrument—with the constituting principles of sustainable

[62] Kyle Bagwell, Petros C Mavroidis and Robert W Staiger, 'It's a Question of Market Access' (2002) 96 *American Journal Of International Law* 56, 59; Kyle Bagwell and Robert W Staiger, 'The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues' (2001) 15(3) *Journal of Economic Perspectives* 69, 71.

[63] Matthew Stilwell, 'Trade and Environment in the Context of Sustainable Development' in Markus W Gehring and Marie-Claire Cordiner Segger (eds), *Sustainable Development in World Trade Law* (2005) 27, 43.

[64] Chapter One, ss 3.2, 3.3.

development to establish the linkage between market access and sustainable development. Judge Weeramantry found the components of the concept (he regards it as 'principle') emanating from well-established areas of international law: human rights, state responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, and good neighbourliness, among others.[65]

Philippe Sands discerned two categories of principles in the UNCED instruments[66] that reflect the concept of sustainable development:

1. The first comprises those core principles which seem to be inherent in the concept of sustainable development and which points to the limits that must be placed on the use of natural resources. These are:

    - integration of environment and development;
    - application of equity between States;
    - consideration of the needs of future generations; and
    - non-exhaustion of renewable natural resources.

2. A second category of principles is drawn from other areas of international law and is intended to provide assistance in achieving sustainable development. These are:

    - sovereign rights of States over natural resources and the responsibility not to cause environmental damage;
    - good neighbourliness and international cooperation;
    - common but differentiated responsibility;
    - precaution and polluter-pays principle.[67]

The International Law Association (ILA) Committee on Sustainable Development has elaborated a set of 'Principles of International Law for Sustainable Development', also known as the ILA New Delhi Principles, which are as follows:[68]

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[65] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Jurisdiction)* [1997] ICJ Rep 7; *Separate Opinion of Vice-President Weeramantry*, 88 <http://www.icj-cij.org/docket/files/92/7383.pdf> at 20 June 2008.

[66] The *1992 Rio Declaration, Agenda 21*, the *Forest Principles*, the *1992 Framework Convention on Climate Change* and the *1992 Convention on Biological Diversity*.

[67] Sands, 'International Law in the Field of Sustainable Development' above n 3, 338.

1. The duty of states to ensure sustainable use of natural resources
2. The Principle of equity and the eradication of poverty
3. The Principle of Common but Differentiated Responsibility (CBDR)
4. The Precautionary Principle
5. The Principle of Public Participation and Access to Information and Justice
6. The Principle of Good Governance
7. The Principle of Integration and Interrelationship

These are all various principles embodied in the 1992 *Rio Declaration*. This section does not cover all the sustainable development principles. It limits itself only to a few: principle of integration, CBDR, precautionary principle, polluter pay principle, principles of intergenerational equity and intragenerational equity.

4.1 Principle of Integration

Our Common Future prudently observes:

> Ecology and economy are becoming more interwoven—locally, regionally, nationally, and globally—into a seamless net of causes and effects.[69]
>
> Until recently, the planet was a large world in which human activities and their effects were neatly compartmentalised within nations, within sectors (energy, agriculture, trade), and within broad areas of concern (environmental, economic, social). These compartments have begun to dissolve. This applies in particular to the various global 'crises' that have seized public concern, particularly over the past decade. These are not separate crises: an environmental crisis, a development crisis, an energy crisis. They are all one.[70]

The principle of integration has been regarded as the 'backbone of sustainable development'.[71] Philippe Sands regarded the principle of integration as 'the

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[68] *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, UN Doc A/CONF.199/8 (9 August 2002). This document was adopted in the 70th Conference of International Law Association, held in New Delhi, India, 2–6 April 2002.

[69] *Our Common Future*, above n 11, 5.

[70] Ibid 4.

[71] Commission on Sustainable Development, 'Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development' (Paper No 3, Prepared for the Commission

commitment to integrate environmental considerations into economic and other development, and to take into account the needs of economic and other social development in crafting, applying and interpreting environmental obligations'.[72] Both the *Rio Declaration* and the *Agenda 21* speaks of the integration between environment and development.[73] The WTO AB in *US–Shrimp/Turtle* accepts the concept of sustainable development as integration of economic and social development and environmental protection.[74] The need for integration is strongly reinforced in the *2002 Johannesburg Declaration* and the *2002 JPOI* where importance has been placed on strengthening and promoting the integration of the three components of sustainable development—economic development, social development and environmental protection—as interdependent and mutually reinforcing pillars.[75]

The principle of integration is closely linked with the market access issue. Market access is exclusively a matter of international trade law. Market access policies directly or indirectly affect environmental and social policies as well as other areas of economic policies. First, enhanced market access for LDCs is directly linked with their poverty, economic growth, food security, employment, labour standards, health, education and environmental problems, which are, basically, different elements of sustainable development. This inter-relation is subject to extensive research, with divergent findings, though the bulk of this research is done under the 'Trade and ....' fashion.[76]

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on Sustainable Development, Fourth Session, Geneva, 26–28 September 1995) <http://www.un.org/documents/ecosoc/cn17/1996/background/ecn171996-bp3.htm> at 25 July 2011.

[72] Sands, *Principles of International Environnemental Law*, above n 2, 263.

[73] Principle 4 of the *Rio Declaration*, 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. The shift of the Rio to a more anthropocentric approach is evident in the way the principle of integration has been drafted. It shows a shift from the Stockholm Principle 13. Here, Paragraph 39.1 of Agenda 21 reflects a balanced approach in which States commit to focus on the 'further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns'. An entire chapter of Agenda 21 is dedicated to this approach. Chapter 8 of Agenda 21 is named 'Integrating Environment and Development in Decision-Making'.

[74] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R footnote 107 (Report of the Appellate Body).

[75] *Johannesburg Declaration on Sustainable Debelopment*, para 5; *Johannesburg Plan of Implementation*, para 2.

[76] See Chapter One, s1.3.

Nevertheless, they include the inevitable tool of market access. Second, when trade restrictions are imposed on exports for not maintaining certain environmental or labour conditions or when NTBs are imposed by way of SPS and TBT measures, eco-labelling and eco-packaging requirements, it is actually the market access of the exporting countries that is obstructed by these environmental or social considerations. Finally, environmental and social conditionality in trade preferential schemes, (for example, the EU GSP+ scheme) reward sustainable development initiative of developing countries by giving them enhanced market access.[77] Some trade preferential schemes incorporate sustainability impact assessment (SIA) to examine the impact of market access on not only economic, but also other social and environmental aspects of developing countries.

SIA is one of the processes for implementation of the principle of integration. It ensures that economic development decisions consider their potential social and environmental aspects or in other words, which assess the potential impact of trade policy reform on sustainable development.[78] An SIA was undertaken for over four years starting from late 2002 under the negotiations of Economic Partnership Agreements (EPAs) between the EU and the Africa, Caribbean and Pacific (ACP) group of states to assess the impact of the agreements on sustainable development of ACP countries. Two of the recommendations coming out of the SIA, address the market access issue of ACP in both ways—ACPs' DFQF market access in EU market as well as market protection for ACPs, which will lift the threat of livelihood and food security of rural population.[79]

4.2 Principle of Intergenerational and Intragenerational Equity

Edith Brown Weiss regarded sustainable development as a principle of intergenerational as well as an intragenerational equity.[80] The articulation of sustainable development in

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[77] Visit <http://ec.europa.eu/trade/issues/global/gsp/memo230605_en.htm> at 25 March 2009. See Chapter Three, s 3.1.

[78] Ibid 104; Clive George and Colin Kirkpatrick, 'Trade and Development: Assessing the Impact of Trade Liberalisation on Sustainable Development' (2004) 38(3) *Journal of World Trade* 441.

[79] PricewaterhouseCoopers, *Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements—Key Findings, Recommendations and Lessons Learned* (2007) PricewaterhouseCoopers <http://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_134879.pdf> at 23 May 2011.

[80] Edith Brown Weiss, 'Intergenerational Equity: Toward an International Legal Framework' in Nazli Choucri (ed), *Global Accord* (1993) 333, 336.

the Brundtland Report as development meeting the needs of both present and future generations reveals the intergenerational feature of sustainable development. This was recognised in *US–Shrimp Article 21.5*, where the WTO Panel found that 'the concept is elaborated ... so as to put in place development that is sustainable ... that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs'.[81]

Sustainable development relies on a commitment to equity with future generations. This ethical and philosophical commitment acts as a constraint on a natural inclination to take advantage of our temporary control over the Earth's resources, and to use them only for our own benefit without careful regard for what we leave to our children and their descendants.[82] The intergenerational equities should also consider past intergenerational inequities. While present generations must not appropriate from future generations, the misappropriations by past generations cannot be brushed aside.[83]

Intragenerational equity appears to be a condition precedent of intergenerational equity. Edith Brown Weiss found an intricate relation between the two—complementing or prejudicing the achievement of the objectives of the other.[84] To him, the right of the future generation as well as the poverty of the present generation will have to be addressed simultaneously.[85] The 'intra'-generational aspect is directed at the serious socio-economic asymmetry in resource access and use within and between societies and nations that has exacerbated environmental degradation and the inability of a large part of humanity to meet even its basic needs adequately.[86]

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[81] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia,* WTO Doc WT.DS58.RW (2001), footnote 202.

[82] Edith Brown Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992) 19(1) *American University Journal of International Law and Policy* 19, 19.

[83] Kamal Nath, 'Trade, Environment and Sustainable Development' in Veena Jha, Grant Hewison and Maree Underhill (eds), *Trade, Environment and Sustainable Development: A South Asian Perspective* (1997) 15, 15.

[84] Weiss, 'Intergenerational Equity: Toward an International Legal Framework', above n 80, 336.

[85] Weiss, 'In Fairness to Future Generations and Sustainable Development', above n 82, 22.

[86] Gregory F Maggio, 'Inter/intra generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources' (1996) 4 *Buffalo Environmental Law Journal* 161.

The world trading system raises concern both for intergenerational and intragenerational equity. Unequal distribution of the benefits gained from international trade due to the inherent Western biasness of the trading regime, declining terms of trade of the primary products in which developing countries have comparative advantage,[87] and the unsustainable consumption pattern of developed countries contribute to intragenerational inequity between developed and developing countries. This also plays a significant role in enhancing intergenerational inequity in developing countries. The *1971 Founex Report* illustrated one of the primary contentions of developing countries that the key environmental problems in developing countries are poverty and underdevelopment and other issues directly related to these two phenomena.[88] This widespread poverty and underdevelopment in LDCs is due to the resource control and misdistribution through financial and other structural levers by developed countries to maintain their extravagant lifestyles.[89] The present market access regime, couched in scores of market access barriers, can contribute to the existing injustice and imbalance. Contrarily, amending the market access regime in favour of LDCs can contribute to sustainable development by entailing both intergenerational and intragenerational equity.

4.3 Principle of Common but Differentiated Responsibility

The CBDR principle has developed from the application of equity in general international law, and the recognition that special needs of developing countries must be taken into account in the development, application and interpretation of rules of international environmental law.[90] The most widely accepted elaboration of the principle is found in Principle 7 of the *Rio Declaration*:

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[87] Brundtland Report mentioned that LDCs use primary commodities for 73 per cent of their export earnings: *Our Common Future*, above n 11, 127.

[88] *Development and Environment: The Founex Report* (4–12 June 1971), reprinted in *In Defence of the Earth* (1980).

[89] Maggio, above n 86, 178.

[90] Sands, *Principles of International Environmental Law,* above n 2, 285.

> In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of technologies and financial resources they command.

The principle articulated in the *Rio Declaration* includes two fundamental elements. The first concerns the common responsibility of States for the protection of the environment at the national, regional and global levels. Instances of common responsibility appear in a wide range of international treaties, among others, on subjects such as natural and cultural heritage,[91] outer space and the moon,[92] climate change,[93] biodiversity,[94] and conservation of wild animals.[95] The second element concerns the need to take into account the different circumstances, particularly each State's contribution to a specific problem and its ability to prevent, reduce and control the threat.[96] It also appears in an extensive number of international treaties in areas including marine pollution and protecting the ozone layer.[97]

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[91] *1972 Convention Concerning Protection of World Cultural and Natural Heritage,* Preamble*: Convention for the Protection of World Cultural Property and Natural Heritage (Paris)* opened for signature 16 November 1972, 27 UST 37 (entered into force 17 December 1975).

[92] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967), art 1.

[93] *United Nations Framework Convention on Climate Change (New York)*, opened for signature 9 May 1992, 31 ILM 849 (1992) (entered into force 24 March 1994), art 4(1).

[94] *1992 United Nations Convention on Biological Diversity*, art 1: *Convention on Biological Diversity*, opened for signature 5 June 1992, 31 ILM 822 (1992) (entered into force 29 December 1993).

[95] *Convention on the Conservation of Migratory Species of Wild Animals(Bonn)*, opened for signature 23 June 1979, 19 ILM 15 (1980) (entered into force 1 November 1983) Preamble.

[96] Segger et al, 'Prospects for Principles of International Sustainable Development Law, above n 40, 56; Duncan French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' (2000) 49(1) *International and Comparative Law Quarterly* 35, 46.

[97] For instance, *United Nations Convention on the Law of Sea (Montego Bay)*, opened for signature 10 December 1982, 21 ILM 1261 (1982) (entered into force 16 November 1994), Preamble and art 207; *Convention for the Protection of Ozone Layer (Vienna)*, opened for signature 22 March 1985, 26 ILM 1529 (entered into force 22 September 1988), art 2(2). For details, see Sands, *Principles of International Environmental Law*, above n 2, 285–9. Sands, 'International Law in the Field of Sustainable Development', above n 3, 303.

The CBDR principle in international environmental law has its philosophical basis in the differential treatment approach in international law.[98] This approach is taken to persuade the countries that are in a less advantageous position to participate in the international regime concerned. Differential implementation, in the form of technology transfer or assistance programmes, or delayed implementation, constitutes one of the ways in which the international community seeks to develop effective tools in the pursuit of sustainable development at the local and international levels.[99] The differential treatment approach is also found in international trade law as S&DT. The GATT/WTO system has officially embraced the differential treatment approach. Most WTO agreements contain provisions for S&DT for LDCs. Among these, preferential treatment under the GSP schemes for developing countries and DFQF treatment for LDCs' exports in developed countries markets are directly linked with the market access issue, which contributes to their sustainable development. Hence, CBDR principle applies to market access issue, though in a slightly different form, as S&DT. The most apparent difference between the two is that in the former, developed Members' responsibility for deteriorating the environment has been acknowledged, while the latter does not accept developed countries' contribution for the degrading economy of developing countries. Chapter Three depicts how S&DT relating to market access has evolved in the GATT/WTO system.

4.4 The Precautionary Principle

Originated in the domestic politics of West Germany in the 1960s and 1970s, the precautionary principle was gradually endorsed in the national legislation of many countries and in international environmental treaties.[100] Principle 15 of the *Rio Declaration* clearly articulated the principle:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of irreversible damage, lack

[98] See generally Lavanya Rajamani, *Differential Treatment in International Environmental Law,* Oxford Monographs in International Law (2006).

[99] Cullet, above n 41, 2.

[100] Gilbert R Winham, The GMO Panel: Applications of WTO Law to Trade in Agricultural Biotech Products' (2009) 31(3) *European Integration* 409, 418.

of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

This principle responds to an important problem in decision making where the action to protect environment does not have to wait for available information. By the time the information will be available, irreparable harm will be caused to the environment. In WTO law, the precautionary principle is found in the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement),[101] though it was not specifically referred to by name in the text. The AB in *EC–Hormones*[102] states that the principle finds reflection in Article 5.7 of the SPS Agreement.[103] The Article allows Members to adopt SPS measures provisionally where relevant scientific evidence is insufficient.[104]

In *EC–Biotech*,[105] the EC unsuccessfully justified its policies on biotech products by referring to precautionary principle, either in connection with the application of general principles of international law, or through the use of Article 5.7 of the *SPS Agreement*.[106] However, efforts of the EC did not find support from the *EC–Biotech* Panel. The Panel refused to decide on whether precautionary principle is a customary principle of international law and thereby would be relevant to the interpretation of WTO agreements. The Panel also decided that the provisions of the *Cartagena Protocol on Biosafety of 2000*[107] will not be applicable in relations between the parties to *EC–Biotech* since all of them were not parties to the *Cartagena Protocol* (also known as

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[101] *Agreement on the Application of Sanitary and Phytosanitary Measures,* 1867 UNTS I-31874 (1995) 493, reproduced in WTO, *The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 59.

[102] *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1998) (Report of the Appellate Body).

[103] Ibid para 124.

[104] See Chapter Four, s 5.3.

[105] *European Communities—Measures Affecting the Approval and Marketing of Biotech Products,* WTO Docs WT/DS291/R, WT/DS292/R, WT/DS293/R (2006) (Report of the Panel).

[106] Winham, above n 100, 418.

[107] *Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal)*, opened for signature 29 January 2000, 30 ILM 1027 (entered into force 11 September 2003).

Biosafety Protocol).[108] It is important to note that *Biosafety Protocol* embraced the precautionary principle to ensure the safe transfer, handling and use of living (genetically) modified organisms.[109] Again, the Panel did not contest the argument of the EC that Article 5.7 is an expression of the precautionary principle.[110]

Therefore, it appears from the WTO jurisprudence that it has taken a dogmatic approach in relation to precautionary principle, which is welcoming for LDCs. The more the WTO becomes supportive of the precautionary approach, the greater the space for the national precautionary measure and this increases the risk of unilateral market access barriers for environment and health reasons.[111]

5 Poverty as Impediments to Sustainable Development of LDCs

According to the *Least Developed Countries Report 2010*, the number of people living in extreme poverty in LDCs has continued to increase over the last 30 years, and by 2007 it was twice as high as in 1980.[112] In 2007, 53 per cent of the population of LDCs was living in extreme poverty, on less than US$1.25 a day, and 78 per cent was living on less than $2 a day.[113] Poverty is the first and foremost challenge for LDCs in achieving sustainable development goals. Poverty is itself a contested term open to different definitions and various theoretical frameworks.[114] The objective of this section is to demonstrate how poverty links two diverse concepts: market access and

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[108] Winham, above n 100, 419–20.

[109] Ibid 418.

[110] Ibid 420.

[111] Wybe T H Douma and M. Jacobs, 'The Beef Hormones Dispute and the Use of National Standards under WTO Law' (1999) *European Environmental Law Review* 137.

[112] UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs* (2010) 35.

[113] Moreover, the incidence of extreme poverty—the percentage of the total population living below the poverty line of $1.25 per day—was significantly higher in African LDCs, at 59 per cent, than in Asian LDCs, at 41 per cent: ibid 32–4.

[114] Jennifer A. Elliott, *An Introduction to Sustainable Development,* Routledge Perspectives on Development Series (2005) 57; Else Oyen, 'Poverty Research Rethought' in S M Miller and Syed Abdus Samad (eds), *Poverty: A Global Review: Handbook on International Poverty Research* (1996).

sustainable development. It begins with an examination of poverty in sustainable development instruments.

As explained in Chapter One, Principle 5 of the *Rio Declaration* states that eradicating poverty is an indispensable requirement for sustainable development. The third chapter of the *Agenda 21*, 'Combating Poverty', states that a specific anti-poverty strategy is one of the basic conditions for ensuring sustainable development.[115] Principle 11 of the *2002 Johannesburg Declaration* recognises 'poverty eradication' as one of the 'overarching objectives of, and essential requirements for sustainable development'. Similarly, Article 7 of the *2002 JPOI* highlights that 'eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development, particularly for developing countries'. It also incorporates a separate chapter on poverty entitled 'Poverty Eradication'.

Our Common Future identifies poverty as one of the most important causes of environmental degradation.[116] *Agenda 21* regards poverty as 'a complex multidimensional problem' which entertains no 'uniform solution' for 'global application'.[117] It calls for 'an effective strategy for tackling the problems of poverty, development and environment simultaneously' since they are interrelated problems.[118] The *2002 JPOI* makes a number of recommendations for poverty eradication, which include developing national programmes for sustainable development, promoting participation of women and indigenous communities in decision making, delivering basic health services, providing access to agricultural resources, increasing food availability and affordability and strengthening the contribution of industrial development to poverty eradication and sustainable natural resource management.[119]

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[115] *Agenda 21*, article 3.1.

[116] *Our Common Future*, above n 11, 72-5.

[117] *Agenda 21*, article 3.1.

[118] Ibid.

[119] *Johannesburg Plan of Implementation*, ch ii.

Poverty is also a major concern of the World Bank, the International Monetary Fund (IMF), the GATT/WTO and other major UN agencies, such as the UN Development Programme (UNDP) and the UNCTAD. The strategies of international institutions for dealing with poverty vary widely. For the World Bank, the basic strategy is two-fold:

(a) Providing opportunities which means increasing economic growth that makes use of the labour force of the poor and

(b) Increasing the capacity of the poor which consists of providing basic social services such as education, health care and family planning so that the opportunities can be availed.[120]

The UNDP developed a 'Human Development Index' encompassing measures of real purchasing power, education (adult literacy and combined primary, secondary and tertiary enrolment) and health (life expectancy).[121] The IMF developed an 'Enhanced Structural Adjustment Facility' to address poverty reduction.[122] The GATT/WTO upholds that trade is the engine of economic growth that automatically reduces poverty. The poverty reduction policies of the World Bank, the IMF and the GATT/WTO are criticised vehemently for being too optimistic.[123]

However, literature on the linkage between trade and poverty broadly answer the following questions.

5.1 Does Trade Liberalisation Lead to Economic Growth and Poverty Eradication?

While examining the relationship between trade and poverty in the poor countries, Jagdish Bhagwati and T.N. Shrinivasan, after scrutinising the theoretical and empirical

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[120] World Bank, *World Development Report 1990: Poverty* (1990); Francine Mestrum, 'Poverty Reduction and Sustainable Development' (2003) 5(1/2) *Environment, Development and Sustainability* 41, 43–44.

[121] UNDP publishes Human Development Report from 1993 onwards: Elliott, above n 114, 57.

[122] Jean-Philippe Therien, 'Beyond the North–South Divide: the Two Tales of World Poverty' (1999) 20(4) *Third World Quarterly* 723, 729.

[123] Ibid.

evidence, found support for their two-step argument: 'trade promotes growth; and growth reduces poverty'.[124] Examining the trade patterns of a group of developing countries that have had larger cuts in tariff and large increases in actual trade volume since the 1980, David Dollar and Aart Kraay found that absolute poverty in those countries has fallen sharply because the income of the poor has increased due to the increased growth accompanied by expanded trade, thus, finding support for the hypothesis that open trade regime leads to faster growth and poverty reduction in poor countries.[125] Jeffrey D. Sachs and Andrew Warner[126] and Jeffrey Frankel and David Romer[127] are also in favour of the positive correlation between trade liberalisation, growth and poverty reduction.[128]

L. Alan Winters, Neil McCulloch, and Andrew McKay[129] also hold the view that trade liberalisation will alleviate poverty in the long term. They strongly deny claims of the adverse effects of trade liberalisation on employment, wages or government spending on the poor due to falling fiscal revenues. However, they acknowledge that the impact of trade liberalisation on poverty depends on the environment in which it is carried out, including the accompanying policies. They also admit the existence of evidence that poorer households may be less able than richer ones to protect themselves against adverse effects or to take advantage of positive opportunities created by trade policy reform. Then, surprisingly and quite illogically, they maintain that trade liberalisation may be beneficial for the poor even in the absence of any complementary policies to address the difficulties of the poor household.[130]

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[124] Jagdish Bhagwati and T N Srinivasan, 'Trade and Poverty in the Poor Countries' (2002) 92(2) *The American Economic Review* 180.

[125] David Dollar and Aart Kraay, 'Trade, Growth and Poverty' (2004) 114 *The Economic Journal* 22.

[126] Jeffrey D Sachs and Andrew Warner, 'Economic Reform and the Process of Global Integration' (1995) 1 *Brookings Papers on Economic Activity* 1.

[127] Jeffrey Frankel and David Romer, 'Does Trade Cause Growth?' (1999) 89(3) *American Economic Review* 379.

[128] Bhagwati and Srinivasan, above n 124.

[129] L Alan Winters, Neil McCulloch and Andrew McKay, 'Trade Liberalisation and Poverty: the Evidence So Far' (2004) 42(1) *Journal of Economic Literature* 72.

[130] Ibid.

A WTO study found that in a world economy marked by increasing income gaps between poor and rich countries, trade can be a factor in bringing about convergence in incomes between countries. It also found that the key to sustained poverty alleviation is economic growth. Usually growth has a positive outcome on poverty. The argument that openness stimulates long-term growth has a good deal of empirical support. To alleviate poverty, developing economies need to grow faster and the poor need to benefit from this growth. Trade can play an important part in reducing poverty, because it boosts economic growth and the poor tend to benefit from that faster growth.[131] The *Global Poverty Report*, prepared jointly by the regional development banks, the IMF and the World Bank,[132]found that comprehensive trade reform is helpful in reducing poverty if it is accompanied by appropriate enabling policies. It urged developed countries to remove trade barriers, reduce subsidies and allow access to their markets for goods from developing countries.[133]

The World Development Report 2000/2001[134] found that on average, market-oriented reforms, including making domestic market open to international trade have delivered lower inflation and higher growth—two powerful factors for reducing income poverty. Openness to international trade usually benefits the income of the poor people as much as anyone else. There is now substantial evidence that open trade regimes support growth and development. But the consequences for poor people depend crucially on how trade liberalisation affects the demand for their greatest asset—their (often unskilled) labour. Though trade liberalisation has delivered growth and poverty reduction, their distributional effects have been more complex. In countries where trade restrictions have created employment for the poor, trade liberalisation would hurt them first. Very often, trade reform unaccompanied by other developments, such as technological change, adversely affects unskilled labour and enhances inequality by creating jobs for skilled labour. Further, trade reforms in developing countries have not

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[131] Dan Ben-David, Hakan Nordstrom and L Alan Winters, *Trade, Income Disparity and Poverty* (2000).

[132] Asian Development Bank, African Development Bank and European Bank for Reconstruction and Development, Inter-American Development Bank, International Monetory Fund and World Bank, 'A Globalised Market—Opportunities and Risks for the Poor: Global Poverty Report 2001'(2001) (hereinafter *Global Poverty Report*).

[133] Ibid.

[134] World Bank, *World Development Report 2000/2001: Attacking Poverty* (2001).

always been matched by complementary reforms by rich countries. Hence, protectionism in developed countries imposes a heavy burden on developing world.[135] The *World Development Report 2001* observed that trade liberalisation yields substantial benefits only when countries have the infrastructure and institutions to underpin a strong supply response. Thus, trade opening needs to be well designed, with special attention to country specifics and to institutional and other bottlenecks. The sequencing of policies should encourage job creation and manage job destruction.[136]

The Least Developed Countries Report 2004[137] contradicted the usual view of the relationship between trade liberalisation and poverty that trade liberalisation is likely to have adverse effects in the short term, but in the long term, it will increase the growth potential of the economy. This report resulted in opposing findings from which it concluded that poverty trends during and in the aftermath of trade liberalisation are mixed, but its long-term effects are adverse in terms of both sustainability of economic growth and its inclusiveness.[138] However, the report did not clarify the rationale of these findings.

5.2 Does Improved Market Access Lead to Poverty Eradication?

The Least Developed Countries Report 2004 stated that international trade can play a powerful role in reducing mass poverty in LDCs, which requires sustained economic growth. It acknowledged the role of exports and imports in facilitating a process of sustained economic growth, the development of productive capacities, expansion of employment opportunities and sustainable livelihood. However, this report warned that improved market access by way of export expansion may not automatically result in poverty reduction, since it is highly probable that export-led growth will cause economic growth concentrated in a small part of the economy. Hence, improved market

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[135] Ibid 70–1.

[136] Ibid 8.

[137] UNCTAD, *The Least Developed Countries Report 2004: Linking International Trade with Poverty Reduction* (2004).

[138] Ibid 17.

access through export expansion is not enough to ensure the eradication of poverty.[139] What is required is the promotion of developmental linkages between growing export activities and the rest of the economy. Thus, the report stated, 'the relationship between trade and poverty is thus asymmetrical. Although LDCs with declining exports are almost certain to have a rising incidence of poverty, increasing exports do not necessarily lead to poverty reduction'.[140]

This report recommended three pillars that can act together coherently and synergistically in making international trade a more effective mechanism in poverty reduction in LDCs:

- better national development strategies that integrate trade objectives as a central component;
- improvements in the international trade regime, including issues that go beyond the scope of the WTO, to reduce international constraints on development in LDCs; and
- increased and effective international financial and technical assistance for developing production and trade capacities.[141]

Kamal Malhotra et al[142] proposed to reform the anti-poor trade regime from a human development perspective for improving the human development situation of developing countries. They emphasised that market access is important for enabling developing countries to reach a level of development at which they can compete on an equal basis and can make important contributions to human development.[143] Dani Rodrik proposed an 'enlightened standard view', which encompasses both enhanced market access in the advanced industrial countries and a range of domestic institutional reform (ranging from

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[139] Ibid 4–8.

[140] Ibid 9.

[141] Ibid 21.

[142] Kamal Malhotra et al, *Making Global Trade Work for the People* (2003).

[143] Ibid; Dani Rodrik, *The Global Governance of Trade as if Development Really Mattered* (2001) (Background Paper for Trade and Sustainable Human Development Project, UNDP) <http://gopher.mtholyoke.edu/courses/epaus/econ213/rodrikgovernance.PDF> at 23 July 2011.

legal and administrative reform to safety nets) to render economic openness viable and growth promoting.[144]

The *Least Developed Countries Report 2008* found that the relationship between enhanced market access, economic growth and poverty reduction has weakened in LDCs since 2000. One of the reasons for this is because export expansion is concentrated in natural resource extraction sites or export-processing zones, with few linkages with the rest of the economy.[145]

This literature reveals that most of the work in the area of trade and poverty deals with the relationship between domestic trade reform (trade liberalisation by reducing tariff and non-tariff barriers) and poverty rather than the relationship between international trade reform by ensuring enhanced market access and poverty reduction.

Poverty is exacerbated by food insecurity and lack of employment and women's empowerment. Widespread poverty, food insecurity and environmental degradation cause severe human suffering and threaten to destabilise global, regional and national economic and ecological conditions.[146] *Our Common Future* identifies the food crisis as one of the biggest challenges for developing countries for achieving sustainable development. A chapter entitled 'Food Security: Sustaining the Potential' is devoted to this issue.[147] *Agenda 21* urges for action to promote food security[148] and women's empowerment[149] in the context of implementation of sustainable development concept. The WTO Preamble emphasises the role of trade in ensuring full employment. The

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[144] Rodrik, above n 143.

[145] In nominal terms, the value of merchandise exports from LDCs rose by some 80 per cent from 2004 to 2006, reaching US$99 billion in 2006. However, 76 per cent of the total increase in LDCs' merchandise exports from 2004 to 2006 can be attributed to the oil and mineral exporting LDCs (Angola, Chad, Dominion Republic of Congo, Equatorial Guinea, Guinea, Mali, Mauritania, Mazambique, Sudan, Timor-Leste, Yemen and Zambia): UNCTAD, *The Least Developed Countries Report 2008: Growth, Poverty and the Terms of Development Partnership* (2008) 5, 10.

[146] Per Pinstrup-Anderson and Rajul Pandya-Lorch, 'Food Security and Sustainable Use of Natural Resources: a 2020 Vision' (1998) 26 *Ecological Economies* 1, 2.

[147] *Our Common Future*, above n 11, ch 5, 162-90.

[148] *Agenda 21*, ch 14.

[149] Ibid ch 24.

2011 *Istanbul Plan of Action* (IPOA)[150] points out the importance of women's empowerment for the development of LDCs. This thesis argues that improved market access for LDCs facilitates increased food security, women's empowerment and employment, assists in poverty alleviation, and contributes to the sustainable development of LDCs.

6 Sustainable Development within the GATT/WTO Framework: An Institutional Approach

To appreciate trade and sustainable development interface, it is instructive to trace how the original interface between trade and environmental protection in the GATT system gradually evolved into a trade–sustainable development debate within the WTO system. This section argues that trade–sustainable development debate within the WTO is no longer confined to the trade–environment debate.

6.1 Trade–Sustainable Development Debate within the GATT

When the GATT was negotiated in 1946, there was no reference to the need for the sustainability of economic growth. The environment as a major policy issue emerged two decades later. The economic model underlying the GATT/WTO system is the Ricardian model of comparative advantage,[151] which does not consider factors such as environmental deterioration caused by over-exploitation or the environmental externalities of economic activities.[152] Hence, there was no explicit mention of environment in the GATT 1947, though trade-related environmental measures (TREMs) were allowed only under the 'General Exceptions' of Article XX for 'protecting human, animal or plant life or health'[153] and 'conservation of exhaustible natural resources'.[154]

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[150] United Nations General Assembly, *Programme of Action for the Least Developed Countries for the Decade 2011-2020*, UN Doc A/CONF.219/3 (Fourth United Nations Conference on the Least Developed Countries, Istanbul, Turkey, 9-13 May 2011) <http://ldc4istanbul.org/uploads/IPoA.pdf> at 6 June 2011.

[151] See Chapter One, ss 3.1, 3.3.

[152] Kareen L Holtby, William A Kerr and Jill E Hobbs, *International Environmental Liability and Barriers to Trade: Market Access and Biodiversity in the Biosafety Protocol* (2007) 2; Shawkat Alam, *Sustainable Development and Free trade,* Routledge Studies in Development Economics (2007) 62.

[153] *GATT 1947*, art XX (b).

The increasing concern of international communities about the impact of economic growth on social development and environment led to the convening of the 1972 Stockholm Conference. During its preparation, trade officials became concerned that anti-pollution measures could become major trade obstacles with the emergence of 'green protectionism'. The study entitled *Industrial Pollution Control and International Trade*,[155] prepared by the GATT Secretariat and submitted to the Stockholm Conference, naturally reflected this fear. From a market access standpoint, this study is significant since it is the first international document that recognised that environmental measures to combat pollution may create market access barriers. Another market access issue addressed by the study is the process and production methods (PPMs) that discriminate between two similar products on the basis of their PPMs. This report urged to refrain from making any discrimination on the basis of PPMs. It also recognised the concern about trade restrictions imposing national policies relating to the environment, labour, health and other social considerations and recommended these policies be discussed outside the domain of the GATT.[156] In November 1971, the GATT General Council established a Group on Environmental Measures and International Trade (the EMIT Group) to examine whether any trade measure for environmental protection and pollution control create market access barriers. After two decades of stalemate, the EMIT met for the first time in 1991 prior to the 1992 UNCED.

However, even before this trade and environment relation was recognised, trade was attributed as an instrument of social development—one of the three pillars of sustainable development. In 1966, Part IV of the GATT, entitled *Trade and Development*, entered into force.[157] Contracting parties recognised international trade

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[154] *GATT 1947*, art XX (b). However, such measures can be applied only when they do not create any arbitrary or unjustifiable discrimination between the similarly situated countries or disguised restriction on international trade, Chapeau of the Article XX of the GATT 1947.

[155] Jan Tumlir, 'Industrial Pollution Control and International Trade' (GATT Studies in International Trade July 1971).

[156] M Rafiqul Islam, *International Trade Law of the WTO* (2006), 514; Gary P Sampson, *The WTO and Sustainable Development* (1st ed, 2005) 17–18; *Early Years: Emerging Environment Debate in GATT/WTO* <http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm> at 23 February 2009.

[157] *Part IV*, GATT BISD, 13th Supp, 1–12 (1965).

'as a means of achieving economic and social advancement'.[158] However, Part IV led to another significant stream of development—differential treatment for developing countries—within the GATT/WTO system. The market access agenda of developing countries lies in this course of development and this issue is covered in Chapter Three. The objective of this thesis is to link LDCs' market access to the sustainable development objectives of the WTO.

Thus, developing countries' current concerns about environmental and social policies to create market access barriers is similar to the concern of the GATT system itself when developed countries in pursuing their rapid economic growth were keen to dismantle trade barriers. The period between the Stockholm and Rio Conferences (1972–1992) witnessed this effort. During the Tokyo Round Negotiations (1973–79), the *Agreement on Technical Barriers to Trade* (hereinafter TBT Agreement)[159] was adopted for the transparent and non-discriminatory application of technical regulations and standards. At the 1982 GATT Ministerial Meeting, Members decided to examine the measures needed to bring under control the export of products prohibited domestically (on the grounds of harm to human, animal, plant life or health, or the environment). This led to the creation, in 1989, of a Working Group on the Export of Domestically Prohibited Goods and Other Hazardous Substances.

When the Uruguay Round of trade negotiations (1986–1994) were launched by *the Punta del Este Declaration of 1986*,[160] no reference to environmental concerns was made. This raised concern outside the GATT.[161] To address this issue, the EMIT Group was convened in 1991 with its three-point agenda: an examination of trade provisions contained in existing MEAs; the multilateral transparency of national environmental regulations likely to have trade effects; and the trade effects of new packaging and labelling requirements aimed at protecting the environment. All these agendas are about

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[158] *GATT 1947*, Part IV, art XXXVI:1(e).

[159] *Agreement on Technical Barriers to Trade*, reproduced in WTO, *The Legal Texts*, above n 101, 121. This is also known as the 'Standards Code'.

[160] *Ministerial Declaration, Punta del Este*, GATT BISD, 33rd Supp, (1987) 3.

[161] Steve Charnovitz, 'The World Trade Organization and the Environment' (1997) 8 *Yearbook of International Environmental Law* 104.

market access barriers. The Uruguay negotiations, the EMIT Group meeting and the UNCED Summit were taking place within the same timeframe, sharing each other's view regarding the trade–environment linkage. This is manifested in a GATT Secretariat report entitled *International Trade,* released in 1992.[162] The second part of the report under the heading of *Trade and Environment* clearly states that the GATT rules do not prevent governments adopting efficient policies to safeguard their own domestic environment but at the same time, warns against the use of unilateral trade measures.[163] It is important to quote from the report to uncover the striking similarity of the GATT's concern and developing countries' concern regarding environmental measures:

> When the environment problem is due to production or consumption activities in another country, the GATT rules are more of a constraint, since they prohibit making market access dependent on changes in the domestic policies or practices of the exporting country. The rationale for this is that to do otherwise would invite a flood of import restrictions as countries (especially those with large markets) either attempted to impose their own domestic environmental, economic and social policies on other countries, or used such an attempt as a pretext for reducing competition from imports.
>
> The real risk, therefore, is not that trade policies will be used, but that they will be used unilaterally. If the door were opened to use trade policies unilaterally … to attempt to force other countries to adopt domestically-favoured practices and policies, the trading system would start down a very slippery slope. Countries are not clones of one another, and will not wish to become so—certainly not under the threat of unilateral trade measures.[164]

Unfortunately, these common concerns of the GATT Members now remain the sole concern of developing countries and developed Members take the same course of action that they once condemned. In the meantime, in the early 1990s, the *Tuna–Dolphin disputes* between the United States (US) and Mexico: *US–Tuna/Dolphin I*)[165] and between the US and the European Community (EC)/the Netherlands: *US–Tuna/Dolphin*

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[162] GATT Secretariat, 'International trade 1990–1991' vol 1 (General Agreement on Tariffs and Trade, 1992) <http://www.ciesin.columbia.edu/docs/008-082/008-082.html> at 9 May 2011.

[163] Ibid.

[164] GATT Secretariat, 'International trade 1990–1991' vol 1 (General Agreement on Tariffs and Trade, 1992) <http://www.ciesin.columbia.edu/docs/008-082/008-082.html> at 9 May 2011.

[165] *United States—Restrictions on Imports of Tuna*, GATT Doc DS21/R/155 (1991) (Report of the Panel).

II,[166] brought the links between environmental protection and trade flows to the forefront of the GATT.[167]

6.2 Trade–Sustainable Development Debate within the WTO

The term 'sustainable development' made its first appearance in the WTO instrument with the Preamble of the *1994 WTO Agreement*. Contemporary development of international environmental law in the UNCED was more likely to influence the insertion of sustainable development in the WTO Preamble.[168] To provide a few examples regarding the trade–sustainable development interface, Principle 12 of the *Rio Declaration* stipulates: 'States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation'.

Agenda 21 speaks of the trade–sustainable development linkage very specifically in several places in its second chapter, 'International Cooperation to Accelerate Sustainable Development in Developing Countries and Related Domestic Polices'. It calls for the international economy to provide for a supportive international climate for achieving environment and development goals. Two pillars for achieving those goals are (a) promoting sustainable development through trade liberalisation;[169] and (b) making trade and environment mutually supportive.[170] Taking the spirit from these stipulations, WTO Members recognise in the Preamble of the *WTO Agreement*[171] that:

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[166] *United States—Restrictions on Imports of Tuna*, GATT Doc DS 29/R (1994) (Report of the Panel).

[167] Islam, above n 156, 514–6; Sampson, above n 156, 19–25; *Early Years: Emerging Environment Debate in GATT/WTO* <http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm> at 30 January 2009; WTO, *Trade and Environment at the WTO* (2004).

[168] Jurgen Wiemann, 'Impacts for Developing Countries' in Sachin Chaturvedi and Nagesh Kumar (eds), *Environmental Requirements and Market Access: Reflections from South Asia* (2007) 29, 30; Markus W Gehring and Marie-Claire Cordiner Segger, 'Introduction' in Markus W Gehring and Marie-Claire Cordiner Segger (eds), *Sustainable Development in World Trade Law* (2005) 1, 9–10.

[169] It claims that an 'open, equitable, secure, non-discriminatory and predictable multilateral trading system' consistent with the goals of sustainable development will promote sustainable development through trade: *Agenda 21*, arts 2.3, 2.5.

[170] To make trade and environment mutually supportive, it recommends that trade and environmental policies will have to be mutually supportive in favour of sustainable development: *Agenda 21*, art 2.19.

> Their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the *objective of sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[172]

Here, the concept of sustainable development is mentioned in connection with the optimal use of the world's resources. This may be partly because the Preamble was drafted as an expansion of the GATT 1947 Preamble, which refers conclusively to the need for 'developing the full use of the resources of the world'.[173] Hence, the WTO Preamble does not refer to sustainable development as the goal of the WTO, but rather as guidance for making the best possible use of the world's resources. However, the Preamble has widened the scope of the WTO and formally linked international trade regime with the approach of elevating standards of living and income for people, ensuring employment and protecting and preserving the environment. More so, it pledges to achieve the above objectives bearing in mind the respective needs and concerns of countries that are at different levels of economic development.

In the spirit of the WTO Preamble, the *1996 Singapore Ministerial Declaration*[174] pronounces sustainable development as a goal of the WTO. Paragraph six of the Declaration says: 'In pursuit of the goal of sustainable growth and development for the common good, we envisage a world where trade flows freely'. The paragraph continues with a number of commitments for:

- a fair, equitable and more open rule-based system;

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[171] *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS I-31874 (1995) (entered into force 1 January 1995) 154 <http://treaties.un.org/untc//Pages//doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf> at 10 June 2011.

[172] Ibid Preamble (emphasis added).

[173] Gehring and Segger, above n 168, 10.

[174] *Singapore Ministerial Declaration*, WTO Ministerial Conference, Singapore, WTO Doc WT/MIN(96)/DEC (18 December 1996) (adopted on 13 December 1996). <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> at 30 January 2009.

- progressive liberalisation and elimination of tariff and NTBs to trade in goods;
- progressive liberalisation of trade in services;
- rejection of all forms of protectionism;
- elimination of discriminatory treatment in international trade relations;
- integration of developing and least developed countries and economies in transition into the multilateral system; and
- the maximum possible level of transparency.[175]

These commitments are made with the aim of achieving sustainable growth and development, avowing that the role of the WTO will be guided by the goal of sustainable development. While describing the working mandate of the Committee on Trade and Environment (CTE) under the heading of 'trade and environment', Paragraph 16 of the *Singapore Ministerial Declaration* also states: 'Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development'.[176] One significant improvement is that here sustainable development objectives have been linked to the implementation of the international trade regime, rather than simply the optimal use of the natural resources.[177] Notably, it announces that WTO agreements are in line with the concept of sustainable development. What is needed is only their 'full implementation'. In the same vein, the *1998 Geneva Ministerial Declaration*[178] states: 'We shall also continue to improve our efforts towards the objectives of sustained economic growth and sustainable development'.[179] In corollary to it, the *2001 Doha Ministerial Declaration*[180] states:

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[175] Ibid para 6.

[176] Ibid para 16.

[177] Gehring and Segger, above n 168, 11.

[178] *Geneva Ministerial Declaration*, WTO Ministerial Conference, Geneva, WTO Doc WT/MIN(98)/DEC/1 (25 May 1998) (adopted on 20 May 1998) <http://www.wto.org/english/thewto_e/minist_e/min98_e/mindec_e.htm> at 31 January 2009 .

[179] Ibid para 4.

[180] *Ministerial Declaration*, WTO Ministerial Conference, 4th Sess, Doha, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) (adopted on 14 November 2001) <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf> at 1 February 2009 (hereinafter *Doha Ministerial Declaration*).

> We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.[181]

Thus, the Doha Round was intended to be conducted in the context of an objective of sustainable development. WTO Members placed it into a strengthened context, referring to the need for cooperation between the WTO and relevant environmental and developmental organisations and referred to the WSSD to be held the next year.[182] The *2002 Johannesburg Declaration*, sharing a number of similar provisions with the *2001 Doha Ministerial Declaration*,[183] reiterates that:

> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries to better address the problems of environmental degradation.[184]

> A universal, rule-based open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalisation, can substantially stimulate development worldwide, benefiting countries at all stages of development.[185]

A meticulous observation of the sustainable development provisions within the WTO documents divulges that the concept of sustainable development went through a gradual shift from a concept being linked merely to the optimal use of the world's resources to an objective of the world trading system. The original trade–environment debate within the GATT gradually took the shape of trade–sustainable development debate, grasping the emergence of sustainable development concept within the environmental forums. The WTO could not stay away from this major political shift going on in environmental forum.

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[181] Ibid para 6.

[182] Ibid.

[183] For details of the similarities between the Doha Declaration and the *Johannesburg Declaration*, see Sampson, above n 156, 38–51.

[184] *Johannesburg Declaration on Sustainable Development*, para 101.

[185] Ibid para 141.

Three years after the WTO's emergence came the celebrated AB decision in *US–Shrimp/Turtle* where the AB approves of the notion of sustainable development as formulated in *Our Common Future*. Footnote 107 states: 'This concept has been generally accepted as integrating economic and social development and environmental protection'.[186] In *US–Shrimp/Turtle Article 21.5,* the WTO Panel found that 'the concept is elaborated ... so as to put in place development that is sustainable ... that meets the needs of the present generation without compromising the ability of the future generations to meet their own needs'.[187]

After the textual reference to the trade–sustainable development interface, the next question that arises is how far sustainable development has become a goal of the WTO, which is primarily a trade organisation. The observations of the WTO Director-General Pascal Lamy do not give any clear indication on this matter. In the 'Foreword' of the book *The WTO and Sustainable Development* he mentioned that 'the achievement of sustainable development is a formal goal of the WTO',[188] but concluded with the statement that 'the fundamental objective of the WTO' is 'the construction of fair trade rules to guarantee better, more long-lasting, more predictable and more transparent trade opening'.[189] Now, it is not clear whether these two objectives mentioned by Lamy are hierarchical to one another or mutually supportive. Gary P. Sampson, who was optimistic to transform the WTO into a 'World Trade and Sustainable Development Organisation', observed with disappointment that within the WTO instruments sustainable development has not yet managed to be dealt with at any place other than in the Preamble as an ornamental term or in Ministerial Declarations.[190]

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[186] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (Report of the Appellate Body).

[187] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia,* WTO Doc WT/DS58/RW, 01-2854 [footnote 202] (Report of the Panel).

[188] Pascal Lamy, Forward in Gary P Sampson, above n 156, viii.

[189] Ibid xi.

[190] Sampson, above n 156, 2, 4.

6.3 Operationalising Sustainable Development within the WTO

Though there is no overarching body within the WTO to deal with sustainable development, the CTE was assigned to investigate the matter. The CTE was established towards the end of the Uruguay Round by the *Ministerial Decision on Trade and Environment*[191] with the mandate to:

- identify the relationship between trade measures and environmental measures in order to promote sustainable development; and
- make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system.

The CTE began its work with a 10-point work programme.[192] Since the 2001 Doha Ministerial Conference, it has focused on some of these, while some others are now formally in the Doha negotiations.[193] The Doha Declaration mandates the CTE along with the CTD to act, within their respective mandates, 'as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected'.[194]

The *Doha Declaration* sets up a Special Session of the CTE to deal with four specific issues:

- the relationship between the WTO rules and MEAs;
- procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;

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[191] *Decision on Trade and Environment*, reproduced in WTO, *The Legal Texts*, above n 101, 411. The Decision on Trade and Environment was adopted by the ministers at the meeting of the Uruguay Round Negotiations Committee in Marrakesh on 14 April 1994.

[192] The original 1994 items are trade rules, environment agreements and disputes; environmental protection and the trading system; tax and other environmental requirements; transparency of environmental trade measures; environment and trade liberalisation; domestically prohibited goods; relevant provisions of the TRIPS; services and the WTO and other organisations: *Items on the CTE's Work Programme* <http://www.wto.org/english/tratop_e/envir_e/cte00_e.htm> at 5 February 2009.

[193] *Items on the CTE's Work Programme* <http://www.wto.org/english/tratop_e/envir_e/cte00_e.htm> at 5 February 2009.

[194] *Doha Ministerial Declaration* para 51.

- the reduction or, as appropriate, elimination of tariff and NTBs to environmental goods and services (EGS); and
- disciplining subsidies to fisheries.[195]

The *Doha Declaration* also instructs the CTE to give particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;

(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and

(iii) labelling requirements for environmental purposes.[196]

For the present thesis, the environmental measures on market access and labelling requirements are significant issues to be discussed later in this chapter. All these mandates of the CTE must be accomplished within the parameters of trade policies and trade-related aspects of environmental policies, shall be compatible with the open and non-discriminatory nature of the multilateral trading system, and shall not add to or diminish the rights and obligations of Members under existing WTO agreements.[197] The CTE currently concentrates on two topics of Paragraph 31 of the *Doha Ministerial Declaration*: relationship of trade rules with MEAs, and EGS.[198]

The CTE often becomes subject to criticism for its failure to recommend any modifications of the provisions of the multilateral trading system, its powerlessness in influencing any meaningful change within the GATT/WTO system and for prioritising the issues favourable to developed countries.[199] Gary P. Sampson, who defended the

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[195] Ibid para 31.

[196] Ibid para 32.

[197] Ibid para 32.

[198] WTO Committee on Trade and Environment Special Session, *Report by the Chairman, Ambassador Manuel A J Teehankee, to the Trade Negotiations Committee for the Purpose of the TNC Stocktaking Exercise*, WTO Doc TN/TE/20 (21 April 2011).

[199] Mark Halle, 'Trade and Environment: Looking beneath the Sands of Doha' (2006) 2 *Journal of European Environmental and Planning Law* 107, 114; Sampson, above n 156, 30.

contribution of the CTE overall, admitted that the changes in the terms of reference and functioning of the committee are required. He identified the cause of frustration was having expectations of this committee that were too high. To him, the perfect response to all these criticisms is to create a separate Committee on Sustainable Development combining both the CTD and the CTE.[200] Developing countries argue that linkages between trade and sustainable development should be examined in the UN bodies, such as the Commission on Sustainable Development (CSD) or the UNCTAD, which are, to them, more suitable than the WTO to examine trade–sustainable development linkage.[201] This thesis does not agree with the proposition for a separate committee or commission to investigate sustainable development linkage with trade. Rather, it argues that the interface between market access and sustainable development needs to be examined in all WTO negotiating committees, particularly those on market access so that objectives of sustainable development is embedded in market access provisions.

7 Stance of Developed and Developing Countries in the Trade–Sustainable Development Nexus: How Far Market Access is Related to this Tension

7.1 Conflicting Perceptions of Developed and Developing Countries

Sustainable development was not initially a developing countries' agenda. They were not ready to sacrifice development in the present for preserving their environment and resources for the future generations.[202] This is very much evident in the carefully crafted language of the *Rio Declaration*, where a balance has been made between developing countries' concern about their right to development,[203] and developed countries' longing

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[200] Sampson, above n 156, 30–33.

[201] Martin Khor, 'Trade, Environment and Sustainable Development: A Developing Country View of the Issues, Including in the WTO Context' (Paper presented at the WTO Symposium on Trade and Environment, Geneva, 15 March 1999).

[202] Magda Shahin, 'Trade and Environment: How Real Is the Debate?' in Gary P Sampson and W Bradnee Chambers (eds), *Trade, Environment, and the Millennium* (2nd ed, 2002) 45, 46; Sampson, above n 156, 20.

[203] *Rio Declaration*, Principle 3.

for integrating environmental protection into development process.[204] From the initial stage, developing countries expressed their resentment about debating on environment within the GATT due to their well-founded fear of environment-related trade restrictions. Naturally, they were sceptical when sustainable development was included in the WTO Preamble. In fact, the relentless effort of developed countries to include a plethora of non-trade issues, such as labour standards, investment, culture, competition and biotechnology, within the WTO proved that their fear was not baseless.

Tensions between developed and developing countries were high on this trade–environment linkage issue throughout the Ministerial Conferences, which reached its peak in the 1999 Seattle Ministerial Conference. Proposals made by WTO Members during the 1998–99 Seattle negotiations manifest how innate the disparity is in the perceptions of developed and developing countries regarding sustainable development. The proposal made by Cuba precisely articulated developing countries' position:

> The Marrakesh Ministerial Decision on Trade and Environment established the close link between trade, the environment and sustainable development. However, in practice, sustainable development is seen by the developing countries as increasingly threatening and unattainable because of the accelerating pace at which trade is being liberalized without properly implementing the results of the Uruguay Round, in particular the provision on special and differential treatment for the developing countries.
>
> The objectives of economic growth and sustainable development can be achieved simultaneously if the basic principles of Agenda 21 and the 1992 Rio Declaration are respected, above all the principles establishing the indispensable requirement to eradicate poverty and the common responsibility for the environment, but differentiated according to levels of development.
>
> The generation of wealth and the elimination of poverty are part of the solution to the problems of the environment in the developing countries, and depend heavily on market access opportunities for their exports.[205]

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[204] Ibid Principle 4; Boyle and Freestone, above n 7, 10–12; Sands, *Principles of International Environmental Law*, above n 2.

[205] WTO General Council, *Preparations for the 1999 Ministerial Conference—Trade, Environment and Sustainable Development, Paragraph 9(d) of the Geneva Ministerial Declaration*, WTO Doc WT/GC/W/387 (15 November 1999) (Communication from Cuba) para 1, 2, 5.

A number of other developing countries also submitted proposals suggesting approaches to trade and environment.[206] They cautioned against the establishment of stronger links between trade and new issues such as environment and labour. They reinforced their demands for greater emphasis on S&DT, particularly with respect to sustainable development. Many are also fearful that more stringent environmental language may allow PPMs to be used as a basis for trade discrimination.[207] Conversely, the US proposed measures 'to ensure that negotiations contribute to sustainable development, inter alia, by promoting free trade in a manner consistent with and supportive of high environmental standards'.[208] Similarly, the EC proposed that 'trade and environment policies should play a mutually supportive role in favour of sustainable development'.[209]

In the Seattle preparations, the US and European Union (EU) also put forward the proposal for establishing a WTO Working Group or Forum for addressing labour issues. Developing countries were prompt in expressing their concern that such trade and labour linkage was 'a veiled protectionist mechanism sought by developed countries as a way to squash developing countries' comparative advantage in labour'.[210] Hence, developing countries were adamant to resist any social and environmental conditionalities in the world trade law if such mechanisms tend to impose restrictions on their access in developed counties' markets. The 1999 Seattle Conference ended up in failure, without any declaration, but developed countries' lobbyist group for

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[206] WTO General Council, *Preparations for the 1999 Ministerial Conference, Negotiations on Agriculture*, WTO Doc WT/GC/W/163 (9 April 1999) (Communication from Cuba, Dominican Republic, El Salvador, Honduras, Nicaragua and Pakistan); WTO General Council, *Preparations for the 1999 Ministerial Conference, the Future WTO Work Programme, under Paragraph 10 of the Geneva Ministerial Declaration*, WTO Doc WT/GC/W/255 (16 July 1999) (Communication from Dominican Republic, Honduras and Pakistan). Similar other proposals are: Kenya (WT/GC/W/233), Bangladesh (WT/GC/W/251), Pakistan (WT/GC/W/126): WTO, *Preparations for the 1999 Ministerial Conference: Compilation of the Proposals Submitted in Phase 2 of the Preparatory Process*, WTO Doc JOB(99)/4797/Rev.3(6986) (18 November 1999) (Informal Note by the Secretariat).

[207] ICTSD, 'Environment' (1999) 3(43) *Bridges Weekly Trade News Digest* 9, 9.

[208] WTO General Council, *Preparations for the 1999 Ministerial Conference, Trade and Sustainable Development*, WTO Doc WT/GC/W/304 (6 August 1999) (Communication from the US) 8.

[209] WTO General Council, *Preparations for the 1999 Ministerial Conference, EC Approach to Trade and Environment in the New WTO Round*, WTO Doc WT/GC/W/194 (1 June 1999) (Communications from the European Communities).

[210] ICTSD, 'Labour' (1999) 3(43) *Bridges Weekly Trade News Digest* 6, 6.

environment and their governments succeeded in pushing up the trade–environment linkage permanently in the WTO forum. Despite the Southern remonstration, the *Doha Declaration* institutionalises this debate in the WTO system and mandates the CTE to address environmental issues mentioned above.

However, developing countries' strong position could, at least, strike a balance in the *Doha Declaration*. Members recognises that 'under WTO rules, no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the level it considers appropriate'.[211] This provision is balanced by making it

> subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.[212]

Developing countries' fervent protest was triumphant in failing the 2003 Cancun Ministerial Conference. In Cancun's failure lies their success in blocking the four Singapore issues: trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation. The 2005 Hong Kong Ministerial Conference preserved the status quo of the *Doha Ministerial Declaration*. However, developed countries were persistent in their position. The *2009 US Trade Agenda*[213] declared its dissatisfaction with the 'imbalance' of the Doha Round, since environment and labour standard issues are not being dealt with priority. It stated that the US is fully prepared to engage with its trading partners to conclude the Doha Round deal at the WTO, only if the US stands to obtain more out of the agreement.[214] These conflicting perceptions on trade–sustainable development linkage show that market access is at the core of all debates.

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[211] *Doha Ministerial Declaration*, para 6.

[212] Ibid.

[213] Office of the United States Trade Representative, '2009 Trade Policy Agenda and 2008 Annual Report' (2008) <http://www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report> at 25 July 2011.

[214] ICTSD, 'Obama Trade Agenda Cites "Imbalance" in Doha Talks, Urges Focus on Environment, Labour Standards' (2009) 13(8) *Bridges Weekly Trade News Digest* 1, 1.

7.2 Specific Issues Emanating from the Trade–Sustainable Development Nexus: Market Access in Centre

Both developed and developing countries have their own stance in trade–sustainable development debate. Developed countries wish to retain the right to 'achieve those levels of health, safety and environmental protection that they deem appropriate—even when such levels of protection are higher than those provided by international standards'.[215] Their moral conscience operates through consumer choice to avoid those products from developing countries that are produced disregarding the basic labour and environmental standards. Developed countries' governments are under continuous pressure from environment and labour lobbyist groups to impose new environmental and social conditions on export, while business groups are concerned about losing their competitive advantage and loss of jobs and markets through the influx of cheap imported products produced with an advantage of lax labour and environmental standards and without incorporating the costs of environmental externalities. They have invented some additional rationale for retaining restrictions on imports, which came to be known as the 'pollution haven hypothesis' and the 'race to the bottom' thesis.[216] According to the 'pollution haven hypothesis', compliance with environmental standards is expensive in developed countries, thus companies would relocate their production to developing countries where the environmental standards are very low.[217] This implies the relocation of jobs to developing countries. The 'race to the bottom' thesis postulates that companies in developed countries would lower their environmental, labour and other regulatory standards to make their products competitive with those from developing countries.[218] However, there is little empirical support for either of these concerns.[219]

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[215] *US Statement at the Opening Session*, WTO Symposium on Trade and Environment (15 March 1999) in Lavanya Rajamani, 'Developing Country Resistance to Linking Trade and Environment: the Perceptions of Inequity and the Politics of Authority' (North–South Series No 1, GETS, 2001) 4.

[216] Rajamani, 'Developing Country Resistance to Linking Trade and Environment', above n 215, 2; Simon Baughen, *International Trade and the Protection of the Environment* (2007), 92–3; Holtby, Kerr and Hobbs, above n 152, 5.

[217] Lawrence Summers, 'Let Them Eat Pollution' *The Economist* (UK edition) 8 February 1992, 82; Daniel Bodansky and Jessica C Lawrence, 'Trade and Environment' in Daniel Bethlehem et al (eds), *The Oxford Handbook of International Law* (2009) 505, 511.

[218] Bodansky and Lawrence, above n 217, 511; Daniel C Esty, 'Bridging the Trade-Environment Divide' (2001) 15(3) *Journal of Economic Perspectives* 113, 123.

Conversely, developing countries allege that by imposing their labour standards, product standards, eco-labelling and other trade restrictions under the MEAs, developed countries have actually transformed their colonialism into 'green imperialism' or 'eco-colonialism'.[220] The South expressed their view that they must be allowed to pursue their economic development, without bearing any costs for environmental externalities. The development ladder that was used by developed countries to reach their current economic position must not be taken away from development process of developing countries. Kamal Nath, the then Indian Minister for Trade, suggested that 'greater trading opportunities will enable developing countries to invest more in environmental protection and give us an opportunity to correct historical imbalances ... till then there should be a moratorium on linking trade with environment'.[221]

This division between developed and developing countries engages an important political issue of State sovereignty. Developed countries argue that it is their sovereign right to adopt whatever standards of public health and environmental protection they deem appropriate. Conversely, developing countries argue that any trade restriction on environmental or health grounds amounts to an interference with the sovereignty of the exporting developing country that is expected to conform with developed countries' environmental standards.[222] To developing countries, trade measures without assistance in capacity building, technology transfer and finances will impede their market access

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[219] Jagdish Bhagwati, 'Trade Liberalisation and "Fair Trade" Demands: Addressing the Environmental and Labour Standards Issues' in Jagdish Bhagwati (ed), *A Stream of Windows: Unsettling Reflections on Trade, Immigration, and Democracy* (1998) 247, 252–3; Judith M Dean, 'Trade and the Environment: A Survey of the Literature' (Policy Research Working Paper Series 966, The World Bank, 1992) 15.

[220] Martin Khor, 'How the South is Getting a Raw Deal at the WTO' in Sarah Anderson (ed), *Views from the South: the Effects of Globalization and the WTO on Third World Countries* (2000) 7; Nath, above n 83, 18; Frank Biermann, 'The Rising Tide of Green Unilateralism in World Trade Law: Options for Reconciling the Emerging North–South Conflict' (2001) 35(3) *Journal of World Trade* 421, 422.

[221] 'India for Delinking Trade from Ecology', *Economic Times* 24 November 1994, cited in Rajamani, 'Developing Country Resistance to Linking Trade and Environment', above n 215, 7.

[222] Scott Vaughan, 'Trade and Environment: Some North–South Considerations' (1994) 27 *Cornell Internatioanl Law Journal* 591, 591–4; Kamal Nath, 'Trade, Environment and Sustainable Development' in Veena Jha, Grant Hewison and Maree Underhill (eds), *Trade, Environment and Sustainable Development: A South Asian Perspective* (1997) 15, 15-8.

and consequently their move towards sustainable development.[223] To appreciate the tension in the trade-market access-sustainable development debate, a closer examination of the specific issues is required.

7.2.1 Trade-Related Environmental Measures

7.2.1.1 Trade Barriers under Multilateral Environmental Agreements (MEAs)

TREMs cover all barriers that are introduced by the importing country to protect the environment, as well as the health and safety of wildlife, plants, animals and humans.[224] Using trade restrictions for achieving environmental objectives dates back to the earliest MEAs.[225] Though only a few of the MEAs contain trade-related measures for achieving environmental objectives, these trade measures have become a source of serious tension between free trade promoters, developing countries and environmentalists. Trade sanctions of the MEAs are being unilaterally used by developed countries against the exports of developing countries, most often deviating from their obligations under the MEAs for providing financial and technological support. Among the MEAs that incorporate the trade-restrictive measures, most widely used are the *1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*[226] and the *Montreal Protocol on Substances that Deplete the Ozone Layer.*[227] Exports of endangered species from developing countries often face the restrictions of CITES. The implementation mechanisms of CITES does not take into account the particular situation of developing countries that have no capabilities for the enforcement of CITES. The Montreal Protocol provides for a commendable framework for assisting

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[223] Shawkat Alam, *Sustainable Development and Free Trade,* Routledge Studies in Development Economics (2007), 16.

[224] Sachin Chaturvedi and Nagesh Kumar, 'An Introduction' in Nagesh Kumar and Sachin Chaturvedi (eds), *Environmental Requirements and Market Access: Reflections from South Asia* (2007) 19, 19.

[225] Article 2 of *Convention for the Protection of Birds Useful to Agriculture of 1902*, which utilised an import ban for protecting birds. *Convention for the Protection of Birds Useful to Agriculture*; Steve Charnovitz, 'An Introduction to the Trade and Environment Debate' in Kevin P Gallagher (ed), *Handbook on Trade and the Environment* (2008) 237, 237–8; Steve Charnovitz, 'A New WTO Paradigm for Trade and the Environment' (2007) 11 *Singapore Yearbook of International Law* 15, 15–17.

[226] *Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington,* opened for signatures 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

[227] *Protocol on Substances that deplete the Ozone Layer (Montreal)*, opened for signature 16 September 1987, 26 ILM 154 (1987) (entered into force 1 January 1989).

developing countries' compliance with the Protocol. However, for developing countries to participate, the transfer of environmentally sound technology (EST) is required, which is obstructed due to the intellectual property rights (IPRs) protection through the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS).[228] Developing countries are totally trapped since their exports of the products containing chlorofluorocarbons (CFCs) face embargoes, they cannot upgrade to EST, and they overburdened with the high price of importing EST from developed countries' firms.[229]

Addressing the interaction between MEAs and WTO is one of the agenda items of the CTE. Despite huge international concern, developed countries are persistent in using trade restrictions for enforcing MEAs. In developed countries proposals are being made for a climate tax or carbon tariff to be imposed on imports from countries that have not ratified the *1997 Kyoto Protocol to the Climate Change Convention*[230] or are not controlling their greenhouse gas emissions.[231] This carbon tariff, if imposed, is likely to be WTO-compatible; if not under Article III of the GATT 1994, then under the exception of Article XX(g) of the GATT 1994.[232] Hence, trade measures are being suggested as a way either to level the playing field between countries with different levels of energy tax or to induce free-riding countries to comply.[233] Though they initially target developed countries and the advanced developing countries, such as

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[228] *Agreement on Trade-Related Aspects of Intellectual Property Rights*, reproduced in WTO, *The Legal Text*, above n 101, 321.

[229] Alam, *Sustainable Development and Free trade,* above n 223, 194.

[230] *Protocol to the United Nations Framework Convention on Climate Change (Kyoto)*, opened for signature 11 December 1997, 37 ILM 22 (1992) (entered into force 16 February 2005)).

[231] Katrin Bennhold, 'France tells US to Sign Climate Pacts or Face Tax', *New York Times* (New York) (1 February 2007) 10 <http://www.nytimes.com/2007/02/01/world/europe/01climate.html?pagewanted=print> at 25 July 2011. Some scholars are vigorous enough to suggest WTO Members to introduce a new agreement, the General Agreement on Trade and Emissions (GATE), to reduce greenhouse gas (GHG) emissions through international trade: Christine McIsaac, 'Opening a GATE to Reduce Global Emissions: Getting over and into the WTO' (2010) 44(5) *Journal of World Trade* 1053.

[232] Paul-Erik Veel, 'Carbon Tariffs and the WTO: An Evaluation of Feasible Policies' (2009) 12(3) *Journal of International Economic Law* 749, 798; Gavin Goh, 'The World Trade Organization, Kyoto and Energy Tax Adjustments at the Border' (2004) 38(3) *Journal of World Trade* 395.

[233] Charnovitz, 'An Introduction to the Trade and Environment Debate', above n 225.

China, India and Brazil,[234] soon the other developing countries may come within their grasp.

7.2.1.2 The Legal Framework of the WTO to Deal with TREMs

There are several WTO provisions that can be called upon to resolve disputes relating to TREMs. The first provision is the WTO Preamble, which calls Members for the 'optimal use of the world's resources in accordance with the objective of sustainable development ... to protect and preserve the environment'. In *US–Shrimp/Turtle* case,[235] the AB employed this provision to interpret Article XX of the GATT 1994. For trade in goods, the legal setup of the WTO for dealing with TREMs is provided by way of 'General Exception' under Article XX of the GATT 1994. Article XX provides Members defence if they, by means of their TREMs, violate the MFN provision of Article I, NT provision of Article III, and the prohibition on quantitative restrictions of Article XI of the GATT 1994.[236] Article XX allows broadly two types of TREMs, for protecting human, animal, plant life or health under Article XX (b) and for conservation of exhaustible natural resources under Article XX (g). Besides the GATT 1994, the TBT Agreement and the SPS Agreement regulate government measures for the protection of human, animal or plant life or health and environment.[237] These two agreements are discussed in separate sections below.

Regarding trade in services, the GATS Article XIV includes an exception for measures necessary for the protection of life and health similar to GATT Article XX(b),[238] but does not contain an exception for conservation measures that parallels GATT Article XX(g).[239] Thus far, no environment-related service measure has been challenged in

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[234] Veel, above n 232, 798.

[235] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).

[236] Charnovitz, 'A New WTO Paradigm for Trade and the Environment', above n 225, 20.

[237] *TBT Agreement* art 2.2; *SPS Agreement* Preamble.

[238] *GATS*, art XIV(b).

[239] Charnovitz, 'An Introduction to the Trade and Environment Debate', above n 225, 243; Bodansky and Lawrence, above n 217, 517.

WTO dispute settlement. Conversely, both the provision of Article XX(b) and (g) along with the introductory paragraph, known as the 'Chapeau' are subject to various GATT/WTO rulings that have provided with extensive interpretation of these provisions. A brief discussion of the GATT/WTO rulings to this point is provided for an understanding of the GATT/WTO approach in regulating TREMs, particularly in seeking the answer to one of the vital question for the thesis: can TREMs be applied unilaterally and extraterritorially?

7.2.1.3 Interpretation of Article XX in the GATT/WTO Disputes

The analysis of TREMs under Article XX of the GATT requires a two-step process. The first step is to examine whether the measure falls within the scope of Clause (b) or (g). The second step is to examine whether the measure at issue satisfies the requirements of the Chapeau of Article XX.[240] For instance, in order to determine whether TREMs comes within the scope of GATT Article XX(g), it has to be examined whether the measures are 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.[241] In *US–Tuna/Dolphin II,*[242] the GATT Panel interprets 'relating to' as 'primarily aimed at' the conservation of natural resources. In this case, the Panel found US trade measure not to be primarily aimed at conservation, because it was based on unpredictable factors such as the incidental capture rate of US vessels, not to any objective standard of dolphin death. The next step is to determine whether the TREMs in question 'constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade' as stipulated in the Chapeau of the GATT Article XX.[243]

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[240] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (2001) [paras 162–72] (Report of the AB); Nikolaos Lavranos, 'The Brazilian Tyres Case: Trade Supersedes Health' (2009) 1(2) *Trade, Law and Development* 230, 247.

[241] *GATT 1994, art XX(g).*

[242] *United States—Restrictions on Imports of Tuna*, GATT Doc DS 29/R (1994) (Report of the Panel).

[243] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (2001) [paras 162–72] (Report of the AB)

Similarly, for TREMs for regarding human, animal or plant life or health, Clause (b) requires that such measures are 'necessary to protect human, animal or plant life or health' and then satisfies the above-mentioned conditions of the Chapeau. According to the AB in *EC–Asbestos*,[244] 'the term "necessary" in Article XX(b) requires that there be no reasonably available and WTO-consistent alternative measure that the regulating government could reasonably be expected to employ to achieve its policy objectives'.[245] Applying the same 'necessity' test, an earlier GATT Panel in *Tuna/Dolphin Dispute I* found the US restrictions on tuna imports from Mexico unjustified because the ban did not fulfil the 'necessity' requirement of Article XX(b).[246] Another GATT Panel in *Thai–Cigarettes*[247] found that Thai import ban was unnecessary because Thailand could resort to other GATT-consistent and less trade-restrictive measure, such as labelling or advertising, instead of an import ban.[248]

The interpretation of 'necessity' has evolved from a least trade-restrictive approach to a less trade-restrictive one, supplemented with a proportionality test that is a process of weighing and balancing a series of factors.[249] In a later dispute, *Brazil–Retreaded Tyres*,[250] the AB adopts a flexible interpretation of the 'necessity' requirement in Article XX(b) of the GATT 1994. Both the AB and Panel in *Brazil–Retreaded Tyres* explain that 'necessary' involves a 'weighing and balancing process' that includes the assessment of three factors: (i) the relative importance of the interests or values furthered by the challenged measure; (ii) the contribution of the measure to the realisation of the end pursued; and (iii) the restrictive impact of the measure on

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[244] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (2001) (Report of the AB).

[245] Ibid paras 162–72.

[246] *United States – Restrictions on Imports of Tuna*, GATT Doc DS21/R–39S/155 (1991) (Report of the Panel).

[247] *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc DS10/R-37S/200 (1990) (Panel Report).

[248] Ibid para 77.

[249] WTO, *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g)*, WTO Doc WT/CTE/W/203, 8 March 2002 (Note by the WTO Secretariat).

[250] *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS322/AB/R, AB-2007-4 (2007) (Report of the Appellate Body).

international commerce.[251] Applying these criteria, the AB found that the Brazilian regulation banning the import of retreaded tyres was 'necessary to protect human, animal or plant life or health'.[252] In fact, after the advent of the WTO, TREMs usually qualify the requirements of Clauses (b) and (g) but in most cases fail to satisfy the requirement of chapeau of Article XX.[253] The trend of flexible interpretation of Article XX implies that the future panels are more likely to uphold TREMs as long as they do not constitute an 'arbitrary and unjustified restriction on trade'.[254]

7.2.1.4 Can TREMs be Applied Unilaterally and Extraterritorially?

It is worth investigating through the GATT/WTO jurisprudence under Article XX whether TREMs can be applied unilaterally and extraterritorially, which would allow powerful Members to create market access barriers for LDCs by imposing their own environmental policies and standards on LDCs.[255] In both *US–Tuna/Dolphin* and *US–Shrimp/Turtle*, the TREMs in question were applied unilaterally and extraterritorially.[256] In both *US–Tuna/Dolphin*, the GATT Panel took a clear-cut stance in forbidding unilateral and extraterritorial application of TREMs. In *US–Tuna/Dolphin I*, the Panel said:

> The panel considered that if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or

[251] Ibid paras 139–143; *Brazil–Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS322/R, 07-2358 (2007) [para 7.104] (Report of the Panel).

[252] *Brazil–Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS322/AB/R, AB-2007-4 (2007) [para 182] (Report of the Appellate Body). The Brazilian measure was ultimately struck down as arbitrary and unjustified because it contained an exception for imports from other Mercosur Member States: Report of the AB, para 233.

[253] For instance, both in *US–Shrimp/Turtle* and *US–Gasoline*, the AB held that the US TREMs in question fulfilled the requirements of Article XX(g); in the former, it being related to the conservation of an exhaustible natural resources and in the latter, to the conservation of endangered sea turtles. However, in both cases, the AB knocked down the measures for being arbitrary and unjustified, and hence for being contrary to the Chapeau of Article XX: Bodansky and Lawrence, above n 217, 516; *United States—Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the Appellate Body).

[254] Bodansky and Lawrence, above n 217, 519.

[255] Islam, above n 156, 517.

[256] Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36(2) *Journal of World Trade* 353, 386.

> health protection policies from which other contracting parties could not deviate without jeopardising their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.[257]

In *US–Tuna/Dolphin II* the GATT Panel used essentially the same language in justifying its interpretation of Article XX(b) and (g) as not permitting unilateral and extraterritorial TREMs:

> If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular *the rights of access to markets*, would be seriously impaired.[258]

Though not welcoming words from the perspective of environmentalists of developed countries, this reasoning precisely depicts the consequences of unilateral and extraterritorial application of TREMs for LDCs' market access.[259] In *US–Shrimp/Turtle*, the AB refused to endorse categorically an extraterritorial application of Article XX(g) in saying 'we do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature and extent of that limitation'.[260] However, the AB recognised in this case that there is 'sufficient nexus between the migratory and endangered marine populations involved and the US for purposes of Article XX(g)', because the species lived in both the US and the Asian waters, and in the high seas.[261] Hence, the decision of the AB that the US had jurisdiction to protect the migratory turtles might proffer a scope for the extraterritorial application of Article XX(g) of the GATT if some linkage can be established between the importing country

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[257] *United States—Restrictions on Imports of Tuna*, GATT Doc DS21/R–39S/155 (1991) para 5.27 art XX(b), para 5.32 art XX(g)).

[258] *United States—Restrictions on Imports of Tuna*, GATT Doc DS 29/R (1994) para 5.26 art XX(g) and paras 5.38–5.39) art XX(b) (emphasis added).

[259] Cf Lorand Bartels suspected whether the panels in Tuna cases correctly applied the rules of customary international law in examining the extraterritorial ambit of Article XX(b) and XX(g) of the GATT 1994: Bartels, above n 256, 390.

[260] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R para 133 (Report of the Appellate Body).

[261] Ibid para 133.

and the environmental element that is threatened by actions within the control of the exporting country.[262]

The AB in *US–Shrimp/Turtle* condemns unilateral application of TREMs. In knocking down the US measure for not satisfying the requirements of the Chapeau of Article XX, it states that 'the unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability'.[263] It refers to Principle 12 of the *Rio Declaration* and Paragraph 2.22(i) of *Agenda 21*, which urges governments to avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country and recommends environmental measures addressing transboundary problems to be based on an international consensus.[264] Ultimately, the AB in *US–Shrimp/Turtle Article 21.5*[265] upheld the US unilateral measure after the US made a good faith effort to negotiate multilateral turtle conservation measures.[266] For LDCs, this might imply that developed Members can unilaterally adopt trade-restrictive environmental measures if they make an attempt to negotiate irrespective of whether there has been any universal consensus on the matter. This essentially ignores the fact that the negotiating playing field is far from level.[267] In the words of Daniel Bodansky and Jessica C Lawrence:

> Because of the enormous differentials between the global North and South in both market and 'discursive' power, Northern States can essentially decide on a rule, go through a formal negotiating process, and then adopt a trade-restrictive environmental regulation unilaterally, regardless of any objection by Southern trading partners.[268]

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[262] Biermann, above n 220, 431.

[263] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, para 172 (Report of the AB).

[264] Ibid para 168.

[265] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (Report of the Panel).

[266] Ibid paras 134, 152–3; Bodansky and Lawrence, above n 217, 516, 524.

[267] Bodansky and Lawrence, above n 217, 524.

[268] Ibid.

7.2.2 Sanitary and Phytosanitary Measures

SPS measures are a critical component of a country's regulatory responses to risks that might negatively impact human, animal or plant health or life.[269] These measures are subject to the SPS Agreement which is an elaboration of rules for the application of the provisions of the GATT 1994 relating to the use of SPS measures. In particular it elaborates the provisions of Article XX(b) of the GATT 1994,[270] which exempts measures 'necessary to protect human, animal or plant life or health' from the general obligations of the GATT 1994. Though the SPS Agreement was drafted with a focus on food safety and veterinary concerns, in 2006, the WTO Panel in *EC–Biotech*[271] gave a broad interpretation to the scope of the SPS Agreement and emphasised that the Agreement could cover 'certain damage to the environment other than damage to the life or health or animals or plants'.[272] This precedent implies that SPS measures also fall within the category of TREMs.

SPS measures are defined in Annex A to the SPS Agreement as measures:

> (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

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[269] Tracey Epps, *International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement,* Elgar International Economic Law (2008), 9.

[270] *SPS Agreement*, Preamble, para 8.

[271] *European Communities—Measures Affecting the Approval and Marketing of Biotech Products,* WTO Docs WT/DS291/R, WT/DS292/R, WT/DS293/R (2006) (Report of the Panel).

[272] *EC—Measures Affecting the Marketing and Approval of Biotech Products*, WT/DS291/R (2006) para 7.209.

(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread or pests.[273]

The Agreement is intended to make an appropriate balance between two conflicting objectives:

1. Protecting and improving the current human health, animal health, and phytosanitary situation of all Member countries, and
2. Protecting Members from arbitrary or unjustifiable discrimination due to different SPS standards or protecting them from disguised restrictions in international trade.[274]

From this preambular language, it is clear that SPS measures may restrict trade flows and constitute as NTBs.[275] SPS measures create trade tensions when exporters find themselves adversely affected by them, either restricting or prohibiting market access or unduly raising the production and marketing costs, that is, the cost of market access.[276] They can also divert trade from one trading partner to another by laying down regulations, discriminating across potential supplies, and ultimately can reduce overall trade flows by increasing costs or raising barriers for all potential suppliers.[277] Tsunehiro Otsuki, John S. Wilson and Mirvat Sewadeh suggested that there can be a very high cost to exporters in setting standards to address relatively small risks to human health.[278] By quantifying the impact of a proposed aflatoxin[279] standard by the

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[273] *SPS Agreement*, Annex A, art 1.

[274] *SPS Agreement*, Preamble, para 1.

[275] Epps, above n 269, 12. Alan O Sykes, *Product Standards for Internationally Integrated Goods Markets* (1995); Sam Laird and Alexander Yeats, 'Trends in Non-Tariff Barriers of Developed Countries, 1966–1986' (1990) 126(2) *Review of World Economics* 299; Patrick A Messerlin and Jamel Zarrouk, 'Trade Facilitation: Technical Regulations and Customs Procedures' (2002) 23(4) *World Economy* 577.

[276] Epps, above n 269, 9.

[277] Spencer Henson and Rupert Loader, 'Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements' (2001) 29(1) *World Development* 85, 89; Spencer Henson et al, 'How Developing Countries View the Impact of Sanitary and Phytosanitary Measures on Agricultural Exports' in Merlinda D Ingco and L Alan Winters (ed), *Agriculture and the New Trade Agenda: Creating a Global Trading Environment for Development* (2004) 359, 359.

[278] Tsunehiro Otsuki, John S Wilson and Mirvat Sewadeh 'Saving Two in a Billion: Quantifying the Trade Effect of European Food Safety Standards on African Exports' (2001) 26 *Food Policy* 495, 512.

[279] Aflatoxins are a group of structurally related toxic compounds that contaminate certain foods. They are substances that can produce liver cancer in the human body: Ibid 498.

EU[280] on export of cereals, dried fruits and nuts from Africa, they found that EU standard, which would reduce health risk by approximately 1.4 deaths per billion a year, will decrease these African exports by 64 per cent or US$670 million.[281] It is important to note that the proposed EU standard was higher than the international standards of the Codex, and was to apply without any scientific risk assessment.[282]

Tracey Epps highlighted four broad categories of situations in which SPS measures may constitute NTBs. These are:

- prohibitions on the sale of an imported product on health grounds;
- positive requirements for imported products that discriminate against and/or result in a burden being placed on foreign suppliers. Sometimes certifying that the standards have been met is more difficult for small producers than complying with food safety and agricultural health requirements. For example, Kenyan vegetable exporters face considerable oversight costs in demonstrating compliance to their major European buyers;[283]
- exclusion of imported products from compulsory approval for marketing; and
- market-driven requirements for compliance with voluntary standards.[284]

SPS measures in the form of NTBs are applied by developed countries to satisfy their consumers, while for developing countries such measures only restrict their market access and function as disguised protectionism.[285] LDCs either incur significant expenditure for complying with the SPS standards or suffer significant export losses on

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[280] The EC proposal to harmonise aflatoxin standards was announced in 1998 and was scheduled for enforcement in 2002: Ibid 497.

[281] Ibid 495.

[282] Ibid 500–1.

[283] Steven M Jaffee and Spencer Henson, 'Agro-food Exports from Developing Countries: The Challenges Posed by Standards' in M Ataman Aksoy and John C Beghin (eds), *Global Agricultural Trade and Developing Countries* (2005) 91, 99.

[284] Epps, above n 269, 12–13.

[285] Graham Mayeda, 'Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonisation on Developing Countries' (2003) 7(4) *Journal of International Economic Law* 737. Prema-chandra Athukorala and Sisira Jayasuriya, 'Food Safety Issues, Trade and WTO Rules: A Developing Country Perspective' (2004) 26(9) *The World Economy* 1395.

account of their inability to comply with. They have to undertake significant investment to comply with these requirements. However, such compliance is not a guarantee for continued market access since developed countries continuously revise their SPS measures, which require renewed investments on the part of the LDC exporters.[286] Jonathan B. Wiener articulated the plight of poorest countries:

> Debates between the United States and Europe over who is 'more precautionary than thou' may look baffling and hairsplitting to the billions of people who live in countries with less stringent environmental standards as compared to either the United States or Europe, less institutional capacity to enforce those standards, less scientific capacity to detect and ward of remote future risks, and much more pressing immediate crises in hunger, health, and environmental quality.[287]

Similarly, in relation to SPS measures, some of the problems LDCs face are insufficient access to scientific/technical expertise; incompatibility of SPS requirements with domestic production/marketing methods; poor access to financial resources; insufficient time permitted for compliance;[288] limitations in administrative arrangements for SPS requirements; poor awareness of SPS requirements amongst government officials, within agriculture and food industry and to a lesser extent, poor access to information on SPS requirements.[289]

Apart from the State regulations, an increasing number of private standards are being set by private sectors (for example, supermarket chains) that create market access barriers for the developing countries and LDCs' exports. These standards, which often are applied in a non-transparent manner, represent an additional cost of production.[290] In

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[286] Kasturi Das, 'Coping with SPS Challenges in South Asia' in B S Chimni et al (eds), *South Asian Yearbook of Trade and Development* (2009) 105, 137.

[287] Jonathon B Wiener, 'Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems' (2003) 13 *Duke Journal of Comparative and International law* 207.

[288] An examination of the SPS notifications within the timeframe of 1 July 2010 to 31 July 2011 reveals that in most of the cases the time limit for making comments on an SPS measure notified by a WTO Member ranges from 15 days to maximum two months after the date of issuing the notification. This observation is based data retrived from the WTO database *SPS Information Management System*, <http://spsims.wto.org/web/pages/report/report13/Report13.aspx> at 17 August 2011.

[289] Henson and Loader, above n 277, 93; Henson et al, above n 277, 367.

[290] Anne-Celia Disdier et al, 'Trade Effects of SPS and TBT Measures on Tropical and Diversification Products' (Issue Paper No 2, ICTSD, 2008) 15.

2005, the matter of private standards-setting was brought forth in the SPS Committee by St Vincent and Grenadines who complained about the 'EurepGAP' SPS standards.[291] The Euro-Retailer Produce Working Group (EUREP), a body composed primarily of food retailers, imposed these standards, which were stricter than the EU government requirements. Referring to Article 13 of the SPS Agreement, which states that Member governments 'shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories ... comply with the relevant provisions of this agreement', these countries argued that the EU rules should apply to private sectors.[292] The EU countered that it could not be responsible unless the private sector organisations claim that their standards are EU standards, and that any claims should be brought up directly with the relevant company. The EU claimed that it was not in a position to intervene given that private sector standards are driven by consumer demand.[293] In the absence of any real dispute on private standards, this issue remains perplexing. Still the remit of private sector standards is incessantly expanding, touching on issues such as production methods, environmental concerns including 'food miles',[294] labour and fair trade issues. For instance, in Switzerland, Bio Suisse refuses to grant 'organic' certification for products imported by air. Hence, the Bio Suisse scheme favours Swiss farmers and their neighbouring European countries, to the detriment of more distant developing countries and LDCs.[295]

Since it is the agricultural products that are mostly affected by SPS measures, more discussion on this topic is undertaken in Section 4.5 of Chapter Four.

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[291] EurepGAP started in 1997 as an initiative by retailers belonging to the EUREP, an association that joins big European leadership supermarkets in the food sectors: ibid 13.

[292] ICTSD, 'SPS CTTE Considers Private Sector Standards: Struggles Continue with S&D' (2005) 9(24) *Bridges Weekly Trade News Digest* 4, 4.

[293] Ibid.

[294] 'Food miles' means carbon emissions associated with transport of agricultural products: *What are Food Miles?* http://www.ecoaction.com.au/category.php?id=80> at 25 July 2011.

[295] Arthur E Appleton, *Supermarket Labels and the TBT Agreement: Mind the GAP*, Business Law Brief (Fall 2007) 10; Bio Suisse, Bio Suisse Import Restrictions <http://www.bio-suisse.ch/en/biosuisseimportpolicy.php> at 20 May 2011.

7.2.3 Technical Barriers to Trade

Technical regulations and standards often create market access barriers for LDCs due to their varied nature across countries, frequent changes, and lack of transparency in their introduction and operation.[296] Such technical regulation and standards in developed countries impose exacerbated costs for LDC exporters in terms of, inter alia, translation, hiring of technical experts to explain such regulations, adjustment of production facilities to comply with the requirements and the need to prove that the exported product meets the requirements of regulations and standards.[297]

Recognising that technical regulations and standards might turn into NTBs, the TBT Agreement[298] in its Preamble commits to strike a balance between avoiding unnecessary obstacles to international trade[299] and ensuring that Members retain their legitimate interest, in particular for the protection of human, animal, plant life or health, and of the environment.[300] In balancing these conflicting interests, the TBT Agreement takes a similar approach taken by the SPS Agreement. Akin to the provision of the Chapeau of Article XX of the GATT 1994, the Preamble of the TBT Agreement puts the regulatory autonomy of Members subject to the requirement that such measures 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade'.[301] The Agreement incorporates the non-discrimination principles of

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[296] Islam, above n 156, 154.

[297] Richard Bonsi, A L Hammett and Bob Smith, 'Eco-labels and International Trade: Problems and Solutions' (2008) 42(3) *Journal of World Trade* 407, 420.

[298] The TBT Agreement—an outcome of the Uruguay Round of Negotiations—replaced the 1979 plurilateral Agreement on Technical Barriers to Trade, also known as the Standards Code. The appreciation in the Tokyo Round negotiations that technical barriers were the largest category of NTBs led GATT Members to adopt the Standards Code: Islam, above n 156, 155.

[299] Preamble of the TBT Agreement in Paragraph five expresses the desire of WTO Members 'to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade'.

[300] Preamble of the TBT Agreement in Paragraph 6 recognises that 'no country should be prevented from taking measures necessary to ensure that quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate'.

[301] *TBT Agreement*, Preamble, para 6.

MFN and NT.[302] It provides for S&DT treatment and technical assistance to developing countries and, in particular, to LDCs, recognising their special difficulties in implementing the Agreement.[303]

Despite these provisions, it is widely claimed that LDCs virtually cannot take advantage of this Agreement due to their lack of institutional capacity and the absence of meaningful contribution towards their technical capacity building.[304] A complete assessment of the TBT Agreement is not within the ambit of the thesis, rather it examines certain specific areas where the provisions of the Agreement are weak in protecting LDCs' interest, creating market access barriers for them and posing a challenge to their sustainable development goals.

7.2.3.1 Technical Regulations are Prioritised over Voluntary Standards

The wide-ranging coverage of the TBT Agreement includes both agricultural and industrial products.[305] It applies to technical regulations, product standards and their conformity assessment procedures (CAPs).[306] The agreement extends its coverage not only to governmental measures at all levels but also to measures taken by non-governmental bodies.[307] This aspect recognised the fact that standards created by private sectors, including non-governmental bodies, might be as much market access barriers as governmental regulations. However, the TBT Agreement makes a distinction between technical regulations and voluntary standards, characterising the former as mandatory

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[302] Article 2.1 of the TBT Agreement stipulates that 'members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country'.

[303] Apart from expressing concern for developing countries in the Preamble, Article 11 of the TBT Agreement provides for technical assistance and Article 12 provides for S&DT for developing countries and LDCs.

[304] Islam, above n 156, 168; Ulrich Hoffmann and Tom Rotherham, 'Environmental Requirements and Market Access for Developing Countries: Promoting Environmental—Not Trade—Protection' in UNCTAD (ed), *Trade and Environment Review 2006* (2006) 1, 16.

[305] *TBT Agreement*, art 1.3.

[306] Ibid art 1.6.

[307] Ibid art 3.

and the latter as voluntary.[308] Though these standards are voluntary in the legal sense, they can have similar effects of mandatory regulations if a large portion of buyers require them.[309] The TBT Agreement prioritises technical regulations by embodying them in the main body while addressing standards separately under a Code of Good Practice (Code) incorporated as Annex 3 to the TBT Agreement.[310] The provisions of the Code are more akin to guidance than to legal requirements.[311]

7.2.3.2 Ambiguity of the 'Legitimate Objectives'

For avoiding unnecessary obstacle to international trade, Article 2.2 of the TBT Agreement provides that 'technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective'. The same provision stipulates a non-exhaustive list of 'legitimate objectives' for the pursuit of which technical regulations can be imposed. The list includes national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.[312] This 'legitimate objective' notion of the TBT Agreement can be argued to be grossly vague. Also ambiguous is the criteria for adopting, preparing and applying technical regulation. It requires a weighing and balancing task between two or more measures for achieving the legitimate objective as the interpretation of the term 'necessary' in the GATT/WTO jurisprudence implies. For making such a balancing task, the Article only requires to take into account of the risks that would incur to the importing country by the non-fulfilment of the legitimate objective.[313] This clearly exempts the importing country from considering whether adhering to such technical regulation would be too burdensome for exporting countries.

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[308] Ibid, Annex 1, arts 1 and 2.

[309] Hoffmann and Rotherham, above n 304, 7.

[310] Islam, above n 156, 157.

[311] Hoffmann and Rotherham, above n 304, 19.

[312] *TBT Agreement* art 2.2.

[313] Ibid.

7.2.3.3 Unspecific International Standards

To deal with the negative effects to trade from divergent national standards, the TBT Agreement encourages harmonisation among technical regulations by requiring Members to use international standards.[314] It provides that when technical regulation is adopted in accordance with relevant international standards, 'it shall be rebuttably presumed not to create an unnecessary obstacle to international trade'.[315] Despite this importance accorded to international standards, the TBT Agreement, unlike the SPS Agreement,[316] neither provides a definition of 'international standard' nor provides a list of international standardising bodies the standards of which are deemed international.[317] In Annex 1.4, it merely describes international standardising institution as 'body or system whose membership is open to the relevant bodies of at least all Members'. This lack of definition creates disagreement about what an international standard is.[318] Unlike the SPS Agreement, the TBT Agreement does not require any scientific justification for deviating from international standard. It leaves up to the importing Member to decide whether the measure on the basis of international standard is 'ineffective and inappropriate means for the fulfilment of the legitimate objective pursued'. In either case, it can deviate from international standards.

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[314] Ibid art 2.4.

[315] Ibid art 2.5.

[316] *SPS Agreement*, Annex A.3.

[317] Humberto Zuniga Schroder, 'Definition of the Concept "International Standards" in the TBT Agreement' (2009) 43(6) *Journal of World Trade* 1223, 1223. In this Article, Humberto defines the concept 'international standard' from a TBT perspective. Michael Koebele, 'Article 1 and Annex 1 TBT' in Peter-Tobias Stoll and Anja Seibert-Fohr Rudiger Wolfrum (eds), *WTO—Technical Barriers and SPS Measures*, Max Planck Commentaries on World Trade Law (2007) 178, 202.

[318] Schroder, above n 317, 1223.

7.2.4 Product- and Process-Related Policies

7.2.4.1 Product-Related Policies

The formulation of product specifications and their implementation by developed countries often create market access barriers for LDCs.[319] Product-related policies are applied to address the improvement of material and energy efficiency, waste management and the control of hazardous or environmentally harmful substances. A range of different policies are used to achieve the above environmental objectives, such as:

- bans on the use of the environmentally hazardous substances;[320]
- setting limits on the concentration of substances;[321]
- setting up energy standards to reduce energy consumption; and[322]
- recycling policies to reduce the production of waste at source.[323]

Instruments used to implement the above policies include labelling, eco-packaging and economic instruments.[324] Product labelling imposes additional administrative and research costs for LDCs and particularly for their small and medium enterprises (SMEs), creating market access barriers for them.[325] Eco-packaging requirements also affect export competitiveness and market access through administrative and compliance costs, which is exacerbated by the existence of differences in requirements between

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[319] Veena Jha and Rene Vossenaar, 'Environmentally Oriented Product Policies, Competitiveness and Market Access' in Veena Jha, Grant Hewison and Maree Underhill (eds), *Trade, Environment and Sustainable Development: A South Asian Perspective* (1997) 41, 41.

[320] A total ban creates market access barriers. An example is the ban invoked by Germany on the use of Pentachlorophenol (PCP) in the manufacture of leather goods, which results in a significant decline of leather products from India to Germany until other substitute chemicals are used.

[321] Gaining access to precise measurement technology and developing credible certification procedures might be expensive and difficult, thus affecting the competitiveness of their export products.

[322] This can be implemented by denying access to products that do not meet the energy standards or by requiring them to use labels, again affecting their competitiveness.

[323] Environmental regulations can require that products contain a minimum amount of recycled materials. This creates markets for domestic recycled products and creates barriers for exported products: Jha and Vossenaar, above n 319, 42.

[324] Ibid 45–6.

[325] Ibid 42.

countries. Compliance with recycled content requirements may be particularly difficult for LDCs as their waste management programmes tend to be underdeveloped. New packaging policies may also induce exporters to substitute less environmentally friendly materials to suit importers' existing recycling facilities, for example, jute packaging had to be switched to synthetic wraps by the suppliers to meet German requirements due to refusal of German recycling companies to handle the steel clips used in jute wrappers.[326] This practice not only replaced a relatively environmentally friendly material with a more damaging one, but also ensured market access loss for jute producing country, such as Bangladesh.[327]

Finally, economic instruments, such as taxes, product charges, levies, returnable deposit systems and various forms of penalty can have significant effects on the market access and competitiveness of a product. For instance, border tax imposed on tropical timber products could result in export losses because it is easy to substitute temperate timber. Similarly, returnable deposit systems increase the costs of production by a higher margin for the exporters than for domestic producers. It is doubtful whether these instruments have, in fact, contributed to economic improvements.[328]

7.2.4.2 Process and Production Methods

Since the *Tuna–Dolphin* disputes in the mid-1990s, the treatment of PPMs under the GATT, and subsequently the WTO, has remained a high profile concern for advocates of sustainable development. The Organization on Economic Cooperation and Development (OECD) defines PPM as 'the way in which products are manufactured or processed and natural resources are extracted or harvested'.[329] Where PPM requirements are mandatory, they have a strong potential for generating rigid barriers to

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[326] Ibid 44–5.

[327] Christine Wyatt, 'Environmental Policy Making, Eco-Labelling and Eco-Packaging in Germany and its Impact on Developing Countries' in Veena Jha, Grant Hewison and Maree Underhill (eds), *Trade, Environment and Sustainable Development: A South Asian Perspective* (1997) 51, 62.

[328] Jha and Vossenaar, above n 319, 44.

[329] OECD, *Process and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures*, OECD Doc OECD/GD(97)137 (1997) [7] <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(97)137&docLanguage=En> at 25 July 2011.

market access. Even where PPM compliance remains voluntary, market concentration and bottlenecks in international supply chains can have the effect of rendering such requirements as virtual prerequisites to market access. This situation is complicated for developing countries by the fact that PPM requirements provide limited opportunities for developing country stakeholders to negotiate market access issues over the course of their development and implementation.[330]

The PPM issue came in the two *US–Tuna–Dolphin* disputes involving primary and secondary embargoes by the US on the import of tuna that had been caught by the use of 'purse seine' nets, which were of a type likely to catch dolphins as well. The award in *US–Tuna–Dolphin II* proceeded on the basis that the measure involved a breach of Art III:4 in that the embargoed tuna was 'like' the permitted tuna, notwithstanding the difference in the method by which it had been harvested. The panel notes 'Article III calls for a comparison between the treatment accorded to domestic and imported like products, not for a comparison of the policies or practices of the country of origin with those of the country of importation'.[331] The Panel concluded that a distinction based on the differing harvesting policies of the importing and exporting countries had no effect on the inherent character of tuna as a product. Thus, the WTO Panel does not differentiate between imported and domestic products on the basis of PPM. Article III once again came to the forefront in *EC–Asbestos* in which the AB makes a distinction between imported Canadian asbestos containing chrysotile fibres and the domestic French asbestos/cement-based products containing PCG fibres.[332] The AB came to the conclusion that the two products, though similar in regards to their end-uses, are not 'like' products for the purpose of Article III:4 since the chrysotile fibres in the imported Canadian asbestos are highly carcinogenic while the domestic PCG fibres are not.[333] This case is different from the *Tuna–Dolphin* case since it is concerned with health risk

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[330] Jason Potts, *The Legality of PPMs under the GATT: Challenges and opportunities for Sustainable Trade Policy* (2008) International Institute for Sustainable Development, [1] <http://www.ppl.nl/bibliographies/wto/files/7883.pdf> at 25 July 2011.

[331] *United States—Restrictions on Imports of Tuna*, GATT Doc DS 29/R para 5.8 (Report of the Panel).

[332] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (2001) [paras 133–40] (Report of the Appellate Body). By PCG fibres the AB refers collectively to polyvinyl alcohol fibres (PVA), cellulose and glass fibres: Report of the Appellate Body, para 84.

[333] Ibid paras 134–40.

(as a product characteristic) that is so severe that it prevents the two products having the same end-uses from being 'like' product and hence, justifies the embargo on imported products.

PPMs are divided into two basic categories: product-related and non-product-related.[334] While product-related PPMs are based on the physical characteristics of the end product, the non-product-related PPMs concern the production method and do not affect the end product physically.[335] Uncertainty arises as to whether the TBT Agreement applies to the PPMs, particularly because of the ambiguous definitions of the 'technical regulations' and 'standards'. Technical regulation is defined in Annex 1 to the TBT Agreement as 'documents which lays down product characteristics or *their related process and production methods* ... with which compliance is mandatory'.[336] Again, standard is defined in Annex 1 as 'documents approved by a recognised body, that provides ... rules, guidelines or characteristics for *products or related processes and production methods* ... with which compliance is not mandatory'.[337] There is a subtle difference between these two definitions. Confusion arose over whether the word 'their' in the former definition makes technical regulations different from standards in relation to the application of the TBT Agreement. This omission of the term 'their' in the definition of 'standards' provides scope for arguing that standards need not be product-related; they could be based on non-product-related PPMs.[338] However, a study conducted by the WTO Secretariat made it clear that the TBT Agreement applies both to technical regulations and standards based on PPMs that are evident in the final products.[339] Most WTO Members accepted that Clauses 1 and 2 of Annex 1 signify that processes and production methods have to be product-related. In other words, the TBT

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[334] Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27 *Yale Journal of International law* 59, 65.

[335] Koebele, above n 317, 195; Sampson, above n 156, 122; Bonsi, Hammett and Smith, above n 297, 415.

[336] *TBT Agreement*, Annex 1, Clause 1 (emphasis added).

[337] *TBT Agreement* Annex 1, Clause 2 (emphasis added).

[338] Appleton, above n 295.

[339] WTO Secretariat, *Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirement, Voluntary Standards and Processes and Production Methods Unrelated to Product Characteristics*, WTO Doc WT/CTE/W/10 (29 August 1995).

Agreement applies only to product-related PPMs. Non-product-related PPMs are not covered by the TBT Agreement.[340] This point remains open to debate and particularly so as no WTO disputes have examined whether non-product-related PPM falls within the TBT Agreement. The *US–Shrimp Article 21.5* approves a US import ban against Malaysian shrimp based on a non-product-related PPM, like earlier decisions does not offer direction regarding the interpretation of the TBT Agreement, and avoids commenting on the underlying PPM issue. Associated with PPM is the issue of eco-labelling, which is discussed below.

7.2.4.3 Eco-labelling

Eco-labelling is a process of environmental performance certification and labelling that is practised around the world. The Global Eco-labelling Network (GEN) defines an eco-label as 'a label which identifies overall environmental preference of a product or service within a specific product/service category based on life-cycle considerations'.[341] Eco-labelling declares that products carrying such labelling to be more environmentally friendly than the same products that do not carry the label.[342] By providing consumers with information about a product's characteristics, in particular, the social or environmental impacts of its production, labelling raises consumer awareness of the environmental effects of products.[343] First initiated in Germany in 1978 with the 'Blue Angel' programme,[344] there are quite a number of eco-labelling programmes around the world. The GEN lists 26 of them, which include the EU flower, the Japan Eco Mark, the US Green Seal and the Nordic Swan.[345]

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[340] Sampson, above n 156, 122–3.

[341] Eco-label is awarded by an impartial third party in relation to certain products or services that are independently determined to meet environmental leadership criteria: Global Ecolabelling Network <http://www.gen.gr.jp/eco.html> at 14 March 2011.

[342] Koebele, above n 317, 199.

[343] Seung Wha Chang, 'GATTing the Green Trade Barrier: Eco-labelling and the WTO Agreement on Technical Barriers to Trade' (1997) 31 *Journal of World Trade* 137; Koebele, above n 317, 199.

[344] T B Simi, 'Eco-labels: Trade Barriers or Trade Facilitators?' (Discussion Paper, Centre for International Trade, Economics & Environment [CUTS CITEE] 2009) 1.

[345] Global Ecolabelling Network, *Product Category List by Program* <http://www.globalecolabelling.net/categories_7_criteria/list_by_program/> at 21 May 2011.

Though a useful and economically efficient means for informing consumers,[346] eco-labelling causes market access barriers for LDCs' exports. It is difficult for LDC exporters to have sufficient information about the existence of the schemes, let alone advanced technical know-how and financial resources to comply with them.[347] Lack of harmony among the eco-labelling schemes adopted by private companies, trade unions and NGOs augment the burden for LDC exporters.[348] Eco-label programmes are 'cradle to grave' or 'life-cycle' schemes, that is, they involve some form of analysis based on the environmental consequences of their manufacture, use and disposal. Life-cycle assessment often requires installations of new production facilities increasing the cost of exports for LDCs. For instance, Samartex Timber and Plywood Company, a leading timber firm in Ghana, despite spending more than US$100,000 in installation of new facilities failed to obtain labelling.[349]

The question of application of WTO rules on eco-labelling is not a clear-cut one. Matthew Stilwell suggests that the SPS and TBT Agreements and the GATT 1994 are relevant for eco-labelling.[350] From the fact that life-cycle assessment of eco-labelling incorporates both product-related and non-product-related PPMs, it can be deduced that the TBT Agreement applies to eco-labelling insofar as the product-related PPMs are concerned. This corresponds to the concern of developing countries that holds that if purely process-based standards are considered covered by the TBT Agreement, this might create a precedent for the acceptability of non-product-related PPMs.[351]

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[346] For instance, a display of the German Blue Angel eco-label on washing machines demonstrates their suitability in the consumption of energy and water. Hence, a product bearing the Angel is considered more environmentally friendly than a product without such a label: Bonsi, Hammett and Smith, above n 297, 411–12.

[347] Simi, above n 344; Jane Earley and Laura Kneale Anderson, *Developing-Country Access to Developed-Country Markets under Selected Ecolabelling Programmes*, Joint Working Party on Trade and Environment COM/ENV/TD(2003)30/FINAL, (24 Dec 2003), [25–35] <http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=com/env/td(2003)30/final&doclanguage=en> at 21 May 2011; Manoj Joshi, 'Are Eco-Labels Consistent with World Trade Agreements?' (2004) 38(1) *Journal of World Trade* 69.

[348] Scott Case, 'Eco-Labels: Making Environmental Purchasing Easier?' (2004) 12(3) *Government Procurement Journal* 32; Bonsi, Hammett and Smith, above n 297, 418.

[349] Bonsi, Hammett and Smith, above n 297, 420.

[350] Stilwell, above n 63, 47–9.

[351] Sampson, above n 156, 123–4.

7.2.5 Environmental Goods and Services

7.2.5.1 Achieving Sustainable Development through a 'Triple Win' Situation

As mentioned earlier in this chapter, the Doha Ministerial Conference in 2001 instructed WTO Members to negotiate on the reduction or elimination of tariff and NTBs to EGS under Paragraph 31(iii) of the Doha mandate. Accordingly, negotiations on environmental goods are taking place in the CTE in Special Session (CTESS) and the Negotiating Group on Market Access (NGMA) on industrial goods, while issues related to environmental services are being negotiated within the Special Sessions of the Council for Trade in Services. These negotiations are mandated to achieve sustainable development by creating a 'win-win-win' situation for trade, environment and development. This 'triple win' situation has been explained on the WTO official website.[352] First, the tariff cut will make environmental technologies available at lower costs for consumers and governments at all levels and give incentives for using environmental technology as well as for innovation and transfer of such technology. Second, it can benefit global environment by improving countries' ability to obtain high quality EGS, which will also improve citizens' lives by providing them with a cleaner environment and better access to safe water, sanitation and clean energy. Finally, the liberalisation of trade in EGS can be beneficial for development by assisting developing countries to obtain the tools needed to address key environmental priorities as part of their ongoing development strategies.[353]

7.2.5.2 Discord over Definition and Classification

However, this rhetoric is surrounded by a number of challenges when applied in reality, triggering the conventional North–South tension and conflicts of economic centres. The negotiations continue without much progress, mired in clashes over definition and

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[352] *Eliminating Trade Barriers on Environmental Goods and Services* (undated) <http://www.wto.org/english/tratop_e/envir_e/envir_neg_serv_e.htm> at 25 March 2009.

[353] Ibid.

classification.[354] First and foremost, the challenge centres on the definition and scope of EGS. There is not yet any agreed definition of EGS, which is apparent from the 2011 Report by the Chairman of the CTE (hereinafter *2011 Chairman's Report*).[355] Several efforts have been made by the international organisations, such as the UNCTAD, the UN Environment Programme (UNEP) and the OECD, to define EGS. The OECD and the Statistical Office of the European Union (Eurostat) defined and classified the environmental industry as 'activities which produce goods and services to measure, prevent, limit, minimise or correct environmental damage to water, air and soil, as well as problems related to waste, noise and ecosystems'.[356]

In negotiations on environmental goods, developed countries advocated for the 'list' approach, which proposed that following the submission of list of goods from Members, the CTESS would negotiate a final list of goods considered environmental. Several delegations, notably the US and New Zealand, pointed to the Asia-Pacific Economic Cooperation (APEC) Early Voluntary Sectoral Liberalisation initiative as a starting point for delegates to consider.[357] The 1998 and 1999 APEC lists of environmental goods concentrate mainly on capital goods, including:

- municipal water delivery systems, potable water treatment technologies, wastewater treatment and sanitation technologies, and related infrastructure;
- industrial heat-pump technologies in existing and new applications; and

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[354] Beatrice Chaytor, 'Liberalisation of Environmental Goods: A Double-edged Sword or a Panacea?' in Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (eds), *Trade and Environment: A Resource Book* (2007) 79.

[355] WTO Committee on Trade and Environment Special Session, *Report by the Chairman, Ambassador Manuel A. J. Teehankee, to the Trade Negotiations Committee*, WTO Doc TN/TE/20 (21 April 2011).

[356] The OECD/Eurostat classified the main categories of EGS, comprising of:
(a) Category A: the pollution management group, which includes such goods and services as air pollution controls and wastewater management;
(b) Category B: cleaner technologies and products, which are products and technologies with fewer adverse environmental impacts in their production and/or use than standard products; and
(c) Category C: resource management products, such as water supply systems and renewable energy.

OECD/Eurostat, *Environmental Goods and Services Industry: Manual for the Collection and Analysis of Data* (1999) <http://unstats.un.org/unsd/envaccounting/ceea/archive/EPEA/EnvIndustry_Manual_for_data_collection.PDF> at 2 August 2011.

[357] WTO Committee on Trade and Environment: Special Session, *Environmental Goods—Submission by New Zealand*, Document No 02-3150 (2002) <http://www.wto.org/english/docs_e/docs_e.htm> at 29 April 2009.

- end-of-pipe pollution abatement technologies, including scrubbers to remove NOx and SOx.

However, many developing countries have raised concerns about focusing exclusively on these lists. Their concerns stem from the fact that these lists are adopted by developed countries to export their sound environmental technologies and services to developing countries on favourable terms without making any provision for transferring such technologies to developing countries to enhance their capacity to achieve sustainable development.

Kenya and other African countries have stated their comparative advantage in environmental products based on agriculture. Ironically, sustainable agricultural products, sustainable fisheries and forestry, despite having the attributes of environmental goods, are not included in the negotiations on environmental goods. Even the possibility of its inclusion has been discarded by assigning the negotiation on environmental goods to the Negotiating Group on Non-agricultural Market Access: NGMA.[358] The scenario is quite similar in the environmental services arena where the existing proposals on the classification of environmental services reflect sectors where developed countries enjoy a comparative advantage, since most of these sectors are capital and technology-intensive.[359]

7.2.5.3 Current State of Negotiations

Ignoring the concern of developing countries and LDCs, the *2011 Chairman's Report* identifies six broad categories under which environmental goods have been listed: air pollution control, renewable energy, waste management and water treatment, environmental technologies, carbon capture and storage and others.[360] Developed

[358] Chantal Line Carpentier, Kevin P Gallagher and Scott Vaughan, 'Environmental Goods and Services in the World Trade Organisation' (2005) 14 *The Journal of Environment and Development* 225.

[359] Mahesh Sugathan and Johannes Bernabe, 'Environmental Services' in Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (eds), *Trade and Environment: A Resource Book* (2007) 87, 92.

[360] WTO Committee on Trade and Environment Special Session, *Report by the Chairman, Ambassador Manuel A. J. Teehankee, to the Trade Negotiations Committee for the Purpose of the TNC Stocktaking Exercise*, WTO Doc TN/TE/20 (21 April 2011) 2.

countries have comparative advantage in almost all goods listed under these categories since most of them are based on advanced technologies and invention. Even telephone sets and refrigerators have been listed under the category of 'environmental technologies' making no distinction between environmental goods and other goods.[361] The list includes only a few products in which developing countries have comparative advantage,[362] such as manufactured textile materials,[363] jute or other textile fibres.[364] Regarding technology transfer to developing countries and LDCs, the *2011 Chairman's Report* simply states that 'liberalising trade in environmental goods will encourage the use of environmental technologies, which can in turn stimulate innovation and technology transfer'.[365] It essentially does not indicate any preferential terms for technology transfer to developing countries. Regarding the S&DT provision for developing countries, the *2011 Chairman's Report* only provides for lesser reduction commitments and delayed implementation for them. Additional flexibilities are promised for LDCs without chalking them out.[366]

The focus of negotiations of EGS has, thus far, been on capital goods and services relating to maintaining complicated environmental technologies that do not represent the entire environmental market. If the negotiation proceeds along the same lines as before, the EGS will be nothing more than the deceitful tactics of developed countries to ensure increased access in developing countries markets for their EGS. Hence, the right path for the WTO is to include those products and services within the scope of EGS in which developing countries have their comparative advantage and to enhance market

[361] HS 2002 Codes 841810, 841821, 841830, 841840, 841861 and 841869 refer to different types of refrigerators and freezers and their parts. HS 2002 Codes 851711, 851721 and 851730 refer to telephone sets, facsimile machines and telephonic apparatus: Annex II.A: Reference Universe of Environmental Goods: Official HS Descriptions: ibid 29, 36.

[362] Nathalie Bernasconi-Osterwalder, Linsey Sherman and Mahesh Sugathan, 'Environmental Goods and Non-agriclutural Market Access' in Adil Najam, Mark Halle and Ricardo Melendez-Ortiz (eds), *Trade and Environment: A Resource Book* (2007) 77.

[363] HS Codes 530310 and 530410: *Report by the Chairman, Ambassador Manuel A. J. Teehankee*, above n 355, 22.

[364] HS Code 630510: ibid 23.

[365] Ibid 3.

[366] Ibid 4.

access in those goods and services that assist them in achieving sustainable development.

7.2.6 Linkage between Trade and Labour Rights

Parallel to the trade and environment debate is the concern over the linkage between trade and labour rights. From an analysis of the GATT/WTO interface with sustainable development, it appears that it was the trade–environment debate, rather trade–labour rights concern, that led to the trade–sustainable development debate. Nevertheless, trade–labour rights issue is important for this thesis for two reasons. First, the social development component of sustainable development incorporates human rights, which include labour rights. Second, the labour rights issue is manipulated by developed countries for creating market access barriers against the export of LDCs. This adversely affects LDCs' journey towards sustainable development.

7.2.6.1 Views from Developed Countries

Labour rights are inserted within the trade arena by way of a 'social clause'.[367] The major proponents of linking labour standards with trade are the OECD countries, their trade unions and workers' organisations, and the human rights organisations of both developed and developing countries. Their arguments reflect predominantly their business interest as well as moral concern. They maintain that the export of cheap goods from countries that possess lax labour standards create 'unfair' competition in developed countries' markets where prices of similar goods remain high for being produced by upholding high labour standards. This unfair trade drives the domestic products from markets, creating domestic business loss and unemployment. This practice, in turn, gives incentives to the local regulatory regime to make labour standards flexible, resulting in a 'race to the bottom' situation and ultimately in the deterioration of the working conditions in developed countries. They regard this situation as 'social dumping' and seek to respond by means of 'social dumping duties' in the form of, for instance, unilateral trade restriction against countries that violate

[367] See generally Maryke Dessing, 'The Social Clause and Sustainable Development' (Sustainable Development and Trade Issues: ICTSD Resource Paper No 1, ICTSD, October 2001).

basic worker's rights.[368] On moral grounds, the proponents of the trade–labour linkage express their concern for the horrendous condition of workers in developing countries.[369]

7.2.6.2 Views from Developing Countries and LDCs

Among the major opponents of the linkages are the governments of developing countries and LDCs, their non-governmental research organisations, and free trade economists. They argue that:

- linking labour rights to trade is a disguised protectionism for the domestic products of developed countries;
- developed countries exercise unilateralism in enforcing their labour standards upon developing countries by disregarding developing countries' economic and social priority;
- such trade restriction is detrimental to the free flow of trade;
- trade sanction is not the appropriate means to address a labour issue of another country that is very much particular to that country; and
- such linkage creates nothing but impediment to the market access of goods of developing countries and has a detrimental impact on their economy and society.[370]

Here, the trade–labour linkage is dissimilar to the trade–environment debate in which one country or its citizens can legitimately be concerned about the import of products from another country on their own health and safety issues, whereas the goods produced by child labour or prison labour do not pose any kind of threat except the fear of losing

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[368] Friedl Weiss, 'Internationally Recognized Labour Standards and Trade' in Friedl Weiss, Erik Denters and Paul de Waart (eds), *International Economic Law with a Human Face* (1998) 79, 90.

[369] Virginia A Leary, 'Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, US Laws)' in Jagdish Bhagwati and Robert E Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (1996) vol 2, 177, 178.

[370] Clyde Summers, 'The Battle in Seattle: Free Trade, Labor Rights, and Societal Values' (2001) 22 *University of Pennsylvania Journal of International Law* 61, 62; International Confederation of Free Trade Unions (ICFTU), *Enough Exploitation is Enough: A Response to the Third World Intellectuals and NGO's Statement Against Linkage* (TWIN-SAL) (29 September 1999) <http://www.hartford-hwp.com/archives/25a/022.html> at 20 May 2011; Martin Khor, *Why GATT and the WTO Should Not Deal with Labour Standards* (1994) Third World Network, Penang <http://www.twn.org/>.

competitiveness in the domestic market. An effort to visualise the plight of the poor people of the poor countries from a Western viewpoint is bound to mislead and do more harm than good. Moreover, such effort driven by moral conscience for avoiding products used by, for instance, child labour addresses only that segment of child labour that is employed in the export sector, without touching the plight of child labour engaged in non-export sectors including a vast number of them in informal sectors. Jagdish Bhagwati termed this type of social clause as 'blue protectionism ... behind a moral face'. Mentioning a number of labour rights violation by the developed countries,[371] he pointed out that the social clause invariably included the standards that the developing countries are guilty of violating.[372]

7.2.6.3 The Background and the Current State of Negotiations

Trade–labour linkage is not at all a new issue. The *1948 Draft Havana Charter*[373] of the ill-fated International Trade Organization (ITO) addressed this issue:

> The Members recognise that unfair labour conditions, particularly in production for export, create difficulties in international trade and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.[374]

With the demise of the ITO, no such provision remained in any official GATT/WTO instrument. During the concluding negotiations of the Uruguay Round, this linkage issue was given serious attention by the GATT and by the International Labour Organization (ILO). A report of the ILO Director-General to the 1994 ILO Annual Labour Conference[375] and the ILO working paper entitled 'The Social Dimensions of

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[371] Denial of workers' participation in decision making on the plant, ill-treatment of the migrant workers and restriction of strikes of workers in certain industries.

[372] Jagdish Bhagwati, 'Trade Liberalisation and "Fair Trade" Demands', above n 219, 745.

[373] *Havana Charter for an International Trade Organisation,* Final Act and Related Documents (UN Conference on Trade and Employment, Havana, 21 November 1947 to 24 March 1948) [art 13] <http://www.worldtradelaw.net/misc/havana.pdf> at 16 August 2009.

[374] Ibid art 7.

[375] International Labour Organization, *Defending Values, Promoting Change: Social Justice in a Global Economy: An ILO Agenda: Report of the Director General (Part I)* (1994).

the Liberalisation of World Trade'[376] were devoted to this trade–labour linkage. This report examined the GATT provisions for suggesting the legal arrangement to be made for inclusion of a social clause within the GATT/WTO. At Marrakesh, after fierce debate between the North and the South, all that was agreed was that the issue would be kept under review until the Ministerial Meeting following the conclusion of the Uruguay Round.[377] Accordingly, in the Singapore Ministerial Meeting, the issue was discussed again. In the *1996 Singapore Declaration*, Members renew their commitment 'to the observance of internationally recognised core labour standards'. It specifically rejects 'the use of labour standards for protectionist purposes' and agrees that 'the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question'.[378]

The Ministerial Conference at Seattle in 1999 saw an unprecedented blockage successfully created by developing countries on the effort of developed countries to insert the labour issue again in trade agenda. The status quo remained in the *Doha Ministerial Declaration*, which reaffirms the role of the ILO regarding 'the internationally recognised core labour standards' only by taking note of the work of the ILO on the 'social dimension of globalisation'.[379] Labour issues might have lost its political significance since the focus of the North–South debate shifted to subsidy issues.[380]

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[376] *The Social Dimensions of the Liberalisation of World Trade*, 261st Session, ILO Doc. GB.261/WP/SLD/1 (1994).

[377] *Decision on the Establishment of the Preparatory Committee for the WTO*, para 8(c)(iii) 33 ILM 1270 (1994), at 1272.

[378] The Declaration assigned the responsibility to the ILO as the competent body to set and deal with labour standards, and noted the continuance of the existing collaboration between the WTO and ILO Secretariats: *Singapore Ministerial Declaration*, above n 83, para. 4. The Director-General of the ILO appeared to welcome its role in increasing the effective enforcement of labour standards: International Labour Conference, *The ILO, Standards Setting and Globalisation: Report of the Director-General* (1997) <http://www.ilo.org/public/libdoc/ilo/P/09605/09605(1997-85).pdf> at 25 July 2011. After a considerable debate within the ILO, it announced the core labour rights, which identified the issues of child labour and forced labour, establishment of freedom of association and collective bargaining, and freedom from discrimination as the core of international labour rights: International Labour Conference, *Declaration on Fundamental Principles and Rights at Work* (1998) <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> at 25 July 2011.

[379] *Doha Ministerial Declaration*, para 8.

[380] Christopher McCrudden and Anne Davies, 'International Trade Law and Labour Rights' in Markus W Gehring and Marie-Claire Cordiner Segger (eds), *Sustainable Development in World Trade Law* (2005) 103.

Though trade–labour linkage is currently a dormant issue within the WTO, it may be revived at any time. However, developing countries' apparent victory within the multilateral trading regime does not mean that they are under no pressure from developed countries. The fact is that developed countries, such as the US and those in the EU, include and enforce their high labour standards by imposing conditionality in the GSP, making the market access of developing countries contingent upon the fulfilment of the conditions laid by developed countries. Under the GSP programme of the US, the President of the US may not designate a country as a GSP recipient if it 'has not taken or is not taking steps to afford internationally recognised workers' rights to workers in the country'.[381] Driven by the 'moral conscience' for the child labour employed in the ready-made garments sector in Bangladesh, the US threatened the market access of Bangladeshi garments with trade boycott by introducing the Harkin Bill, resulting in dismissal of several thousand child labourers from their job.[382] The US trade action on the ground of labour standards generated vehement criticism against it, since its moral conscience for labour rights does not correspond to its act in ratification of only a negligible number of the ILO conventions.[383]

8 Conclusion

The main objective of this chapter was to establish a linkage between market access and sustainable development from the perspective of LDCs. Tracing the evolution of the concept of sustainable development enabled an understanding of the context and circumstances in which sustainable development was embraced as an objective of the WTO. Though the exact boundary of the concept is yet to be demarcated, the chapter observed that the WTO has accepted the articulation of the concept as provided in *Our*

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[381] *Trade Act of 1974*, 19 USC § 502 (b) (7) (1980). This ground of exclusion was added to the *Trade Act of 1974* by the *Generalised System of Preferences Renewal Act of 1994*, enacted as Title V of the *Trade and Tariff Act of 1984*, Pub. L. No 98–573.

[382] Michael E Nielsen, 'The Politics of Corporate Responsibility and Child Labour in the Bangladeshi Garment Industry' (2005) 81(3) *International Affairs* 559.

[383] Leary, above n 369, 178. For an account of unilateral trade sanctions of the US on labour rights issue see Philip Alston, 'Labour Rights Provision in US Trade Law: "Aggressive Unilateralism"?" (1993) 15(1) *Human Rights Quarterly* 1.

Common Future, which means a balancing process between economic and social development and environmental protection. However, this chapter disagrees with the approach of operationalising the concept only through the activities of the CTE. It argues for embedding a sustainable development approach for LDCs within all WTO negotiations that might affect LDCs. The Doha Round promotes the liberalisation of EGS by including in the list products made by advanced technology, which is where the comparative advantage of developed Members lies. LDCs are asked to take the benefits of advanced technology by reducing their tariffs on the environmental goods that, in fact, promote market access for developed countries' products. But in order to contribute to the sustainable development of LDCs, they must be provided with the transfer of technology on preferential terms.

In the course of examining the trade–sustainable development interface, the chapter observed a clear divide between the perception of developed Members on the one hand, and developing and LDC Members on the other. These conflicting perceptions need to be reconciled in pursuance of the goals of sustainable development. In particular, the chapter closely examined the issues that are at the heart of the conflicting perceptions. To promote sustainable development, developed Members impose environmental and social requirements on exports from LDCs. They take the form of SPS and TBT measures, voluntary standards, eco-labelling, product and process standards and social clauses (which require compliance with labour rights). These instruments, imposed without associated technical assistance and financial support, and capacity-building programmes pose challenges for LDC exporters. Instead of addressing the deep-rooted social, environmental and economic problems of LDCs, trade sanctions are employed to exacerbate the existing vulnerable situation. Therefore, technical and financial assistance need to be provided to the satisfaction of the exporting LDCs as a prerequisite for imposing environmental and social requirements.

In establishing the linkage between market access and sustainable development this chapter addressed research question I. It analysed the constituent principles of sustainable development and found that the market access agenda of LDCs can be promoted by the principle of integration, intergenerational and intragenerational equity and CBDR. The precautionary principle might play a negative role since it might give a broader authority to developed Members to restrict the market access of LDCs. The

chapter addressed poverty as a major impediment to sustainable development. Poverty is closely associated with food insecurity, unemployment and women's empowerment issues, which can be addressed by enhanced market access for LDCs. The next chapter investigates the development of LDCs' market access on the basis of the S&DT principle and examines whether the market access provisions are favourable for the sustainable development of LDCs.

Chapter Three:
A Critical Appraisal of the Market Access Regime for LDCs*

1 Introduction

The market access regime of LDCs can be characterised as preferential and non-reciprocal, which is based on the principle of S&DT.[1] Shaped by the GSP, the objective of preferential market access is to assist with economic growth and development in developing countries and LDCs. The AB observed in *EC–Tariff Preferences*[2] that 'enhanced market access is intended to provide developing countries with increasing returns from their growing exports, which returns are critical for those countries' economic development'.[3] *Our Common Future*[4] articulates economic development as one of the three pillars of sustainable development. There is no denying of the fact that economic development is a contributor to sustainable development.[5] Especially in LDCs, economic development gives impetus to social development and environmental protection by creating employment, by improving women's empowerment, health and labour standards, and education, and by eradicating poverty. It has been recognised in a number of sustainable development instruments that poverty eradication is an essential requirement of sustainable development.[6] It can be argued that preferential market

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* Some part of this paper was presented as 'The Applicability of the Principle of Non-discrimination in GSP Schemes: Revisiting *EC-Tariff Preferences*' in the Post-graduate Conference on Law and Crisis in the University of Sydney on 31 October 2009.

[1] See also Chapter One ss 2.1, 3.2.

[2] *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R, AB-2004-1 (2004) (Report of the Appellate Body).

[3] Ibid para 106.

[4] World Commission on Environment and Development, *Our Common Future* (1987) 43, cited in *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 [footnote 107] (Report of the Appelate Body).

[5] Gary P Sampson, *The WTO and Sustainable Development* (2005) 194.

[6] See Chapter Two, s 5.

access by contributing to poverty eradication promotes sustainable development in LDCs.

The linkage between market access and sustainable development having been established in Chapter Two, this chapter focuses on quintessential features of LDCs' market access regime. It undertakes a historical analysis to depict the logical flow of LDCs' stance regarding their DFQF market access. However, the evolution of LDCs' market access regime does not make any reference to sustainable development. In *EC–Tariff Preferences*, the AB observed in *obiter dicta* that sustainable development constituted an objective of the WTO.[7] It has been argued that an evolutionary reading of the concept of 'development' as listed in the GSP would most likely recognise the link between promoting economic growth of developing countries and sustainable development, which is well established in international law.[8] Such recognition is more imperative since developing countries and LDCs have embraced the concept of sustainable development to strengthen their demand for market access and meaningful S&DT provisions.[9]

This chapter makes a comparative analysis between the legal framework and operation of GSP and DFQF schemes to examine whether the DFQF treatment committed in the Doha Round instruments is susceptible to the same loopholes of the GSP schemes. It argues that for achieving sustainable development, the market access regime for LDCs must be accompanied by meaningful technical and financial assistance, and capacity-

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[7] *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R, AB-2004-1 (2004) [para 94] (Report of the Appellate Body). The AB referred to the preambular provision of sustainable development to make an analogy between the Enabling Clause and the GATT 1994 Article XX(g). As decided by the AB in *US–Shrimp/Turtle* that the preambular objective of sustainable development can be pursued through an exception measure of the GATT Article XX(g). Similarly, the Enabling Clause, even if characterised as an exception measure, can be a 'positive effort' to enhance economic development of developing country Members. The Preamble to the *WTO Agreement* embodies this objective: *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R, AB-2004-1 (2004) [paras 94–5] (Report of the Appellate Body).

[8] Stephanie Switzer, 'Environmental Protection and the Generalised System of Preferences: A Legal and Appropriate Linkage' (2008) 57(1) *International and Comparative Law Quarterly* 113, 139.

[9] See especially WTO General Council, *Preparations for the 1999 Ministerial Conference—Trade, Environment and Sustainable Development, Paragraph 9(d) of the Geneva Ministerial Declaration*, WTO Doc WT/GC/W/387 (15 November 1999) (Communication from Cuba). See also Chapter Two s 7.1.

building programmes to address the supply-side constraints that pose a serious impediment to the market access of LDCs.

2 Background of the Market Access Regime for LDCs

The agenda for the enhanced market access of LDCs is not an innovation of the Doha Round. To understand the current market access regime for LDCs, it is necessary to examine how market access provisions have evolved by tracing the history of the GATT/WTO. The historical analysis demonstrates that the original focus of developing countries on protecting domestic infant industries gradually shifted to that of non-reciprocal preferential market access. In the beginning, developing countries were considered a homogeneous group. LDCs as a distinct group from other developing countries emerged at a later stage.

2.1 Early Negotiations for the International Trade Organization: Equality was the Thumb Rule

The central conception of the post-war trading world, envisaged in the early drafts of the *Havana Charter*[10] and the *GATT 1947*,[11] was equality for all countries, expressed through the non-discrimination principle of the most favoured nation treatment.[12] Developing countries, being aware of the consequences of such equality rules, presented as many as 800 amendment proposals,[13] some of which were accepted in the *Havana*

[10] Also known as *Charter of the International Trade Organisation (ITO).*

[11] *General Agreement on Tariffs and Trade (Geneva),* opened for signature 30 October 1947, 55 UNTS 187 (entered into force provisionally since 1 January 1948 under *the 1947 Protocol of Application,* 55 UNTS 308).

[12] Stanley D Metzger, 'Law and Policy Making for Trade Among "Have" and "Have-Not" Nations' in John Carey (ed), *Law and Policy Making for Trade Among "Have" and "Have-Not" Nations: Background Paper and Proceedings of the Eleventh Hammarskjold Forum* (1968) 5, 26–7. The first draft of the ITO Charter, known as the Proposed Charter, as well as the Suggested Charter published by the US, embodied one set of rules for all countries without making any provisions for economic development or special rules or exceptions for developing countries: *Proposals for Consideration by an International Conference on Trade and Employment* (Publication No 2411, Commercial Policy Series No 79, US Department of States, 1945); *Suggested Charter for an International Trade Organisations of the United Nations* (Publication No 2598, Commercial policy Series No 98, US Department of States, 1946).

[13] These proposals include demands for exemptions from the *Havana Charter's* legal obligations, demands of commodity price controls, quantitative restrictions for balance of payments, longer deadlines for commitments and new tariff preferences and non-reciprocity in tariff concessions: Clair Wilcox, *A*

Charter.[14] They were allowed to use trade restriction (1) by raising bound tariffs, (2) by imposing quantitative import restrictions, and (3) by securing preferential tariffs from other developed or developing countries. But each of these exemptions was made subject to such stringent conditions.[15] These provisions did not materialise at that time since the *Havana Charter* never saw daylight.[16] What came into being, by default, was the *GATT 1947*, which was not technically an organisation with members, rather it was a treaty with contracting parties.[17]

2.2 The First Decade of the GATT (1948–57): Market Protection for Developing Countries

Though the *Havana Charter* was doomed, its infant industry exceptions for tariffs and quantitative import restrictions[18] survived in the *GATT 1947* as Article XVIII.[19] The same did not happen in relation to the *Havana Charter* provision permitting new preferences,[20] which was abruptly declined by the US. Article XVIII was completely

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Charter for World Trade (1949) 30–1, 47–9 and 140–52; William Adams Brown Jr, *The United States and the Restoration of World Trade: An Analysis and Appraisal of the ITO Charter and the General Agreement on Tariffs and Trade* (1950) 97–104, 152–60,178–80 and 203–11; Robert E Hudec, *Developing Countries in the GATT Legal System* (1987) 11.

[14] *Havana Charter for an International Trade Organisation,* Final Act and Related Documents (UN Conference on Trade and Employment, Havana, 21 November 1947 to 24 March 1948) <http://www.worldtradelaw.net/misc/havana.pdf> at 16 August 2009. *Havana Charter* was signed on 24 March 1948. *Havana Charter* included a chapter on economic development and reconstruction (arts 8–15) and another on international governmental commodity agreements (arts 55–70).

[15] Ibid arts 8–15; T N Srinivasan, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future* (2000) 22; Hudec, above n 13, 14.

[16] The *Havana Charter* was demised when the US Congress rejected it.

[17] Diana Tussie, *The Less Developed Countries and the World Trading System: A Challenge to the GATT* (1987) 12.

[18] *Havana Charter for an International Trade Organisation,* Final Act and Related Documents (UN Conference on Trade and Employment, Havana, 21 November 1947 to 24 March 1948) [art 13] <http://www.worldtradelaw.net/misc/havana.pdf> at 16 August 2009.

[19] Article XVIII of the *GATT 1947*, titled 'Government Assistance to Economic Development' recognised that 'special government assistance may be required to promote the establishment, development or reconstruction of particular industries or branches of agriculture, and that in appropriate circumstances the grant of such assistance in the form of protective measures is justified'. It also warns against 'unwise use of such measures'.

[20] *Havana Charter for an International Trade Organisation,* Final Act and Related Documents (UN Conference on Trade and Employment, Havana, 21 November 1947 to 24 March 1948) [art 15] <http://www.worldtradelaw.net/misc/havana.pdf> at 16 August 2009.

redrafted in the *1954–55 Review Sessions*[21] to clarify the extent of the legal elasticity conferred on developing countries.[22] This revision allows developing countries to modify or withdraw concessions included in their Schedules and to impose quantitative and other restrictive measures to protect infant industries. It also permits developing countries facing difficulties with balance of payments to control the general level of imports.[23] The *Review Sessions* also adopted a new Article XXVIII(*bis*),[24] asking contracting parties to take into account 'the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes'.[25] Hence, in the first decade developing countries' trade policy was concerned with market protection or import substitution induced by the theories of infant industry protection.[26]

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[21] *Revisions to Article XVIII, sections A, B, and C*, GATT BISD, 3rd Supp, 179–89 (1955); *A Chronology of Principal Provisions, Measures and Initiatives in Favour of Developing and Least Developed Countries in the GATT and The WTO* <http://www.wto.org/english/tratop_e/devel_e/d2legl_e.htm> at 5 September 2009 (hereinafter *A Chronology of Principal Provisions*). Article XVIII was amended since developing countries could not make major use of infant industry exceptions in Article XVIII due to the requirements of consultations, annual reporting and reviews needed for invoking it: Srinivasan, above n 15, 23; Hudec, above n 13, 25.

[22] Sampson, above n 5, 196.

[23] Ibid; Tussie, above n 17, 18.

[24] *Article XXVIII (bis) adopted*, GATT BISD, 3rd Supp, 205–22 [art 3(b)] (1955) *A Chronology of Principal Provisions*, above n 21.

[25] Ibid.

[26] The policy of protecting infant industry is grounded on the belief that a non-competitive industry will become competitive due to gradual improvements in production efficiency: Tracy Murray, *Trade Preferences for Developing Countries* (1977) 20. Raul Prebisch and Hans Singer argued in the late 1950s and early 1960s that developing countries need to accelerate industrial capacity in non-traditional manufactures both to reduce import dependence and to diversify away from traditional commodities, which were subject to declining terms of trade in the long term and adversely volatile prices in the short term. Part of the recommended policy prescription was high trade barriers to protect infant industries: Bernard Hoekman and Caglar Ozden, 'Introduction' in Bernard Hoekman and Caglar Ozden (eds), *Trade Preferences and Differential Treatment of Developing Countries* (2006) xi, xi. This import-substitution or market protection policies have been subject to severe criticism. See Sampson, above n 5, 199–205.

2.3 Trade Policy of Developing Countries Shifted to Market Access

The fact that developing countries were not the equal beneficiaries of international trade was brought to light by the landmark *Haberler Report of 1958*.[27] The report concluded that developing countries were facing problems in international trade due to their dependence on primary products and import barriers in developed countries' markets and that their export earnings were insufficient for their economic development. It is evident that the report instigated a policy shift in developing countries. The GATT, though it made a positive response formally,[28] was sluggish in taking any substantive action. In the words of Robert Hudec:

> The GATT's work evolved into a slow and patient form of bureaucratic slogging—unending meetings, detailed studies of trade flows and trade barriers and repeated declarations in increasingly urgent but never-quite-binding language. The work was tedious, repetitive and often absurd.[29]

This observation of Hudec, though made in context of the GATT, holds good for the role of the WTO in the Doha Round. However, the dilatory tactics of the GATT saw the unification of developing countries in vocalising their concerns. In 1959, 15 developing countries[30] submitted a Note on the Expansion of International Trade, challenging the core principles of the GATT system—reciprocity and equality of treatment. They asked for negotiation on non-tariff measures (NTMs) since their exports of primary products are hindered by these NTMs. They proposed that developed countries should make unilateral concessions to contribute to the rise in export earnings of developing

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[27] Gottfried Haberler et al, *Trends in International Trade* (1958). *Trends in International Trade* is known as the *Haberler Report* in honour of Professor Gottfried Haberler, Chairman of the GATT-appointed panel of experts. The panel was appointed for a study of the problems faced by the developing countries. The panel was chaired by Gottfried Haberler with James Meade, Jan Tinbergen and Oswaldo as other members: Srinivasan, above n 15, 23.

[28] The GATT adopted an Action Programme and established a special working group, namely Committee III. This committee expressed its view about the ineptitude of tariff negotiation based on the reciprocity principle to achieve economic development in developing countries and appealed for unilateral trade concession by developed countries 'with a view to facilitating an early expansion of the export earnings of less developed countries'. BISD, 8th Supplement 108–10, 23, 135–41 (1960).

[29] Hudec, above n 13, 44–5.

[30] The name of the countries appeared as: Brasil (Brazil), Burma (Myanmar), Cambodia, Chile, Cuba, Federation of Malaya (Malaysia), Federation of Rhodesia and Nyasaland (Zambia, Malawi and Zimbabwe), Ghana, Greece, India, Indonesia, Pakistan, Peru and Uruguay.

countries.[31] Likewise, in 1963, 21 developing countries[32] amalgamated in proposing a programme of action urging developed Members to adopt the following measures on exports of developing countries:

(a) a commitment not to introduce new tariffs and NTMs;
(b) the elimination of illegal quantitative restrictions on imports;
(c) duty-free entry for tropical products;
(d) a schedule for the reduction and elimination of tariffs on semi-processed and processed products; and
(e) the elimination of internal taxes on products wholly or mainly produced in LDCs.[33]

Developing countries even resorted to the complaint procedure of the GATT to highlight the import restrictions by developed countries on products of developing countries.[34] Succumbing to these drives from developing countries, the GATT adopted the *Declaration on Promotion of the Trade of Less-Developed Countries* in 1961.[35] It recognised the urgency of rapid and sustained expansion of export earnings of less-developed countries and recommended improving market access for exports from these countries by reducing tariffs on primary products and reducing the gap between primary and processed products.[36]

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[31] Tussie, above n 17, 26–27.

[32] Argentina, Burma, Brazil, Cambodia, Ceylon, Cuba, Chile, Nigeria, Federation of Malaya, Ghana, Haiti, India, Indonesia, Israel, Pakistan, Peru, United Arab Republic, Tanganyika, Tunisia, Uruguay and Yugoslavia.

[33] GATT BISD, 12th Supp, 36 (1964), cited in Tussie, above n 17, 27. Here LDC refers to developing countries.

[34] Uruguay, in 1961, filed a legal complaint under Article XXIII against 15 developed country Members of the GATT. It identified 576 trade restrictions in 15 developed countries, which were seriously reducing Uruguayan exports, nullifying and impairing the benefits Uruguay could have received from the GATT. However, Uruguay did neither maintain that those restrictions were GATT-inconsistent nor show how exactly particular measures impair benefits expected from the GATT.[34] Hence, this case contributed only in revealing the GATT's ineffectiveness in protecting the legal rights of developing countries: Hudec, above n 13, 46–9.

[35] *Declaration on Promotion of the Trade of Less-Developed Countries*, GATT BISD 10th Supp, 28–32 (1962); *A Chronology of Principal Provisions*, above n 21.

[36] GATT BISD, 10th Supp, 28–32 (1962); *A Chronology of Principal Provisions*, above n 21.

2.4 Institutionalising Preferential Market Access within the GATT

2.4.1 Part IV of the GATT 1947

In 1965, the GATT adopted a new chapter, Part IV, entitled *Trade and Development*, comprising Article XXXVI to XXXVIII.[37] Part IV is particularly significant in two ways. First, it reflects the acceptance by developed countries of the principles of 'special and differential treatment' and 'non-reciprocity' in the GATT system. It states:

> The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.

Second, it prioritises the need for 'rapid and sustained expansion of the export earnings of the less-developed countries'[38] by expanding their market access for both primary and manufactured products of export interest to these countries.[39] Therefore, Part IV formally endorses that market access for developing countries is to be based on the principle of S&DT and non-reciprocity. However, Part IV was widely criticised as having merely symbolic importance whereby the less-developed countries achieved very little by way of precise commitments. It remained a non-binding text articulated in impressive language. The use of phrases such as 'to the fullest extent possible', 'make every effort' and 'where appropriate' subtract all legally binding implications. Its apparent more legalistic language gives the mere illusion of commitment, though it holds significance as a soft law instrument. This gives developing countries reason to resort to them in support of their demands for differential treatment regarding market access.

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[37] *Part IV*, GATT BISD, 13th Supp, 1–12 (1965); *A Chronology of Principal Provisions*, above n 21.

[38] *GATT 1994*, art XXXVI:2.

[39] *GATT 1994*, arts XXXVI:4, XXXVI:5. Article XXXVI:4 places importance on market access of developing countries in primary products, given their continued dependence on such products, while Article XXXVI:5 highlights the need for increased market access in manufactured products.

2.4.2 Generalised System of Preferences

2.4.2.1 UNCTAD I and UNCTAD II

Meanwhile, at the initiative of developing countries[40] and within the auspices of the UN, the first UNCTAD was held in 1964.[41] UNCTAD was the principle forum in shaping international norms of preferential market access for developing countries.[42] UNCTAD I, mostly occupied with the discussions about preferences, reached no substantial decision, as developed and developing countries were divided on the normative contents of preferences.[43] Four years later, with a change in the political atmosphere,[44] developing countries' petition for preferential market access was heard at

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[40] Developing countries, being disgruntled with the apathy of the GATT towards their demands, resorted to the UN forum to push for convening the UNCTAD to resolve their problems in international trade: Tussie, above n 17, 28.

[41] The conference was institutionalised to meet every four years, given the magnitude of the problems at stake and the need to address them. It has intergovernmental bodies meeting between sessions and a permanent secretariat providing the necessary substantive and logistical support: UNCTAD, *A Brief History of UNCTAD* <http://www.unctad.org/Templates/Page.asp?intItemID=3358&lang=1> at 20 March 2011.

[42] Kele Onyejekwe, 'International Law of Trade Preferences: Emanations from the European Union and the United States' (1995) 26 *St. Mary's Law Journal* 425, 447. Within the UNCTAD, the work of Secretary-General Robert Prebisch's work, *Towards a New Trade Policy for Development: Report by the Secretary-General of the United Nations Conference on Trade and Development,* (UN Econ., UN Doc E/CONF.4613 (1964)), is cited as playing a catalyst role for GSPs: Marc Williams, *Third World Cooperation: The Group of 77 in UNCTAD 43–47* (1991); Onyejekwe, at 447.

[43] Most developing and socialist countries voted to adopt the General Principle Eight, which contained the normative content of the GSP, while the majority of developed countries either abstained or voted against it. The Principle states:

> International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries. However, developed countries should grant concessions to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions in return from developing countries. New preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them.

Principles Governing International Trade Relations and Trade Policies Conducive to Development, Proceedings of the United Nations Conference on Trade and Development, Geneva, 23 March to 16 June 1964: Final Act and Report, Annex A.I.3, at 20, UN Doc E/CONF.46/141, vol I (1964); Onyejekwe, above n 42, 448.

[44] All developed countries accepted the principle of preferences by 1968. The US, a diehard opponent of preferential schemes from the very beginning, found itself unsupported in its effort to block the emergence of preferences. Due to the formation of the EC and a Free Trade Area (FTA) Europe became politically strong enough to deviate from the GATT MFN rule in having preferential arrangements. Finally, in an informal meeting in Punta del Este in 1967, the Americans reversed their position to agree to provide preferential market access to developing countries. This happened when they comprehended

the second conference of the UNCTAD (UNCTAD II), held in New Delhi in 1968.[45] After years of discussion, countries were able to reach a tentative consensus for the establishment of the GSP through the adoption of Resolution 21(II).[46] Here the UN Members unanimously agreed to 'the early establishment of a mutually acceptable system of generalised, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries'.[47]

2.4.2.2 Agreed Conclusions

The details of the GSP appeared in 1970 in a set of 'Agreed Conclusions',[48] which notes the view of the preference-granting countries as to the legal status of GSP. They wanted the system to be of a non-binding and temporary character, susceptible to withdrawal in whole or in part, and subject to a reduction of tariffs on an MFN basis.[49] Kele Onyejekwe observed that the principle of good faith was seriously lacking in these 'Agreed Conclusions'. Given that developed countries already agreed in principle that preferences were needed for the development of developing countries, now reserving

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that GSP could be used to counter the Afro-Europe regionalism: *Renewal of the Generalized System of Preferences: Hearing before the Subcommittee on International Trade of the Senate Committee on Finance*, 98th Congress, 1st Session 6 (1983); Hudec, above n 13, 50; Murray, above n 26, 16.

[45] In the meantime in 1965, the GATT CTD published a report under the head of *Expansion of Trade Among Less-Developed Countries*, acknowledging that 'the establishment of preferences among less-developed countries, appropriately administered and subject to the necessary safeguards, can make an important contribution to the expansion of trade among these countries and to the attainment of the objectives of the General Agreement': The CTD, *Expansion of Trade among Less-developed Countries*, GATT BISD, 14th Supp, 136 (1966).

[46] Preferential or Free Entry of Exports of Manufactures and Semimanufactures of Developing Countries to the Developed countries, UNCTAD, 2nd Session, vol I, Annex, Agenda Item 11, at 38, UN Doc TD/97/Annexes (1968). For a detailed history of GSP, see R Krishnamurti, 'Tariff Preferences in Favour of Developing Countries' (1970) 4 *Journal of World Trade Law* 447.

[47] The Panel *in EC–Tariff Preferences* notes that Resolution 21(II) itself did not set up the details of the GSP arrangements although it did set out its objectives and principles. The Resolution called for the establishment of a Special Committee on Preferences as a subsidiary organ of the Trade and Development Board with the express mandate to formulate the modalities of the GSP: *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (2003) [para 7.82] (Report of the Panel).

[48] *Appendix: Agreed Conclusions on the Special Committee on Preferences*, UNCTAD, *Generalized System of Preferences*, Decision 75 (S-IV), 10 ILM 1083 [1084] (21 June 1971) (hereinafter *Agreed Conclusions*). The Special Committee on Preferences after holding sessions from 1968 through 1970 and considering the submissions of the OECD reached the 'Agreed Conclusions': Onyejekwe, above n 42, 450.

[49] *Agreed Conclusions* 1089.

their unilateral right to withdraw preferences would breach the obligation of good faith.[50]

2.4.2.3 The 1971 Waiver Decision

GSP essentially created a deviation from the MFN obligation of the GATT. Hence, the GSP agreed to at UNCTAD II required the legal authority from the GATT. This was resolved by adopting the *1971 Waiver Decision*, which granted a ten-year waiver in the GATT to provide developed countries with legal permission to depart from the MFN rule in providing 'generalised, non-reciprocal and non-discriminatory preferences beneficial to the developing countries'.[51]

2.4.2.4 The *1979 Enabling Clause*

During the Tokyo Round (1973–79), developed and developing countries engaged themselves in strenuous bargaining on the characteristics of GSP schemes. The proposal of Brazil suggested that the GATT should provide a standing legal basis for GSP, that is, that GSP should be integrated into the GATT on a permanent basis and backed by sanctions to assure its effectiveness.[52] The proposal further sought to make preferential treatment irrevocable, or subject to compensation if withdrawn, and non-discriminatory. It intended to put preferences on nearly the same legal footing as tariff concessions within the GATT.[53] As expected, developed countries turned down the Brazilian proposals.

The negotiations led to the *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, which is known as the

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[50] Onyejekwe, above n 42, 451–2. Onyejekwe referred to the statement of the ICJ in the *Nuclear Tests Case* that 'one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith'. *Nuclear Tests Case (Australia v France)* (Jurisdiction) [1974] ICJ Rep 253, 268.

[51] *Waiver for Generalised System of Preferences*, Decision of 25 June 1971, GATT BISD, 18th Supp, 24 (1972).

[52] Gilbert R Winham, *International Trade and the Tokyo Round Negotiation* (1986) 144–5.

[53] Ibid.

1979 *Enabling Clause*.[54] It provides a permanent legal structure for S&DT of developing countries regarding preferential market access. However, none of the developing countries' proposals were retained in the final text. The 'graduation rule' became its permanent feature, whereby certain developing countries and certain products, when becoming competitive, would no longer be eligible to receive preferential market access.

The GSP scheme that came out of these instruments gave developed countries 'loose commitments with strong provisions' rather than 'strong commitments with loose escape provisions'.[55] The common stance of developed countries is grounded on their perception of the GSP as a certain form of aid that gives them the discretionary right to withdraw the preference at any time from any product and any country without even consulting the affected GSP beneficiaries.[56] Conversely, developing countries feared that the GSP scheme could be used by developed countries as an excuse for introducing a plethora of protective measures into their trade relations with them.[57]

2.5 Emergence of the LDCs

2.5.1 LDCs in the GATT

With the announcement by the UN of *LDC list*,[58] the GATT enthusiastically treated LDCs as a distinct species within the genus of developing country groups. The Declaration of Ministers inaugurating the Tokyo Round[59] declared the special status of

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[54] *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of 28 November 1979, (L/4903), GATT BISD, 26th Supp, 203–18 (1980) (*Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*).

[55] Norma Breda dos Santos, Rogerio Farias and Raphael Chunha, 'Generalised Sytem of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues' (2005) 39(4) *Journal of World Trade* 637, 648.

[56] Ibid.

[57] David Wall, 'Problems with Preferences' (1971) 47(1) *International Affairs* 87, 95.

[58] *Identification of the Least Developed among the Developing Countries*, GA Res 2768 (XXVI), 1988th plen mtg (18 November 1971) <http://www.integranet.un.org/esa/policy/devplan/profile/ga_resolution_2768.pdf> at 11 September 2009.

[59] *The Tokyo Declaration (14 September 1973)*, GATT BISD, 20th Supp, 19 (1972–3).

LDCs by pledging that 'the particular situations and problems of the least developed among the developing countries shall be given special attention', and emphasising 'the need to ensure that these countries receive special treatment in the context of any general or specific measures taken in favour of the developing countries during the negotiations'.[60] Both the *1971 Agreed Conclusions* and the *1979 Enabling Clause* specifically mention providing more favourable preferential access to LDCs.[61] The WTO Panel in *EC–Tariff Preferences*[62] is of the view that 'in designing and modifying GSP schemes, Paragraph 3(c) does allow for differentiation among developing countries, in the case of special treatment to the least developed countries'.[63]

Interesting as it may be, the LDC provisions in the *Doha Development Agenda* (DDA) were sketched out 20 years before in the *GATT Ministerial Declaration of 1982*.[64] The Annex to the 1982 Declaration calls for the improvement of market access for LDCs with the objective of 'providing fullest possible duty-free access'; elimination or reduction of NTBs for LDCs; more flexible rules of origin; technical assistance for LDCs; strengthening of trade promotion activities; facilitating participation of LDCs in international negotiations; and considering the interests of LDCs in other trade policy issues.[65] The *Punta del Este Declaration of 1986*[66] pronounced that appropriate attention would be given to the 'expeditious implementation' of the above LDC provisions. It can be argued that one of the motivating factors for this prompt and

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[60] Ibid para 6.

[61] Section V of the Agreed Conclusions provides that 'the special need for improving the economic situation of the least-developed among the developing countries is recognised. It is important that these countries should benefit to the fullest extent possible from the generalized system of preferences': *Agreed Conclusions*. Article 2(d) of the Enabling Clause provides for 'special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries': *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*.

[62] *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (2003) (Report of the Panel).

[63] Ibid para 7.115.

[64] Gerrit Faber and Jan Orbie, 'The Least Developed Countries, International Trade and the European Union: What about "Everything but Arms"?' in Gerrit Faber and Jan Orbie (eds), *European Union Trade Politics and Development: 'Everything but Arms' Unravelled* (2007) 1, 5.

[65] *Ministerial Declaration*, GATT Doc L. 5424 (29 November 1982), GATT BISD 29 Supp (1983) 9–26.

[66] *Ministerial Declaration, Punta del Este*, GATT BISD, 33rd Supp (1987) 19–28.

unequivocal recognition of LDCs was to fully engage the more advanced developing countries in the framework of rights and obligations,[67] while exempting LDCs from this framework. The conclusion of the Uruguay Round brought about an eruption of LDC provisions in the *WTO Agreement*,[68] other WTO agreements,[69] and the *1994 Decision on Measures in Favour of Least-Developed Countries*,[70] which called for improved market access, LDC waiver from substantive commitments, technical assistance and strengthening export and production bases for LDCs.

2.5.2 LDCs within the WTO

The course of action towards LDCs took a further step after the *Singapore Ministerial Declaration of 1996*,[71] where an agreement was reached to adopt a *Plan of Action*.[72] Accordingly, the *Comprehensive and Integrated WTO Plan of Action for Least-Developed Countries* divided LDC provisions in three main segments: (a) more effective implementation of decision in favour of LDCs, (b) human and institutional capacity building, and (c) preferential duty-free market access.[73] The concept of DFQF market access as a legitimate object of negotiation was formally introduced by the first WTO Director-General, Renato Ruggiero utilising the *Singapore Ministerial*

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[67] L Alan Winters, 'The Road to Uruguay' (1990) 100(403) *The Economic Journal* 1288, 1298.

[68] *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS, I-31874 (1995) (entered into force 1 January 1995) 154 [Preamble] <http://treaties.un.org/untc//Pages//doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf> at 10 June 2011.

[69] For instance, *Agreement on Agriculture* Preamble, art 15; *Agreement on the Application of Sanitary and Phytosanitary Measures* art 10; *General Agreement on Trade in Services* Preamble, arts IV, XIX; *Agreement on Trade-related Aspects of Intellectual Property Rights* Preamble, art 66, 67; *Agreement on Technical Barriers to Trade*, art 11.

[70] *Decision on Measures in Favour of Least-Developed Countries*, UN Trade Series vol 1867, I-31874 (1995) [42] <http://treaties.un.org/untc//Pages//doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf> at 10 June 2011.

[71] *Singapore Ministerial Declaration*, WTO Ministerial Conference, Singapore, WTO Doc WT/MIN(96)/DEC (18 December 1996) (adopted on 13 December 1996).

[72] Ibid para 14.

[73] *Comprehensive and Integrated WTO Plan of Action for the Least-Developed Countries*, WTO Doc WT/MIN(96)/14 (7 January 1997) (adopted on 13 December 1996).

Declaration as a platform for it.[74] In fact, after the conclusion of the Uruguay Round, LDCs started to take a more independent course and gradually became more active in the WTO negotiations.[75] With support from the UN Office of the High Representative for LDCs, the UNCTAD and the WTO Secretariat, LDCs gradually developed a more distinct international profile. Their call for improved market access received new support from the Everything but Arms (EBA) initiative of the EU,[76] and the Third UN Conference on the Least Developed Countries (UN LDC-III), in Brussels, May 2001.[77] Immediately after this, in July 2001, LDC ministers met at Zanzibar, Tanzania to adopt a common position prior to the Doha Ministerial Conference in November 2001. The *Zanzibar Declaration*[78] calls on the Doha Ministerial to agree on a 'binding commitment' on DFQF market access 'from all products from LDCs on a secure, long-term and predictable basis'.[79]

The *Doha Ministerial Declaration* reiterates the commitment of the *Singapore Declaration* to take positive measures for securing LDCs' share in world trade 'commensurate with the needs of their economic development'.[80] Concretely, the Declaration promises to give DFQF market access for products originating from

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[74] Jess Pilegaard, 'An LDC Perspective on Duty-free and Quota-free Market Access' in Gerrit Faber and Jan Orbie (eds), *European Union Trade Politics and Development: 'Everything but Arms' Unravelled* (2007) 135, 148.

[75] Stephen Woolcock, 'The Changing Nature of Trade Diplomacy' (Paper for the BISA Panel on Economic Diplomacy in the Twenty-First Century, London School of Economics and Kings College, London, 2002).

[76] In February 2001, the European Council adopted Regulation (EC) 416/2001, the so-called 'EBA Regulation' ('Everything But Arms'), granting duty-free access to imports of all products from 49 LDCs, except arms and ammunitions, without any quantitative restrictions (with the exception of bananas, sugar and rice for a limited period). EBA was later incorporated into the GSP Council Regulation (EC) No 2501/2001 <http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/everything-but-arms/> at 10 June 2011.

[77] United Nations General Assembly, *Programme of Action for the Least Developed Countries for the Decade 2001-2010* in Report of the Third United Nations Conference on the Least Developed Countries, UN Doc A/CONF.191/13 (30 September 2001).

[78] *Zanzibar Declaration*, Meeting of the Ministers Responsible for Trade of the Least Developed Countries, Zanzibar, WTO Doc WT/L/409 (6 August 2001).

[79] Ibid para 4.

[80] *Ministerial Declaration*, WTO Ministerial Conference, 4th sess, Doha, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) (adopted on 14 November 2001) (hereinafter the *Doha Ministerial Declaration*) para 2; *Singapore Ministerial Declaration*, WTO Ministerial Conference, Singapore, WTO Doc WT/MIN(96)/DEC (18 December 1996) (adopted on 13 December 1996) para 4.

LDCs,[81] and technical assistance and capacity building for improvement of their participation in several areas: non-agricultural market access (NAMA),[82] specific sectors of investment,[83] competition policy,[84] government procurement,[85] trade facilitation,[86] trade and environment,[87] improved market access[88] and Integrated Framework for Trade-Related Technical Assistance for Least-Developed Countries (IF).[89] However, the commitment to the 'objective of duty-free, quota-free market access' for LDC products,[90] crafted in a promising language, does not correspond to the LDCs' appeal for 'binding commitment' in the *2001 Zanzibar Declaration*. Subsequently, the *2002 Work Programme for LDCs*,[91] adopted by the Sub-Committee on Least Developed Countries,[92] address the systemic issues of market access, technical assistance and capacity building for LDCs.[93] The mandate of the *2002 Work Programme for LDCs* is limited to the (i) identification and notification of market access barriers; and (ii) monitoring the progress of, and recommending on technical assistance and capacity-building initiative for LDCs.[94] On LDCs' front, both the *2003*

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[81] *Doha Ministerial Declaration* para 42.

[82] Ibid para 16.

[83] Ibid para 21.

[84] Ibid para 24.

[85] Ibid para 26.

[86] Ibid para 27.

[87] Ibid para 33.

[88] Ibid para 42.

[89] Ibid para 43.

[90] Ibid para 42.

[91] WTO, *WTO Work Programme for the Least Developed Countries* (adopted by the Sub-Committee on the Least Developed Countries), WTO Doc WT/COMTD/LDC/11 (13 February 2002) (*WTO Work Programme for the Least Developed Countries*) <http://www.wto.org/english/tratop_e/devel_e/dev_sub_committee_ldc_e.htm> at 8 September 2009.

[92] The Sub-Committee on Least Developed Countries was established in 1995 as a subsidiary body of the CTD to look specifically at issues of particular importance to LDCs: *The Sub-Committee on Least Developed Countries* <http://www.wto.org/english/tratop_e/devel_e/dev_sub_committee_ldc_e.htm> at 10 June 2011.

[93] *WTO Work Programme for the Least Developed Countries* para 5 <http://www.wto.org/english/tratop_e/devel_e/dev_sub_committee_ldc_e.htm> at 8 September 2009.

[94] Ibid paras 7–11.

Dhaka Declaration,[95] and the *2005 Livingstone Declaration*,[96] stress the determination of LDCs to obtain a 'binding commitment on DFQF market access for all products from LDCs on a secure, long-term and predictable basis'.[97] It is evident from the LDCs' Declarations that the issue of DFQF market access was at the top of the LDCs' negotiating agenda in the Doha Round. Consequently, at the 2005 Hong Kong Ministerial Conference, both 'developed countries and developing countries declaring themselves in a position to do so, agree to implement duty-free and quota-free market access for products originating from LDCs'.[98] Members also reaffirm their commitment 'to enhance effective trade-related technical assistance and capacity building to LDCs',[99] and strengthening the role of the IF,[100] Joint Integrated Technical Assistance Programme (JITAP)[101] and Aid for Trade[102] to build the supply-side capacity and trade-related infrastructure that would ultimately assist them to expand their trade.[103]

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[95] *Dhaka Declaration* was adopted by the LDC trade ministers meeting in Bangladesh in 31 May to 20 June 2003 in the lead-up to the Cancun ministerial Conference: *Dhaka Declaration*, Second LDC Trade Ministers' Meeting, WTO Doc WT/L/521 (26 June 2003).

[96] *Livingstone Declaration* was adopted by the LDC trade ministers meeting in Livingstone, Zambia, during 25–6 June 2005 in preparation for the Hong Kong Ministerial Conference in December 2005: *Livingstone Declaration*, Fourth LDC Trade Ministers' Meeting, Livingstone, WTO Doc LDC/IV/2005/4 (26 June 2005) <http://www.ifg.org/documents/WTOHongKong/LivingstoneDec.pdf> at 10 June 2011.

[97] *Dhaka Declaration*, Second LDC Trade Ministers' Meeting, WTO Doc WT/L/521 (26 June 2003) para 15; ibid para 1.

[98] *Doha Work Programme, Ministerial Declaration*, WTO Ministerial Conference, 6th Sess, Hong Kong, WTO Doc WT/MIN(05)/DEC (22 December 2005) (adopted on 18 December 2005), para 47 and Annex F: *Special and Differential Treatment: Para 36, Decision on Measures in Favour of Least Developed Countries* (hereinafter *Hong Kong Ministerial Declaration*). The same commitment has been reiterated in all subsequent Ministerial Declarations and Chairman's Working Paper until the submission of this thesis.

[99] Ibid para 47.

[100] See this chapter, s 4.2.

[101] Ibid.

[102] Ibid.

[103] *Hong Kong Ministerial Declaration* paras 48, 53, 57.

3 Analysing the DFQF Market Access Schemes for LDCs vis-à-vis GSP Schemes

As mentioned in the previous section, WTO Members agreed in the *2005 Hong Kong Ministerial Declaration* to accord LDCs DFQF market access.[104] Annex F provides:

> developed-country Members shall, and developing-country Members declaring themselves in a position to do so should:
>
> (a)(i) Provide duty-free and quota-free market access on a lasting basis, for all products originating from all LDCs by 2008 or no later than the start of the implementation period in a manner that ensures stability, security and predictability.
>
> (ii) Members facing difficulties at this time to provide market access as set out above shall provide duty-free and quota-free market access for at least 97 per cent of products originating from LDCs ... .[105]

DFQF market access is mandated in addition to the existing GSP schemes institutionalised by the *1979 Enabling Clause*, which provides that 'contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties'.[106] Apart from various GSP schemes,[107] several countries have set up their DFQF market access schemes for LDCs.[108] Among these, two noteworthy schemes are the EBA initiative by the EU[109]

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[104] Ibid Annex F: *Special and Differential Treatment: Para 36, Decision on Measures in Favour of Least Developed Countries*.

[105] Ibid.

[106] *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, art 1 (footnote omitted).

[107] UNCTAD reports that there are currently 13 national GSP schemes notified to the UNCTAD Secretariat—Australia, Belarus, Bulgaria, Canada, the EU, Estonia, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey, and the US: *About GSP* , UNCTAD <www.unctad.org/Templates/Page.asp?intItemID=2309&lang=1> at 11 June 2011.

[108] Australia, Belarus, Canada, the EU, Kazakhastan, Kyrgyz Republic, Moldova, Norway, New Zealand, Russia, Switzerland, Tajikistan, Turkey and Uzbekistan apply duty-free access for all products from LDCs: UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs* (2010), 60 (Table 13: Preferential Market Access Measures in favour of LDCs).

[109] The EU adopted EBA in 2001 by EC regulation No 416/2001: Council Regulation (EC) No 416/2001 of 28 February 2001 *Amending Regulation (EC) No 2820/98 Applying a Multiannual Scheme of Generalised Tariff Preferences for the Period 1 July 1999 to 31 December 2001 so as to Extend Duty*

and African Growth and Opportunity Act (AGOA) of the US,[110] which were launched and adopted in about the same period.[111] In the course of examining the efficacy of the market access regime for LDCs, this chapter makes a comparative analysis between GSP schemes under the ambit of the *1979 Enabling Clause* on the one hand, and on the other, DFQF provision of the *2005 Hong Kong Ministerial Declaration* along with AGOA and EBA. The objective of this analysis is to assess whether DFQF market access provides a better arrangement for LDCs or whether they also fall into the loopholes of the existing GSP schemes.

3.1 Country Coverage and Conditionality

3.1.1 The Enabling Clause and GSP Schemes

3.1.1.1 Country Coverage

The *Enabling Clause* allows contracting parties to accord preferential market access to developing countries, including more favourable treatment to LDCs.[112] The provision of the clause does not give any hint as to whether such preferences have to be provided to all developing countries or if the preference-granting countries have discretion to select countries to whom preferential market access shall be accorded. The Dispute Settlement Body (DSB) of the WTO had an unique opportunity to clarify this matter in *EC–Tariff Preferences*,[113] where India challenged the drug arrangements of EC's GSP scheme that

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Free Access without Any Quantitative Restrictions to Products Originating in the Least Developed Countries [2001] OJ L60/43.

[110] *African Growth and Opportunity Act* (AGOA) was passed in Congress in the period 1999–2000 and signed into law by President Clinton on 18 May 2000. It was signed into law as Title 1 of the *Trade and Development Act of 2000* <http://www.agoa.gov/agoa_legislation/agoatext.pdf> at 11 June 2011. The July 2004 AGOA Acceleration Act (AGOA III) extends the programme for most products from 2008 to 30 September 2015: Dries Lesage and Bart Kerremans, 'The Political Dynamics behind US and EU Trade Initiatives towards the Least Developed Countries' in Gerrit Faber and Jan Orbie (eds), *European Union Trade Politics and Development: 'Everything but Arms' Unravelled* (2007) 74, 74.

[111] Both AGOA and EBA were launched in 1996–97 and adopted in 2000–01. These two are also GSP schemes. The EBA results from the special application of the GSP in favour of LDCs. It has been established under Paragraph 2(d) of the Enabling Clause. AGOA is also a special scheme within the US GSP for SSA developing countries: Faber and Orbie, 'The Least Developed Countries', above n 64, 1.

[112] *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (Enabling Clause) paras 1, 2(a), 2(d). Footnote 1 to Paragraph 1 states that 'developing countries' also refer to 'developing territories'.

[113] *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R, AB-2004-1 (2004) (Report of the Appellate Body); WTO Doc WT/DS246/R (2003) (Report of the Panel).

granted additional tariff preferences to a 'closed list' of developing countries to assist them in combating drug production and trafficking.[114] India claimed that the EC's drugs regime was discriminatory and violated the 'non-discriminatory' requirements for GSP programmes set out in the *Enabling Clause*.[115] The Panel held that 'the term "developing countries" in paragraph 2(a) should be interpreted to mean *all* developing countries'.[116] Exception can be made only when developed countries implement *a priori* limitations,[117] which are 'measures that set import ceilings so as to exclude certain import originating in individual developing countries where the products concerned reach a certain competitive level in the market of the preference-giving country'.[118] The EU appealed against this part of the Panel's findings.[119] Reversing the above finding of the Panel, the AB held that 'the term "developing countries" in Paragraph 2(a) should not be read to mean "all" developing countries and, accordingly, that Paragraph 2(a) does not prohibit preference-granting countries from according different tariff preferences to different sub-categories of GSP beneficiaries'.[120]

However, the AB clearly states that it does not 'rule on whether the *Enabling Clause* permits *ab initio* exclusions from GSP schemes of countries claiming developing country status, or the partial or total withdrawal of GSP benefits from certain

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[114] The Drug Arrangement was established under the EC Council Regulation 2501/2001: *Council Regulation (EC) No 2501/2001 of 10 December 2001 Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2002 to 31 December 2004* [2001] OJ L346/1.

[115] India challenged both the EC's Drug Arrangements and the EC's preference schemes conditioned on labour and environmental grounds. Later in 2003, India dropped its challenges against labour and environmental schemes since she did not wish to put its main claim against the Drug Arrangements at risk by raising more politically sensitive trade-labour and trade-environment issues: *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (2003) para 1.15 (Report of the Panel). Gregory Shaffer and Yvonne Apea, 'Institutional Choice in the General System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights' (Legal Studies Research Paper Series, Paper No 1008, University of Wisconsin, Law School, 2006) 8.

[116] *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (2003) para 7.174 (Report of the Panel) (emphasis in the original text).

[117] Ibid.

[118] Ibid para 7.108.

[119] *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R, AB-2004-1 (2004) (Report of the Appellate Body).

[120] Ibid para 175.

developing countries under certain conditions'.[121] By saying so, the AB essentially limits the scope of its findings. It excludes a very important issue from its determination, which is whether the *Enabling Clause* permits the preference-giving countries to actually pick and choose the beneficiary countries or whether they can withdraw the scheme according to their will. In the absence of such a determination, the *status quo* remains. This means preference-giving countries reserve the right to select the GSP beneficiaries.[122] There has been only a minor limitation, that is, after *EC–Tariff Preferences*, preference-granting countries are required to select their beneficiaries on the basis of 'clear prerequisites' or 'objective criteria'.[123] In this dispute, the AB found EC's Drug Arrangements to be inconsistent with the *Enabling Clause*, but not because this scheme creates discrimination among developing countries, rather due to its lack of transparency, failure to establish any 'clear prerequisites' or 'objective criteria', which would allow other developing countries similarly affected by the drug problem to be included as beneficiaries.[124]

3.1.1.2 Positive and Negative Conditionalities

Developed countries link their preferential schemes to a plethora of non-trade conditions—from human rights, sustainable development and intellectual property protection to uphold political ideology. These GSP conditions have been identified to be of two broad types: positive and negative conditionality.[125] Positive conditionality functions as an incentive to meet certain standards set by the preference-granting countries for gaining additional preferences and works as a reward for complying with those standards. Negative conditionality poses the threat of withdrawal of existing preferences in case of failure to comply with certain standards, also set unilaterally by

[121] Ibid para 129.

[122] Tussie, above n 17, 31; For detail on this point see Murray, above n 26, 33–52.

[123] *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R (2004) para 183 (Report of the Appellate Body).

[124] Ibid para 183.

[125] For an account of both of these conditionalities, see Switzer, above n 8; Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6(2) *Journal of International Economic Law* 507.

preference-giving countries. It operates as a punishment for the beneficiaries.[126] Instances of both type of conditionality are worth mentioning.

Negative conditionality can be found in the GSP system of both the US and EC. The US GSP Scheme that came into effect in 1976 through the *Trade Act of 1974*[127] created mandatory and discretionary criteria for GSP status. Both these criteria are essentially negative since they specify conditions under which a particular developing country cannot be designated a beneficiary.[128] Under a set of mandatory criteria, countries are deemed ineligible for GSP beneficiaries for any of the following reasons: communism, membership of an international cartel (Organization of the Petroleum Exporting Countries [OPEC]) causing damage to the world economy (in the US opinion), reverse preferences,[129] expropriation, failure to enforce arbitral awards, involvement in terrorism, violation of worker's rights and child labour.[130] Under the discretionary criteria, the US Trade Representative (USTR) can take account of factors, such as the desire to be a beneficiary, level of economic development, GSP status in other country's GSP scheme, market openness, level of intellectual property protection, trade policy regarding trade in services and investment practices, and implementation of internationally recognised worker's rights.[131] Even the President can withdraw or suspend the GSP status of a country if he or she determines that due to the changed situation the country should be barred from being designated as a GSP beneficiary.[132] The US system permits any interested US private party to petition for a country's removal, total or partial, as a GSP beneficiary.[133] Labour unions and intellectual

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[126] Melissa Healy, 'European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries: The Use of Positive Conditionality in the European Generalised System of Preferences' (2009) 15(3) *International Trade Law and Regulation* 79, 79–81.

[127] *Trade Act of 1974*, 19 USC §§ 2461–2467 <http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file381_8358.pdf> at 26 July 2011.

[128] Murray, above n 26, 36.

[129] When preference-granting country's products also receives preferences in the beneficiary country.

[130] *Trade Act of 1974*, 19 USC §2462(b).

[131] *Trade Act of 1974*, 19 USC §2462(c).

[132] *Trade Act of 1974*, 19 USC § 2462(d)(2).

[133] *Part-2007: Regulation of the US Trade Representative Pertaining to Eligibility of Articles and Countries for the Generalised System of Preferences,* 15 CFR § 2007.0(a) and (b).

property trade associations have been the two more active users of this provision.[134] The behaviour of a developing country is monitored by the US in deciding periodically whether it should continue to enjoy GSP benefits.[135] The US GSP provisions show how GSP is used by the US to elicit reciprocity from developing countries. In the words of Tracy Murray:

> Obviously the intent of such conditions can only be to elicit economic or political behaviour on the part of developing countries which is consistent with US international economic and political interest.[136]

Similarly, the EC GSP scheme, introduced in 1971, also contains negative conditionality but it does not negatively determine a country's eligibility to become a GSP beneficiary, rather it provides for temporary withdrawal of GSP status. Under this scheme, preferential arrangements can be temporarily withdrawn on the following grounds: serious and systematic violations of the principles laid down in certain international conventions concerning core human rights and labour rights or related to the environment or good governance; export of goods made by prison labour; failure in custom controls on illicit drugs; money laundering; serious unfair trade practices; infringement of the objectives of regional fishery organisations or arrangements of which the Community is a Member.[137] They can also be withdrawn for fraud, failure to comply with rules of origin or failure to provide administrative cooperation for implementation of GSP schemes.[138]

<http://ecfr.gpoaccess.gov/cgi/t/text/textidx?c=ecfr&sid=9c1e2fb5a48d543abd219d1725ab3575&rgn=div5&view=text&node=15:3.2.1.7.7&idno=15#15:3.2.1.7.7.0.36.1> at 11 June 2011.

[134] Shaffer and Apea, above n 115, 5.

[135] Murray, above n 26, 36.

[136] Ibid.

[137] *Council Regulation (EC) No 732/2008 of 22 July 2008 Applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007* [2008] OJ L211/1,6 (ch III: *Temporary Withdrawal and Safeguard Provision,* art 15) <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:211:0001:0039:EN:PDF> at 11 June 2011.

[138] *Council Regulation (EC) No 732/2008 of 22 July 2008 Applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007* [2008] OJ L211/1,6 (ch III: *Temporary Withdrawal and Safeguard Provision,* art 16).

Positive conditionality is the more prominent feature of the present EC GSP scheme, as commented by Sanchez Arnau that unlike the US, 'the EU has tried to avoid using GSP-linked sanctions'.[139] The current EU GSP scheme, effective from 1 January 2009 to 31 December 2011, retains the three tier arrangements[140] adopted on 27 June 2005.[141] To benefit from the special incentive arrangement, a country must have ratified and effectively implemented all the 27 conventions related to labour rights, environment and governance principle. The beneficiary must further give an undertaking to maintain the ratification through implementing legislation and measures, and must accept the regular monitoring and review of its implementation.[142] Moreover, it must prove that it is a vulnerable country by satisfying the vulnerability conditions in the EC GSP scheme:

- not being classified by the World Bank as a high-income country during three consecutive years;
- five largest sections of its GSP-covered imports into the Community must represent more than 75 per cent in value of its total GSP-covered imports; and
- GSP-covered import from that country to the Community must represent less than one per cent in value of the total GSP-covered imports into the Community.[143]

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:211:0001:0039:EN:PDF> at 11 June 2011.

[139] Juan C Sanchez Arnau, *The Generalised System of Preferences and the World Trade Organization* (2002) 270. For an overview of the current US GSP scheme see *US Generalised System of Preferences (GSP) Guidebook, 2009* <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp> at 28 September 2009; for details on the EC GSP scheme see *Generalised System of Preferences: Handbook on the Scheme of the European Community*, 2008 <http://www.unctad.org/en/docs/itcdtsbmisc25rev3_en.pdf> at 28 September 2009.

[140] General Arrangement, Special Incentive Arrangement for Sustainable Development and Good Governance (GSP Plus scheme) and Special Arrangement for the Least-developed Countries: *Council Regulation (EC) No 732/2008 of 22 July 2008*, art 1.2.

[141] The 2005 Scheme was adopted by Council Regulations (EC) No 980/2005: *Council Regulations (EC) No 980/2005 Applying a Scheme of Generalised System of Preferences* [2005] OJ L169/1. For details, see UN, *Generalised System of Preferences: Handbook on the Scheme of the European Community* (2008).

[142] *Council Regulation (EC) No 732/2008 of 22 July 2008,* art 8.

[143] Ibid art 8(1)(c), 8(2)(a)(b).

Even after conferring the special incentive arrangement, they can be temporarily withdrawn if the country's legislation no longer incorporates those convention provisions or if the legislation is not effectively implemented.[144]

3.1.2 DFQF Provision, EBA, and AGOA

Annex F to the *Hong Kong Ministerial Declaration* requires developed and developing country Members to provide DFQF market access to products originating from 'all' LDCs.[145] Hence, by committing DFQF for all LDCs, it removes the ambiguity retained in Paragraph 2(a) of the *Enabling Clause*. This provision is silent on conditionality issues.

EBA has been established in favour of, in principle, all LDCs in order to boost their exports and development. The main benchmark for eligibility is being on the UN list of LDCs.[146] They do not need to satisfy any other criteria. However, under the EU, GSP countries may lose their EBA status on the basis of the temporary withdrawal provisions.[147] These provisions are about serious violations of core labour rights, unacceptable trade practices and violations of international agreements as regards fisheries. Exclusion on this ground is not automatic, rather it depends upon the wishes of the Council and the Commission. In 1997, EU excluded Myanmar from GSP benefits because of its forced labour practices. Consequently, it has never been granted EBA status.[148] However, efficacy of such a penalty measure is in serious doubt since such measures simply worsens the general economic situation of the target country by

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[144] Ibid art 15(2).

[145] *Hong Kong Ministerial Declaration* para 36(a)(i) of Annex F (emphasis added).

[146] Olufemi Babarinde and Gerrit Faber, 'Exports by Least Developed Countries in SSA: The Role of Preferential Systems, Geography and Institutions' in Gerrit Faber and Jan Orbie (eds), *European Union Trade Politics and Development: 'Everything but Arms' Unravelled* (2007) 96, 96.

[147] *Council Regulation (EC) No 980/2005 of 27 June 2005 Applying a Scheme of Generalised Tariff Preferences* [2005] OJ 169/1,6 (ch III: *Temporary Withdrawal and Safeguard Provisions*, art 16) <http://www.georgia.gov.ge/pdf/2009_12_29_19_43_59_1.pdf> at 11 June 2011.

[148] Lesage and Kerremans, above n 110, 85.

reverting it to less favourable terms of trade. In consequence, the labour and human rights situation is likely to deteriorate more.[149]

In contrast to EBA, which is based on universalism, AGOA is based on regionalism and focused on Sub-Saharan Africa (SSA) as a particular geographical area.[150] Unlike EBA, AGOA is not explicitly for LDCs. Important non-LDCs such as South Africa or Kenya are AGOA beneficiaries, while all Caribbean, South Pacific and Asian LDCs are by definition excluded.[151] AGOA is designed with the most stringent conditionality. Section 107 of the AGOA lists 48 SSA countries that are potentially eligible for AGOA beneficiaries.[152] The listed countries are potential, not necessarily actual, recipients of AGOA preferences. There are three more steps for a SSA country to receive benefits.[153] First, the President must designate them as an 'eligible sub-Saharan African Country' by applying eight statutory requirements formulated in vague terms.[154] These requirements are:

- A market-based economy must exist. Three criteria for market orientation are: (1) protection of private property; (2) incorporation of an open, rules-based system; and (3) minimal interference by the government in the economy.[155]
- A liberal political system must exist. Four criteria are: (1) rule of law; (2) political pluralism; (3) the right to due process; and (4) equal protection under the law.[156]

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[149] Weifeng Zhou and Ludo Cuyvers, 'Linking International Trade and Labour Standards: The Effectiveness of Sanctions under the European Union's GSP' (2011) 45(1) *Journal of World Trade* 63, 77.

[150] Lesage and Kerremans, above n 110, 82.

[151] Ibid 74.

[152] The economic and demographic indicator used to designate these countries as potential AGOA beneficiaries are: population, per capita GDP, in US dollars and purchasing power parity (PPP) terms; percentage of population below poverty line; composition of GDP by sectors, namely agricultural, industrial and services; labour force by occupation (i.e., percentage of labour force in each sector) and unemployment rate (as well as year of latest estimate).

[153] Raj Bhala, 'Generosity and America's Trade Relations with Sub-Saharan Africa' (2006) 18 *Pace International Law Review* 133, 149.

[154] *Trade Act of 1974*, 19 USC § 3703; ibid 154–60.

[155] *Trade Act of* 1974, 19 USC § 3703 (a)(1)(A).

[156] Ibid 19 USC § 3703 (a)(1)(B).

- Barriers to US trade and investment must be eliminated. Three criteria are: (1) creating an environment favourable to investment; (2) protection of intellectual property; and (3) the resolution of bilateral trade and investment disputes.[157]
- Broad-based economic policies must be put in place. Six criteria are: (1) the reduction of poverty; (2) improved health care; (3) increased educational opportunities; (4) expanded physical infrastructure; (5) the promotion of private enterprise; and (6) the formation of capital markets through micro-credit and other programs.[158]
- A system must exist to combat corruption and bribery. The only criteria is to signing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[159]
- Internationally recognised worker rights must be protected. These are: (1) the right of association; (2) the right to organise and bargain collectively; (3) a prohibition on forced or compulsory labour; (4) a minimum age for employment of children; and (5) acceptable working conditions with respect to minimum wages, hours of work and occupational safety and health.[160]
- A country must not engage in activities that undermine the national security or foreign policy interests of the US.[161]
- A country must not engage in gross violations of internationally recognised human rights.[162]

After designating the eligible SSA according to the above requirements, the President of the US must designate them as 'a beneficiary sub-Saharan African country' using the country-eligibility criteria of the GSP discussed above.[163] The criteria mentioned above are quite ambiguous and subject to variant interpretations. Ultimate power to grant and

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[157] Ibid 19 USC § 3703 (a)(1)(C).

[158] Ibid 19 USC § 3703 (a)(1)(D).

[159] Ibid 19 USC § 3703 (a)(1)(E).

[160] Ibid19 USC § 3703 (a)(1)(F).

[161] Ibid 19 USC § 3703 (a)(2).

[162] Ibid 19 USC § 3703 (a)(3).

[163] Bhala, above n 153, 161.

withdraw AGOA status lies inside the White House. In fact, the US President has used this discretionary power for several times. In 2000, President William Jefferson Clinton accorded AGOA status to 34 of the 48 potentially eligible countries as actually eligible,[164] excluding 14 of the poorest countries whose average per capita GDP was US$1657.[165] By 2006, most of them had acquired AGOA status except Equatorial Guinea, Liberia and Togo, due to the combination of problems regarding political pluralism, rule of law and human rights, the undermining of the US foreign policy interests and insufficient economic reform.[166] In 2011 President Barack Obama cancelled the AGOA status of Democratic Republic of Congo (DRC) by stating the failure of the DRC in 'making continual progress in meeting the requirements' of the AGOA.[167] This action is likely to severely affect this war-trodden country since the largest share of its exports to the US is under the AGOA.[168]

Finally, a beneficiary SSA country can be a recipient of trade preferences on textile and apparel articles by satisfying even further criteria.[169] The US must determine that a country that has satisfied all the above criteria has also implemented the procedures, including an effective visa system, to prevent unlawful textile and apparel transhipment.[170] These procedures must conform to those set forth in Chapter Five of

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[164] *Proclamation No 7,350, 65 Federal Regulation 59,321 (2 October 2000)*, cited in Bhala, above n 153, 162 .

[165] These are Angola, Burkina Faso, Burundi, Comoros, Democratic Republic of Congo, Ivory Coast, Equatorial Guinea, Gambia, Liberia, Somalia, Sudan, Swaziland, Togo, and Zimbabwe. Except Zimbabwe, all are LDCs. Later on, President Bush declared five of these countries to be eligible AGOA beneficiary countries (effective 17 January 2001).

[166] Lesage and Kerremans, above n 110, 86.

[167] Office of the Press Secretary of the White House, *Presidential Proclamation – African Growth and Opportunity Act: To Take Certain Actions under the African Growth and Opportunity Act, and for Other Purposes* (21 December 2010) para 7 <http://www.whitehouse.gov/the-press-office/2010/12/21/presidential-proclamation-african-growth-and-opportunity-act> at 12 August 2011.

[168] In 2010 the total US imports from DRC was US$324573 thousand of which imports under the AGOA schemes was US$295790 thousand: *Bilateral Trade Profile: US-Democratic Republic of Congo* (undated) <http://agoa.info/index.php?view=country_info&country=cd&story=trade> at 12 August 2011.

[169] Bhala, above n 153, 150.

[170] Ibid 164.

the *North American Free Trade Agreement (NAFTA).*[171] This requires a Sub-Saharan LDC to comply with the same rules that are applicable to Canada and Mexico. When a beneficiary meets these criteria for textile and apparel preferences, the USTR lists that country on its website.[172] The foregoing discussion reflects that an AGOA beneficiary has to satisfy more stringent conditions than a GSP beneficiary. It has to satisfy additional conditions after satisfying the GSP conditions. In this sense, it can be argued that AGOA is not close to the DFQF arrangement as envisaged in the *2005 Hong Kong Ministerial Declaration.*

3.2 Reciprocity

Regarding non-reciprocity, Paragraph 5 of the *Enabling Clause* provides that '[t]he developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries'. Footnote 3 to Paragraph 2(a) refers to the 1971 Waiver Decision that characterises the GSP as non-reciprocal preferences to developing countries. Non-reciprocity is also envisaged in the *Hong Kong Declaration.*[173] Both AGOA and EBA are, in principle, non-reciprocal systems. However, the conditionality that this chapter highlights both in relation to old GSP schemes and new DFQF market access hardly render them non-reciprocal. For instance, to become eligible for AGOA, an LDC must eliminate barriers to US trade and investment.[174] Such conditions can only aim to force economic or political behaviour on the part of developing countries that is compatible to US or EU economic and political interests.[175] These are merely reverse preferences. This is particularly evident from the way rules of origin are designed by preference-granting countries.

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[171] *North American Free Trade Agreement* began on 1 January 1994. The contracting parties are the US, Canada and Mexico. See official website of NAFTA <http://www.nafta-sec-alena.org/en/view.aspx> at 11 June 2011.

[172] Bhala, above n 153, 164.

[173] It is reaffirmed that least-developed country Members will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial or trade needs, or their administrative and institutional capacities: *Hong Kong Ministerial Declaration* Annex F: Para 38 *Decision on Measures in Favour of Least-Developed Countries.*

[174] See this chapter, s 3.1.1.

[175] Murray, above n 26, 36.

3.3 Product Coverage

The *Enabling Clause* is silent about product coverage. Thus, it is left to the discretion of the preference-giving countries. GSP schemes most often exclude product categories in which developing countries have comparative advantage. The US excludes T&C, watches, footwear, handbags, luggage, flat goods, work gloves, steel, glass and electronic equipment from its coverage.[176] Similarly, Japan excludes several agricultural, fisheries and industrial products.[177] Murray expressed frustration regarding the GSP schemes back in 1977, which is true even for present GSP schemes:

> the bulk of those products which they (developing countries) do export and therefore in which they have a demonstrated international comparative advantage, are excluded from the GSP. The GSP incentives thus tell the developing countries to stop doing what they do well and instead start doing something else.[178]

The *2005 Hong Kong Declaration* endorses DFQF market access regarding all products. But Members facing difficulties are asked to provide DFQF market access for at least 97 per cent of products. It does not specify which products have to be included within the scheme. This is also left to the discretion of the preference-giving countries. In its communication on behalf of the LDC Group, Zambia[179] pointed out the shortcomings of the DFQF treatment provisions:

> (i) Members could avoid their commitment to 100 percent DFQF treatment to LDCs if they faced any difficulties in providing it. In case of such difficulties they would commit to 97 percent defined at the tariff line level. This could be vital for LDCs given their product

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[176] Stefano Inama, *Handbook on Duty-Free Quota-Free and Rules of Origin: Part I: Quad Countries* (2009) [47] UN Doc UNCTAD/ALDS/2008/4 <http://www.unctad.org/en/docs/aldc20084_en.pdf> at 5 June 2011.

[177] Ibid 42.

[178] Murray, above n 26, 59.

[179] WTO CTDSS, WTO NGMA and WTO Committee on Agriculture Special Session, *Duty-free and Quota-free Market Access Implementation of the Decision on Measures in Favour of Least-Developed Countries of Annex F of the Hong Kong Ministerial Declaration of December 2005*, WTO Docs TN/CTD/W/31, TN/MA/W/78, TN/AG/GEN/23 (30 June 2006) (Communication from Zambia on behalf of the LDC Group).

concentration only to a very small number of exportable products which has been underscored in section two of the chapter.

(ii) Developing country Members were permitted to phase in their commitments and enjoy flexibility in coverage.[180]

EBA covers all products except arms and ammunition, with a transition period for bananas until 2006, and for rice until 2009.[181] In order to be eligible under AGOA, products have to be determined 'not import sensitive' by the President, taking into account the advice from the US International Trade Commission (USITC). Among the excluded items are some textile articles, certain steel products, canned peaches and apricots, broken rice and dehydrated garlic.[182] The three per cent margin in the Hong Kong deal gives many possibilities to deny DFQF market access to the products that are important to LDCs.[183] Kimberly Ann Elliott observed that 'because both rich-country tariff peaks and LDC exports tend to be relatively concentrated in similar sectors, even a small number of product exclusions can rob the initiative of any meaning'.[184]

Another crucial factor is the utilisation of tariff preferences. Stefano Inama argued:

> product coverage itself represents only one of the several dimensions to substantially enhance market access conditions for LDCs' exports. Equally, or more important, is the utilisation of trade preferences and the factors currently impeding the full use of the available preferences.[185]

Stefano Inama defines it as 'the ratio of amount of imports, which actually received trade preferences at the time of customs clearance in the preference-giving country, to

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[180] Ibid para 1.

[181] Lesage and Kerremans, above n 110, 75.

[182] Office of the USTR, *2008 Comprehensive Report on US Trade and Investment Policy toward Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act: The Eighth of Eight Annual Reports* (May 2008) <http://www.ustr.gov/sites/default/files/asset_upload_file203_14905.pdf> at 11 June 2011.

[183] Lesage and Kerremans, above n 110, 75, 89.

[184] Kimberly Ann Elliott, 'Open Markets for the Poorest Countries: Trade Preferences That Work' (The CGD Working Group on Global Trade Preference Reform, Center for Global Development, 2010) 8.

[185] Stefano Inama, 'Market Access for LDCs' (2002) 36(1) *Journal of World Trade* 85, 87.

the amount of dutiable imports eligible for preferences'.[186] The utilisation rate of preferences is a clear indicator of the effectiveness of trade preferences.[187] It has been found that even with better coverage of products, utilisation rate of preferences of LDCs is often low due to restrictive rules of origin,[188] or due to the fact that preference is given to products that are not commonly exported by LDCs.[189] A 2011 Note by the WTO Secretariat found that, in 2008, on average 52 per cent of LDC imports were eligible to some sort of 'preferential scheme' and the average rate of utilisation of the preferential schemes was 87 per cent.[190]

3.4 Rules of Origin

3.4.1 Rational

Though the *Enabling Clause* does not say anything about rules or origin, preferential market access always comes with rules of origin, fulfilment of which is a precondition for the application of a preferential tariff.[191] Preferential rules of origin aim to ensure that the preferences in preferential arrangements are available only to the beneficiaries who are an integral part of the preferential regime in question.[192] Annex II to the Agreement on Rules of Origin defines preferential rules of origin as:

> those laws, regulations and administrative determinations of general application applied by any Member to determine whether goods qualify for preferential treatment under

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[186] Ibid, 88.

[187] Ibid.

[188] UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs* (2010) 63.

[189] WTO, Sub-Committee on Least-Developed Countries, *Market Access for Products and Services of Export Interest to Least-Developed Countries: Note by the Secretariat*, WT/COMTD/LDC/W/48/Rev.1 (9 March 2011) 38.

[190] WTO Sub-Committee on Least-Developed Countries, *Market Access for Products and Services of Export Interest to Least-Developed Countries*, WTO Doc WT/COMTD/LDC/W/48/Rev.1 (9 March 2011) (Note by the Secretariat) 38.

[191] Stefano Inama, *Rules of Origin in International Trade* (2009) 1.

[192] Asif H Qureshi and Roman Grynverg, 'Preferential Rules of Origin and WTO Disciplines with Specific References to the US Practice in the Textiles and Apparel Sectors' (2005) 32(1) *Legal Issues of Economic Integration* 25, 28.

contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of Paragraph 1 of Article I of the GATT 1994.[193]

The rationale is that main objective of GSP and like preferences is to stimulate production and employment in export sectors of developing countries. However, the GSP could initiate a system of trade diversion through beneficiary countries, stimulating the creation of 'trading houses' instead of industrial production and employment.[194] Rules of origin were established to prevent such deflection of trade. These rules constitute a set of requirements designed to prevent the beneficiaries from simply re-exporting goods produced elsewhere unless such goods were substantially processed in the exporting beneficiary developing country.[195] However, as this section reveals, the manner in which rules of origin is applied by the preference-giving countries gives rise to the assumption that these rules are plainly not for the benefit of the GSP beneficiaries. Rather, they are for protecting the import-competing industries of the granting countries. In particular, the rules requiring the use of inputs from the preference-giving country creates nothing but reverse preferences.[196] The rules of origin are burdensome for LDCs because they increase production costs where they are restrained from sourcing inputs from the most competitive sources globally.[197]

3.4.2 Basic Features of Rules of Origin in GSP Schemes

There is no international consensus at present as to how rules of origin should be formulated precisely. WTO Members enjoy a wide degree of discretion in the manner in

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[193] *Agreement on Rules of Origin*, Annex II: Common Declaration with regard to Preferential Rules of Origin, art 2. WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 211.

[194] Murray, above n 26, 84.

[195] Ibid.

[196] Kimberly Ann Elliott, 'Changing Rules of Origin to Improve Market Access for Least Developed Countries' (Centre for Global Development, CGD Notes, October 2010) <http://www.cgdev.org/content/publications/detail/1424480/> at 19 January 2011.

[197] Eckart Naumann, 'UN LDC IV: Reforming Rules of Origin in Preference-Giving Countries' (ICTSD Policy Brief Number 2, ICTSD and Trade Law Centre for Southern Africa [TRALAC] March 2011) [3] <http://www.acp-eu-trade.org/library/files/Neumann_EN_010411_ICTSD_UN%20LDC%20IV%20reforming%20RoOs.pdf> at 28 July 2011.

which these rules of origin are formulated and applied. WTO Panel in *US–Textiles Rules of Origin*[198] observed that Members retain considerable discretion in designing and applying their respective non-preferential rules of origin, that is, in determining the criteria that confer origin, changing the criteria over time, or applying different criteria to different goods.[199] In this case, India alleged that the US rules of origin violated Articles 2(b), 2(c) and 2(d) of the *WTO Agreement on Rules of Origin*[200] on the grounds that these rules were not being used as instruments to pursue trade objectives; their impact on international trade had a restrictive, distorting or disruptive effect; they were unduly strict; not related to manufacturing or processing; and were discriminatory. The Panel ruled that India failed to substantiate the allegations made. Though this dispute was in relation to non-preferential rules of origin, it is significant for the analysis of this chapter since from the approach of the Panel, it can be easily assumed that the discretion of preference-granting countries regarding preferential rules of origin is much wider.[201]

This assumption becomes more likely to be correct given the fact that the *WTO Agreement on Rules of Origin* expressly excludes preferential rules of origin from its main application.[202] Its prohibition as to the use of rules of origin as a trade policy instrument, and in a trade-restrictive, discriminatory, distorting, disruptive or non-relevant fashion do not apply to preferential rules of origin. These are applicable in relation to non-preferential rules of origin.[203] Regarding preferential rules of origin, the Agreement on Rules of Origin only makes a 'Common Declaration' for clarity, transparency, due process and confidentiality.[204] In the absence of a binding WTO

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[198] *United States—Rules of Origin for Textiles and Apparel Products*, WTO Doc WT/DS243/R (20 June 2003) (Report of the Panel).

[199] Ibid paras 6.24, 6.25, 6.73.

[200] *Agreement on Rules of Origin*, reproduced in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 211.

[201] Qureshi and Grynverg, above n 191, 30–1.

[202] *Agreement on Rules of Origin*, art 1.

[203] Ibid arts 2(b)–(d).

[204] *Annex II to the Agreement on Rules of Origin* merely upholds Members' commitments to make the requirements to be fulfilled to satisfy the rules of origin to be clearly defined, published beforehand and based on positive standards. However, it does not take into account the consideration of preference-receiving countries as to whether they would find the rules too complicated to comply with: Qureshi and Grynverg, above n 191, 29.

agreement on preferential rules of origin, it remains with the discretion of preference-granting countries, which are reluctant to harmonise them or link them to a common standard.[205]

Under the rules of origin, a product must satisfy a minimal-processing requirement,[206] expressed as an 'either/or' test; either the goods presented for preferential tariff treatment are (i) wholly obtained or produced in the exporting beneficiary country, without foreign component parts; or (ii) substantially transformed from imported materials and components.[207] The major controversy surrounding the rules of origin involves the question of what constitutes substantial transformation. Preference-granting countries have their individual rules on this substantial transformation. It can be easily understood what difficulties an LDC has to go through in satisfying the rules of origin for so many preferential schemes along with the non-preferential rules in relation to the same product.[208]

Two criteria are mainly used to determine transformation: process criteria and percentage criteria. Process criteria involve the assessment of the degree of processing undertaken in the beneficiary country. The principle underlying the process criteria is that the final goods must be defined for tariff purposes as different from any imported materials or components embodied in them.[209] Percentage criteria may be further divided into two types: (a) one that prescribe a must-use minimum percentage on the value of domestic materials; and (b) the other prescribe a percentage ceiling on the maximum value of imported material that may be used in the manufacture of a qualifying product.[210]

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[205] Naumann, above n 197, 1.

[206] Murray, above n 26, 86.

[207] Ibid 87.

[208] Onyejekwe, above n 41, 464.

[209] Murray, above n 26, 87. The EU, Japan, Norway, Sweden and Switzerland base their preferential rules of origin on 'process' criterion: Murray, above n 26, 87.

[210] Murray, above n 26. US GSP Scheme and AGOA use percentage value test while Canada uses the percentage ceiling approach: Naumann, above n 197, 5; Murray, above n 26.

Another requirement of the rules of origin is the adequate documentation of origin and consignment.[211] This rule is designed to ensure that goods presented for customs clearance under GSP tariff treatment are entitled to such preferential treatment.[212]

In each of these cases, preference-granting countries have unlimited discretion to design the rules of origin to make them trade-restrictive. Even if they are not trade-restrictive, LDCs experience extreme difficulties in complying with the different rules of origin of different schemes. Apart from these general rules, there are several other rules that are applied in different manners by different preference-granting countries. Two of them are the donor-country content rule and the cumulative origin rule.

3.4.2.1 Donor-Country Content Rule

Some preference-granting countries apply the donor-country content rule that allows products (materials, parts and components) of their manufacture when supplied to a preference-receiving country and used there in a process of production, to be regarded of that preference-receiving country's origin for determining whether the finished product qualifies for GSP treatment.[213] This donor-country content rule is designed to favour the sourcing of donor-country raw materials and semi-processed goods for further processing in the beneficiary country.[214] The EC, Canada, Japan and the Russian Federation apply this rule.[215]

3.4.2.2 Cumulative Origin Rule

The cumulative origin rules permits a product to be manufactured and finished in a preference-receiving country using imported materials, parts or components from other preference-receiving countries, and this material could be considered as originating in

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[211] Onyejekwe, above n 41, 465.

[212] Murray, above n 26, 86.

[213] Inama, *Rules of Origin in International Trade*, above n 191, 189.

[214] Naumann, above n 197, 1.

[215] Inama, *Rules of Origin in International Trade*, above n 191, 189.

the preference-receiving country claiming the preferential tariff treatment.[216] Cumulation reduces the restrictiveness of rules of origin.[217] Full cumulation is the most flexible form,[218] which permits a preference-receiving country to use materials from other preference-receiving countries while regional cumulation permits using materials from other Members of the same region. Canada applies a full and global cumulation regarding all preference-receiving countries as one single area for determining origin.[219] The EC, Japan, Norway and Switzerland grant regional cumulation to certain regional associations. They differ from each other in the detail of these rules.[220]

The EC has reformed its rules of origin by a new regulation on EC GSP rules of origin that came into force on 1 January 2011.[221] A significant change has been brought in relation to cumulation rules of origin. Under the previous rules of origin, the origin was conferred to the country of last manufacturing only when the value added was greater than the customs value of the imported inputs from the other Member country of the regional organisation.[222] In the new regulation, this requirement has been replaced by a more flexible one that only requires that the inputs originating in the other Members of the regional group have undergone working or processing that is more than minimal-processing operations.[223] Moreover, the new regulation also introduced 'extended cumulation', which allows cumulation between GSP beneficiary countries and EU Free Trade Agreement partner countries under certain conditions.[224] The extended cumulation rules exclude some agricultural and fishery products.

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[216] Ibid 190.

[217] Naumann, above n 197, 6.

[218] Ibid 6.

[219] Inama, *Rules of Origin in International Trade*, above n 191, 191.

[220] Ibid.

[221] *Commission Regulation (EU) No 1063/2010 of 18 November Amending Regulation (EEC) No 2454/93 Laying Down Provisions for the Implementation of Council Regulation (EEC) No 2913/92 Establishing the Community Customs Code* [2010] OJ L 307/1.

[222] Stefano Inama, 'The Reform of the EC GSP Rules of Origin: *Per aspera ad astra*?' (2011) 45(3) *Journal of World Trade* 577, 584; Trade Policy Review of the European Union, WT/TPR/S/248, 33.

[223] Inama, 'The Reform of the EC GSP Rules of Origin: *Per aspera ad astra*?', above n 222, 585.

[224] Ibid 585.

While the cumulative origin rule holds benefit for developing countries, the rationale for the donor-country content rule could be nothing but obtaining reverse preferences from the beneficiary countries.

3.4.3 Rules of Origin in DFQF Schemes

The apparent generosity of the EBA regarding country coverage and product coverage is overshadowed by its burdensome rules of origin. As an extension of the GSP, the rules of origin of GSP also apply for the EBA scheme. The EBA rules of origin are based on goods being substantially transformed according to product-specific criteria.[225] Its rules of origin require that a change of heading under the Harmonised System must have taken place in the originating country. EBA allows partial regional accumulation for Members of the Association of South East Asian Nations (ASEAN), the South Asian Association for Regional Cooperation (SAARC), the Andean[226] and the Central American Common Market (CACM). More stringent rules of origin apply for fish and fish preparation and for clothing and textile products.[227] In the new rules of origin, the EC Commission used a threshold of 70 per cent allowance of non-originating material for LDCs and 50 per cent for developing country beneficiaries. This substantially liberalised the previous rules of origin, which requires a maximum allowance of 40 per cent.[228]

Similarly, the AGOA also applies the US GSP rules of origin's basic rule of a 35 per cent value-added test.[229] This means the sum of (i) the costs or value of materials produced in an AGOA beneficiary and (ii) the direct costs of processing operations in an AGOA beneficiary must equal or exceed 35 per cent of the value of an article as

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[225] Naumann, above n 197, 6.

[226] The Andean Community is customs union comprising the South American countries of Bolivia, Columbia, Equador, and Peru.

[227] Babarinde and Faber, above n 146, 96.

[228] Inama, 'The Reform of the EC GSP Rules of Origin: *Per aspera ad astra*?', above n 222, 33.

[229] *Trade Act of 1974*, 19 USC §2463(a)(2)(A).

determined by the US Customs and Border Protection.[230] Under the AGOA, this quantitative test benchmark is made a little flexible, by allowing for up to 15 per cent of the appraised value of an article to consist of materials produced in the US.[231] The benefit is given to the donor country itself. The rules of origin under both the AGOA and EBA are more complex and stringent for T&C products, which severely constrain LDCs in their ability to diversify and expand exports to the EU and the US.[232]

Unlike the *Enabling Clause*, the *2005 Hong Kong Ministerial Declaration* acknowledges the importance of simplified rules of origin. Paragraph 47 states that 'Members shall take additional measures to provide effective market access' by adopting 'simplified and transparent rules of origin so as to facilitate exports from LDCs'.[233] Again, relevant texts in Annex F states that WTO Members agree to '[e]nsure that preferential rules of origin applicable to imports from LDCs are transparent and simple, and contribute to facilitating market access'. However, despite continuous effort, there has not yet been any progress in making rules of origin simple, harmonised and transparent for LDCs. LDCs' detailed proposal on rules of origin[234] did not gain much support from the preference-receiving countries.[235] However, the Draft NAMA Modalities in Paragraph 15 urge Members to use the model provided in the WTO document TN/MA/W/74, which is a proposal from Zambia on behalf of LDCs.[236] To ensure DFQF market access for LDCs it is vital to apply a single rules of origin methodology across all DFQF schemes with the most flexible full cumulation rule.

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[230] Ibid.

[231] Ibid § 2466(b)(2)(A).

[232] Paul Brenton and Caglar Ozden, 'The Effectiveness of EU and US Unilateral Trade Preferences for LDCs' in Gerrit Faber and Jan Orbie (eds), *European Union Trade Politics and Development: 'Everything but Arms' Unravelled* (2007) 117, 118. Paul Brenton considers AGOA rules of origin to be less stringent than those of the EBA for T&C.

[233] *Hong Kong Ministerial Declaration* para 47.

[234] WTO CTDSS, NGMA, Committee on Agriculture Special Session, *Least Developed Countries Proposal on Rules of Origin*, WTO Docs TN/CTD/W/30; TN/MA/W/74 and TN/AG/GEN/20 (12 June 2006).

[235] Naumann, above n 197, 9.

[236] WTO NGMA, *Draft Modalities for Non-Agricultural Market Access*, WTO Doc TN/MA/W/103 (8 February 2008); WTO NGMA, *Draft Modalities for Non-Agricultural Market Access: Third Revision*, WTO Doc TN/MA/W/103/Rev.2 (10 July 2008); WTO NGMA, *Draft Modalities for Non-Agricultural Market Access*, WTO Doc TN/MA/W/103/Rev.3 (6 December 2008) (Revision).

3.5 Summary and a Sustainable Development Linkage

The comparative analysis of legal framework and operation of GSP and DFQF scheme reveals that DFQF promises immense advantage for LDCs by providing market access for a wide range of product categories, in a non-discriminatory manner and without any conditionality attached. The EBA of the EU holds this positive aspect while AGOA retains all vices of the old GSP schemes including conditionality and reciprocity. However, both EBA and the AGOA retain stringent rules of origin that reduce the utilisation rate of preferences. Unsurprisingly, Celine Carrere and Jaime De Melo found that preferential access of LDCs is greater in the EU than in the US, while rules of origin applied in both markets are complicated and different.[237]

It is axiomatic to mention that trade policy of the EU in providing preferential market access to developing countries and LDCs (through EBA) is intently knitted towards the objective of sustainable development. The quotation below demonstrates this:

> we should start with a common roadmap on the governance of globalisation, notably in North–South relations. This is a long-standing concern of the EU, as various existing instruments show: EU/ACP agreements, the Generalise System of Preferences for developing countries, regional trade agreements, the 'Everything but Arms' initiative which grants duty-free and quota-free access to the EU market to the 49 poorest countries. But we now need to devote all tools of external policy (trade, development, diplomacy) to harnessing globalisation, towards sustainable development and a global partnership with Developing Countries.[238]

Now, the question is what is the approach of the EU in incorporating sustainable development in its GSP schemes? In a 1994 Communication on the 'Role of the GSP',[239] the EU proposed the introduction of 'special incentive mechanisms' that would

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[237] Celine Carrere and Jaime De Melo, 'The Doha Round and Market Access for LDCs: Scenarios for the EU and US Markets' (2010) 44(1) *Journal of World Trade* 251, 287.

[238] Pascal Lamy, 'Europe's Role in Global Governance. The Way Ahead' (Speech delivered at Humboldt University, Berlin, 6 May 2002), cited in Faber and Orbie, 'The Least Developed Countries', above n 64, 3.

[239] Commission of the European Communities, *Integration of the Developing Countries into the International Trading System: Role of the GSP 1995–2004*, COM(94) 212 final (1 June 1994) (Communication from the Commission to the Council and the European Parliament) <http://aei.pitt.edu/4213/1/001682_1.pdf> at 29 July 2011.

provide additional margin of preferences to developing countries as 'positive inducements and logical components of development policy in that they reflect the idea of social progress and protection of the environment as aspects of, rather than preconditions for, sustainable development.[240] Robert Howse observed that the EU environmental conditionality 'may contribute to increased trade consistent with sustainable development, as stated in the Preamble to the WTO Agreement'.[241]

In fact, the crucial question that arose in the aftermath of *EC–Tariff Preferences* was whether the *Enabling Clause* allows developed countries to condition the granting of preferential market access on developing country's attainment of certain non-trade-related goals.[242] The case triggered a vibrant academic debate as to the legitimacy and implications of conditionality in GSP schemes.[243] At one side of the debate, there are opinions that such conditionality on preferences could outweigh the benefits that developing countries would receive from preferential market access. This would give unfettered rights to developed countries to impose their values on developing countries,[244] and use preferences as 'bargaining leverage'.[245] While the opinions at the

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[240] Ibid 11.

[241] Robert Howse, 'Back to the Court after Shrimp/Turtle? Almost but Not Quiet Yet? India's Short-lived Challenge to Labour and Environmental Exceptions in the European Union's Generalised System of Preferences' (2003) 18(6) *American University International Law Review* 1333, 1362.

[242] Jennifer L Stamberger, 'The Legality of Conditional Preferences to Developing Countries under the GATT Enabling Clause' (2003) 4(2) *Chicago Journal of International Law* 607, 607.

[243] A roundtable among Steve Charnovits, Lorand Bartels, Robert Howse, Jane Bradley, Joost Pauwelyn and Donald Regan highlighted several aspects of implication of the EC–Tariff Preferences decision: Steve Charnovitz et al, 'Internet Roundtable: The Appellate Body's GSP Decision' (2004) 3(2) *World Trade Review* 239; Shun-yong Yeh, 'Dragging Out of or Deeper into Another Impasse of the Political Economy of the World Trade Organization? A Critic of the Findings of the Dispute Settlement Body in European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries' (2006) 1 *Asian Journal of WTO and International Health Law and Policy* 465; James Harrison, 'GSP Conditionality and Non-Discrimination' (2003) 9(6) *International Trade Law and Regulation* 159; Kevin Moss, 'The Consequences of the WTO Appellate Body Decision in EC–Tariff Preferences for the African Growth Opportunity Act and Sub-Saharan Africa' (2006) 38 *New York University Journal of International Law and Politics* 665; Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program', above n 125; Lorand Bartels, 'The WTO Legality of the EU's GSP+ Arrangement' (2007) 10(4) *Journal of International Economic Law* 869; Lorand Bartels, 'The Appellate Body Ruling on EC –Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programmes' in Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi (eds), *Human Rights and International Trade* (2005) 463; Healy, above n 126; Switzer, above n 8.

[244] Stamberger, above n 242, 616.

[245] Santos, Farias and Chunha, above n 55, 660.

other end of the debate are that 'GSP benefits are a "gift" of sorts';[246] hence a donor should have the right to set the terms of the gift and specify the beneficiaries.[247] Hence, applying the concept of sustainable development to create conditionality is unlikely to be helpful for LDCs, rather the concept should be employed to make market access meaningful and effective for LDCs.

4 Technical and Financial Assistance, Capacity Building and Waiver for LDCs

4.1 Supply-side Constraints of LDCs and Limited Negotiating Capacity

It has only recently been understood that supply-side constraints are a vital factor encumbering LDCs in utilising market access benefits under the preferential arrangements. For instance, UNCTAD clearly showed that supply-side constraints were major impediments inhibiting the capacity of Bangladesh to access benefits under the EU GSP and EBA schemes,[248] and the situation is the same with the African countries.[249] UNCTAD studies on the export competitiveness of LDCs, in particular, indicate that the basic productive capacity of LDCs, whether in agriculture or manufacturing, is rudimentary. LDCs in general face infrastructure-related problems, which include limited power outages and voltage fluctuations, shortage of gas supply, inadequate urban water supply, and high transaction costs. These impose extensive burden on entrepreneurs and businesses.[250]

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[246] Gene M Grossman and Alan O Sykes, 'A Preference for Development: The Law and Economics of GSP' (2005) 4(1) *World Trade Review* 41, 55.

[247] Ibid 63. Grossman and Sykes argued that discretion to impose conditionality is the political bargain that encouraged donor countries to confer preferences and they would have been unwilling to do so if constrained by tight non-discrimination requirements: at 54–5.

[248] UNCTAD and Commonwealth Secretariat, *Duty and Quota Free Market Access for LDCs: An Analysis of QUAD Initiatives* (2001) UN Doc UNCTAD/DITC/TAB/Misc.7 <http://r0.unctad.org/ditc/tab/publications/duty_quota_free.pdf> at 28 July 2011.

[249] Marco Fugazza, 'Export Performance and Its Determinants: Supply and Demand Constraints' (UN, 2004).

[250] Rashed Al Mahmud Titumir and M Iqbal Ahmed, 'Aid for Trade Initiative in Multilateral Trade Negotiation: An Illustration with the Case of Bangladesh' in B S Chimni et al (eds), *South Asian Yearbook of Trade and Development* (2009) 251, 267.

Besides, weak institutional capacity and lack of technical 'know-how' in LDCs constrain their capacity to compete in high value-added segments of product chains. Some of these institution-related limitation are: (a) lack of knowledge about market conditions including standard and quality requirements and lack of capacity to meet compliance costs; (b) lack of knowledge of the preferential advantages available under the preferential arrangements; (c) unawareness about the consequences in submitting incomplete documentation, such as customs declarations; (d) difficulties in understanding tariff classifications and changes in such classifications and modifications or amendments made to the preferential schemes; and (e) minimal diversification into new and dynamic sectors of manufacturing and services trade.[251] Poor linkage to the global supply chains and the limited access to sufficient, predictable and long-term finance are also major obstacles. Due to these impediments, LDCs have to incur a series of transaction costs[252] that significantly increases domestic prices. LDCs face higher unit costs that are almost US$1800 per container and this amount is 63 and 95 per cent more than in the OECD and East Asia and Pacific respectively. This greatly reduces the effective preference margins that LDCs receive for their exports.[253]

Moreover, export dependency on a few commodities makes LDCs' export regime more vulnerable to external shocks.[254] In addition, as many developed countries have their tariff rates on certain products at zero per cent, exports from LDCs that are entitled to DFQF access have to compete on an equal footing with exports from other countries, in particular from advanced developing countries.[255] Also the increased number of reciprocal Regional Trade Preferences (RTAs) reduces preferential market access

[251] Inama, 'Market Access for LDCs' above n 185, 85; Lakshmi Puri, 'Towards a New Trade "Marshall Plan" for Least Developed Countries: How to Deliver on the Doha Development Promise and Help Realise the UN Millennium Development Goals?' (UN, 2005); ibid 268.

[252] These costs are mainly due to delays, preparation of documents and administrative fees.

[253] WTO Sub-Committee on Least-Developed Countries, *Market Access for Products and Services of Export Interest to Least-Developed Countries*, WTO Doc WT/COMTD/LDC/W/48/Rev.1 (9 March 2011) (Note by the Secretariat) 30.

[254] Inama, 'Market Access for LDCs', above n 185, 85; Puri, above n 251; Titumir and Ahmed, above n 250, 268.

[255] UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs* (2010) 59.

enjoyed by LDCs.[256]An UNCTAD study indicates that certain LDCs and certain sectors have suffered considerably from the erosion of preferences.[257] The supply-side constraints of LDCs also include their lack of representation and involvement in the 70 different councils, committees, working parties and other groupings of the WTO that engage in over 2800 meetings each year.[258] Limited negotiating capacity makes them face considerable trade barriers for products of their export interest.[259] The preferential market access regime needs to be complemented by a meaningful technical and financial assistance programme,[260] which will enable LDCs to achieve sustainable development through trade.

LDCs lack the institutional capacity and bargaining power to move forward their demands and manage a place on the trade negotiation agenda.[261] Their inability in effective participation in the WTO process arises from their inadequate human and institutional capacity as well as the decision-making processes of the WTO itself.[262] The decision-making rules of the WTO, based on formal equality of the one-country-one-vote system, do not even provide equal access to many developing country Members, let alone LDCs.[263] For instance, the implication of Article IX:1 of the WTO Agreement is that a decision will be adopted if no Member present formally objects.[264] This could

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[256] Carrere and De Melo, above n 237, 252.

[257] UNCTAD, *Erosion of Trade Preferences in the Post–Hong Kong Framework: From 'Trade is Better than Aid' to 'Aid for Trade'* (2007) <http://www.unctad.org/en/docs/ldc20056_en.pdf> at 29 July 2011.

[258] Gregory Shaffer, 'Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?' (2005) 23 *Wisconsin International Law Journal* 643, 649.

[259] Ibid.

[260] WTO Sub-Committee on Least-Developed Countries, *Market Access for Products and Services of Export Interest to Least-Developed Countries*, WTO Doc WT/COMTD/LDC/W/48/Rev.1 (9 March 2011) (Note by the Secretariat) 29.

[261] Sonia E. Rolland, 'Developing Country Coalitions at the WTO: In Search of Legal Support' (2007) 48(2) *Harvard International law Journal* 483, 513.

[262] T. Ademola Oyejide, 'Interests and Options of Developing and Least-developed Countries in a New Round of Multilateral Trade Negotiations' (G-24 Discussion Paper Series No. 2, Centre for International Development, Harvard University, May 2000) 22.

[263] Rolland, above n 261, 515-17.

[264] Article IX:1 of the WTO Agreement provides that decisions of the Ministerial Conference and the General Council Shall be taken by a majority of the votes cast, unless otherwise provided in the relevant WTO Agreements.

exclude a good number of LDCs with no means to attend the meeting to vote.[265] LDCs have limited access to the Green Room Process which has been dominated by the power-plays by the US, the EC and the major developing countries such as, India, Brazil and China. Besides, the under-represented LDC delegates are not often best-suited for their responsibility,[266] without any technical expertise and negotiating experience. Also, there is inadequate coordination among the institutions involved in the articulation and implementation of trade policy. There is no one way solution to the negotiating incapacity of LDCs. On the one hand, LDCs need to develop strategies of their participation in several negotiating steps,[267] on the other hand, the WTO needs to expand its technical assistance for enhancing the participation of LDCs through, among others, providing training programmes, setting up regional offices in Asia and Africa, disseminating information, and funding regional conferences among LDCs.

4.2 Technical and Financial Assistance and Capacity-Building Programmes of the WTO

Prior to the establishment of the WTO, the GATT technical assistance mainly took the form of 'trade policy courses' taught in Geneva.[268] As a result of an announcement in the 1996 Singapore Ministerial Conference,[269] the IF was established in 1997 to facilitate coordination of trade-related technical assistance and promote an integrated

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[265] Rolland, above n 261, 517.

[266] Blackhurst et al found in a study that African delegations in Geneva are officials from the Ministry of Foreign Affairs rather than Ministry of Trade. Hence they do not have any in-depth understanding of trade issues: Richard Blackhurst, Bill Lyakurwa and T. Ademola Oyejide, 'Improving African Participation in the WTO' (Paper presented at the WTO/World Bank Conference on Developing Countries in a Millennium Round, Geneva, 20-21 September 1999).

[267] Debapriya Bhattacharya divided the negotiation process in seven steps: (1) identification of the problem, (2) identification of the interest of all parties involved, (2) an effective consultation process with relevant stakeholders, (4) the establishment of negotiation machinery and supporting institutions to develop the negotiating agenda, (5) the formulation of a negotiating strategy, (6) the actual negotiation, and (7) the assessment of negotiation outcome before an agreement is reached: Debapriya Bhattacharya, 'Least Developed Countries in Trade Negotiations: Planning Process and Information Needs' (Paper 52, Centre for Policy Dialogue, September 2005).

[268] Shaffer, 'Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?' above n 258, 657.

[269] Ibid 658.

approach to assist LDCs enhance their trade opportunities.[270] One of the objectives of the IF was to embed the trade agenda into national development strategies, in particular within the Poverty Reduction Strategic Papers (PRSPs).[271] The IF brought together six international agencies—UNCTAD, International Trade Centre (ITC), UNDP, WTO, IMF, and the World Bank—to collaborate with bilateral donors to ensure greater coherence in the provisions of technical assistance.[272] In 1998, WTO, UNCTAD and ITC launched another trade capacity-building programme for selected African LDCs and developing countries, namely the JITAP.[273] However, these programmes were widely criticised for a number of factors: lack of funding,[274] inadequate focus on supply-side issues,[275] poor coordination,[276] being donor-driven to serve donor-defined interests rather than being demand-driven to serve interests defined within the recipient countries.[277] Another major problem with these programmes was that they imposed conditionalities on the recipient countries without considering the contextual realities of LDCs.[278] In order to become an IF beneficiary, countries need to comply with three basic criteria, namely (i) demonstrate sufficient commitment to streamline trade into the respective national development strategy, (ii) the PRSPs process should be in a

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[270] Hugo Cameron and Dominique Njinkeu, 'Introduction: Aid for Trade and Development' in Hugo Cameron and Dominique Njinkeu (eds), *Aid for Trade and Development* (2008) 1, 7.

[271] Raymond Saner and Laura Paez, 'Technical Assistance to Least-Developed Countries in the Context of the Doha Development Round: High Risk of Failure' (2006) 40(3) *Journal of World Trade* 467, 472.

[272] Shaffer, 'Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?', above n 258, 658.

[273] Cameron and Njinkeu, above n 270, 7.

[274] Marjorie Florestal, 'Technical Assistance Post-Doha: Is There any Hope of Integrating Developing Countries into the Global Trading System?' (2007) 24(1) *Arizona Journal of International and Comparative Law* 121, 126; ibid 6.

[275] Cameron and Njinkeu, above n 270, 6.

[276] There was often lack of coherence among the aid agencies resulting in duplication of effort: Florestal, above n 274, 126.

[277] Mary E Footer, 'Technical Assistance and Trade Law Reform Post-Doha: Brave New World' in John Hatchard and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century: Essays in Honour of Peter Slinn* (2003) 117, 126; Shaffer, 'Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?' above n 258, 649. However, even programmes that seem demand-driven can actually be donor-driven, inasmuch as donors can work through their allies in developing country bureaucracies that act as brokers to serve their personal and donor interests: Shaffer, 'Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?', above n 258, 649.

[278] Titumir and Ahmed, above n 250.

preparatory stage, and (iii) meetings with the World Bank or the UNDP should also be in a preparatory stage.[279] Application criteria for IF required many of the human and financial resources that LDCs were actually applying for.[280]

Recognising the importance of technical assistance for LDCs, the *2001 Doha Ministerial Declaration* holds promises for trade-related technical assistance and capacity building programmes in just about all of its negotiating chapters.[281] It contains specific commitments to provide 'unspecified amounts of technical assistance' to developing countries and LDCs.[282] The Doha announces technical cooperation and capacity building as 'core elements of development dimensions of the multilateral trading system',[283] and acknowledges the role of technical assistance in mainstreaming trade into national plans for economic development and strategies for poverty reduction.[284] The Declaration urges the 'core agencies' in coordination with development partners to explore the enhancement of the IF with the objective of addressing the supply-side constraints of LDCs.[285] However, the Doha provisions on technical assistance does not address the limitations of the technical assistance as pointed out before.

While the existing programmes were continuing, the *2005 Hong Kong Ministerial Declaration* announced a new programme, Aid for Trade, which aimed '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'.[286] This is, beyond doubt, a good initiative, particularly because it provides for assistance addressing supply-side

[279] Saner and Paez, above n 271, 474.

[280] Ibid 474.

[281] See this chapter, s 2.5.2.

[282] Susan Prowse, 'The Role of International and National Agencies in Trade-related Capacity Building' (2002) 25(9) *World Economy* 1235, 1235.

[283] *Doha Ministerial Declaration* para 38.

[284] Ibid para 38.

[285] Ibid para 43.

[286] *Hong Kong Ministerial Declaration* para 57.

capacity, which is a market access problem, rather than only for the smooth implementation of the WTO obligations. Emphasising the need for Aid for Trade, Hugo Cameron and Dominique Njinkeu stated that two conditions must be met to make trade liberalisation an engine of growth:

> First, favourable market access regimes need to be in place. Second, for low-income countries that face severe challenges such as lack of human, institutional, and production capacity, their integration into the global economy must be supported by development assistance targeted to enhance growth and trade.[287]

The Aid for Trade programme has been declared as an integral part of the official development assistance (ODA) programmes.[288] A few months before the Fourth UN Conference on the Least Developed Countries (UN LDC-IV) was held on 9–13 May 2011 in Istanbul, the LDC Group demanded a financial package under Aid for Trade to be additional to the existing aid flows.[289] Their concerns stemmed from the fact that since Aid for Trade is a part of the ODA, an increase in allotment for Aid for Trade might divert funds from other priority development areas of LDCs. However, the final text of the UN LDC-IV, namely the IPOA[290] does not reflect the request made by LDCs for increased and predictable Aid for Trade funding.[291] It simply calls developed countries to:

> Implement effective trade-related technical assistance and capacity-building to least developed countries on a priority basis, including by enhancing the share of assistance to

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[287] Cameron and Njinkeu, above n 270, 1.

[288] OECD and WTO, *Aid for Trade: Is it Working?* <http://www.oecd.org/dataoecd/30/36/45581702.pdf> at 29 July 2011.

[289] International Dialogue on Exploring a New Global Partnership for the LDCs in the Context of the UN LDC IV, A Summary of Recommendations, 24–26 November 2010, Dhaka, Bangladesh.

[290] UN, *Programme of Action for the Least Developed Countries for the Decade 2011–2020*, UN Doc A/CONF.219/3 (UN LDC-IV, Istanbul, Turkey, 9–13 May 2010) <http://ldc4istanbul.org/uploads/IPoA.pdf> at 6 June 2011 (hereinafter *2011 Istanbul Plan of Action*). In its resolution 63/227 of 2008, the United Nations General Assembly decided to convene the Fourth United Nations Conference on the Least Developed Countries (UN LDC-IV). Main objectives of the Conference are to comprehensively assess the implementation by LDCs and their development partners of the *Programme of Action for the Least Developed Countries for Decade 2001-2010* adopted in Brussels in 2001 (the Brussels Programme) and to identify new challenges and opportunities for LDCs and to adopt an action plan for 2011-2020 <http://www.un.org/wcm/content/site/ldc/home/Background> at 6 June 2011.

[291] ICTSD, 'UN LDC Conference Endorses 10-Year Plan, But Criticised for Lack of Accountability Mechanisms' (2011) 15(18) *Bridges Weekly Trade News Digest* 1, 3.

least developed countries for Aid for Trade and support for the Enhanced Integrated Framework, as appropriate, and strengthening their capacity to access available resources, in support of the needs and demands of least developed countries expressed through their national development strategies ...[292]

The Third Global Review of Aid for Trade, held on 18 and 19 July 2011, showed a positive link between the Aid for Trade Initiative and trade performance.[293] This was hailed by Lamy as an 'encouraging account of how we are building trade capacity, not just for the short or medium-term, but importantly for the long-term'.[294] However some countries have highlighted the initiative's inadequacy in monitoring and evaluation and asked the monitoring to be more pragmatic and specific, given the case stories provide mainly anecdotal evidence.

LDCs need technical and financial assistance in a transparent, consistent and predictable manner to address their supply-side constraints. They must have the flexibility to use the fund to address needs that are perceived by them to be priorities.[295] Assistance programmes should be without any conditionality. For instance, the IPOA calls LDCs to 'address supply-side constraints by enhancing productive capacities and reducing constraints on the private sector, as well as building and diversifying their export base'.[296] It can be argued that reducing constraints on the private sector is far remote to

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[292] UN, *Programme of Action for the Least Developed Countries for the Decade 2011–2020*, UN Doc A/CONF.219/3 (UN LDC-IV, Istanbul, Turkey, 9–13 May 2010) [64] <http://ldc4istanbul.org/uploads/IPoA.pdf> at 6 June 2011.

[293] ICTSD, 'WTO Meeting Highlights Aid for Trade Success, Though Work Remains' (20 July 2011) 15(27) *Bridges Weekly Trade News Digest* 1, 2.

[294] *Lamy Hails "Encouraging" Third Global Review of Aid for Trade*, (19 July 2011) WTO News: Speeches—DG Pascal Lamy http://www.wto.org/english/news_e/sppl_e/sppl201_e.htm at 18 August 2011. In opening the Third Global Review of Aid for Trade on 18 July 2011, Lamy reported a 60 per cent increase in Aid for Trade resources since 2005. He cited results of the initiative range from increased export volumes, to more employment, to faster customs clearance times and impacts on poverty: *Aid for Trade: Lamy Reports 60% Increase in Resources and Positive Impact on the Ground*, (18 July 2011) WTO News: Speeches—DG Pascal Lamy <http://www.wto.org/english/news_e/sppl_e/sppl200_e.htm> at 18 August 2011.

[295] *International Dialogue on Exploring a New Global Partnership for the LDCs in the Context of the UN LDC IV: A Summary of Recommendations* (Dhaka, 24–26 November 2010) [22] <http://www.oecd.org/dataoecd/6/34/47092539.pdf> at 6 June 2011 (hereinafter *2010 Dhaka International Dialogue on UN LDC IV*).

[296] Ibid para 61 bis.

the objective of addressing supply-side constraints. A mere blind focus on market access is also not effective. Assistance must be provided to build supply-side capacity in product and services where LDCs have comparative advantage. It is more damaging if financial assistance and logistics are provided for environmentally harmful activities only to avail market access, however profitable it might seem. A World Bank/UNDP investment programme of US$30 million helped launch the export-oriented commercial shrimp farming in Bangladesh in the late 1980s and early 1990s. Bangladesh substantially increased their export of shrimp to European markets but the shrimp culture caused permanent damage to the ecological and biological system in the coastal area, made huge agricultural land barren, and caused scarcity of fresh water for drinking.[297]

Trade-related assistance programmes are recognised as a tool for achieving sustainable development. As the *2002 Johannesburg Plan of Implementation* states categorically, in order to achieve sustainable development in a globalised world, urgent action in required to 'enhance the delivery of coordinated, effective and targeted trade-related technical assistance and capacity-building programmes, including taking advantage of existing and future market access opportunities, and examining the relationship between trade, environment and development'.[298]

4.3 Waiver for LDCs

The WTO agreements and the Doha Round instruments exempt LDCs from tariff reduction commitments. Annex F to the *2005 Hong Kong Ministerial Declaration* reaffirms that LDCs 'will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial or trade needs, or their administrative and institutional capacities'.[299] In the agricultural sector, LDCs are

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[297] Zaid Bakht, 'Environmental Standards and Exports of Bangladesh' in Nagesh Kumar and Sachin Chaturvedi and (ed), *Environmental Requirements and Market Access, Reflections from South Asia* (2007) 209, 219.

[298] *Plan of Implementation of World Summit on Sustainable Development: Report of the World Summit on Sustainable Development*, [6–72] UN Doc A/CONF.199/20 (2002) [para 47 (e)] <http://www.unctad.org/en/docs/aconf199d20&c1_en.pdf> at 24 July 2011.

[299] *Hong Kong Ministerial Declaration* Annex F: Special and Differential Treatment.

exempt from all new disciplines under the *December 2008 Revised Draft Modalities for Agriculture*.[300] Though LDCs are exempt from trade liberalisation commitments under the WTO, they are under tremendous pressure to substantially reduce their tariff level by the IMF and the World Bank.[301] A group of African countries[302] highlighted the deleterious effect on their economies of the IMF and World Bank's prescribed trade liberalisation. African countries had to liberalise trade as a result of the structural adjustment programmes of the Bretton Woods institutions. They referred to empirical studies that show that industrial growth has fallen behind GDP growth in SSA since the 1980s with de-industrialisation in a numbers of African countries being associated with trade liberalisation.[303] This issue is not explored further as it falls beyond its scope.

5 Enforceability of Market Access Provisions for LDCs

Preferential market access, technical assistance and capacity building programmes, and Aid for Trade are based on non-reciprocity rule. Robert E. Hudec maintained that the non-reciprocity rule cannot create any legal obligation due to lack of a principled basis for defining specific obligations.[304] Hudec explained that had there been any legal obligation to grant preferential market access, no principle of legal theory could determine the specific rights and duties such legal obligation would entail, that is, how much one developing country is entitled to receive from any particular developed country and vice versa.[305]

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[300] WTO Committee on Special Session, *Revised Draft Modalities for Agriculture*, WTO Doc TN/AG/W/4/Rev.4 (6 December 2008) paras 142–4 (hereinafter *December 2008 Agriculture Modalities*).

[301] See especially Raymond Saner and Ricardo Guilherme, 'The International Monetary Fund's Influence on Trade Policies of Low-income Countries: a Valid Undertaking?' (2007) 41(5) *Journal of World Trade* 931. Here, Saner and Guilherme explored the involvement of the IMF in influencing the setting of trade policy and tariff regimes of low-income countries.

[302] WTO NGMA, *Market Access for Non-Agricultural Products*, TN/MA/W/27 (18 February 2003) (Communication from Ghana, Kenya, Nigeria, Tanzania, Uganda, Zambia and Zimbabwe).

[303] UNCTAD, *Economic Development in Africa: Performance, Prospects and Policy Issues* (2001) UN Doc UNCTAD/GDS/AFRICA/1: TD/B/48/12, <http://www.unctad.org/en/docs/pogdsafricad1.en.pdf> at 29 July 2011.

[304] Hudec, above n 13, 188.

[305] Ibid.

Kele Onyejekwe argued that '[t]he law of trade preferences, because of its wide acceptance, its preciseness, and its practice by states, has become hard law'.[306] In illustrating the transition of the law of trade preferences from soft law into hard law, he gave the example of the *Declaration on the Establishment of a New International Economic Order*,[307] which calls for preferential treatment.[308] In fact, developing countries attempted to establish a binding legal obligation on the part of developed countries to provide non-reciprocal preferences in the platform of the New International Economic Order.[309] However, the attempt failed in non-cooperation from developed countries.[310] In adopting the GSP provisions, developed Members leave no uncertainty as to the legal status of such market preferences. Both the 1970 Agreed Conclusions and the 1971 GSP Decision, clarified that granting of tariff preferences does not constitute a binding commitment.[311]

But the legal status of DFQF market access creates confusion. It can be assumed that the final text of the Doha Round may be close to the DFQF provision in Annex F to the *2005 Hong Kong Ministerial Declaration*. As mentioned in Section 3.3, the *Decision on Measures in Favour of Least-Developed Countries* by using the word 'shall' imposes a legal obligation on developed countries to grant DFQF market access for LDCs no later than at the start of the implementation period. Lorand Bartels and Christian Haberli, emphasising the mandatory nature of this obligation, argued that when the Doha Round is concluded and ratified, this obligation will acquire binding effect by its own term.[312] Andrew D. Mitchell and Tania Voon also regard the DFQF decision as an example of

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[306] Onyejekwe, above n 41, 443.

[307] *Declaration on the Establishment of a New International Economic Order*, GA RES/3201(S-VI), UN GAOR Ad Hoc Commission, 6th Session, UN Doc A/, RES/3201(S-VI) (1973), reprinted in 13 ILM 715 (1974).

[308] Ibid.

[309] Lavanya Rajamani, *Differential Treatment in International Environmental Law,* Oxford Monographs in International Law (2006) 18–19.

[310] Ibid 19.

[311] *Agreed Conclusions* para (b).

[312] Lorand Bartels and Christian Haberli, 'Binding Tariff Preferences for Developing Countries under Article II GATT' (2010) 13(4) *Journal of International Economic Law* 969, 974–6.

S&DT in concrete and enforceable form.[313] An implication of mandatory DFQF market access implies that an LDC can bring claim to the DSB against a preference-granting country in case of the denial of market access of its products. These characteristics alone make DFQF market access entirely distinct from other GSP schemes that are still unilateral and discretionary. No such binding implication emanates from the provisions of technical and financial assistance in the *Hong Kong Ministerial Declaration.* They are merely 'best endeavour' provisions.

All Doha Round Texts leave unaddressed several important issues regarding the implementation of this commitment towards LDCs. Will LDCs be able to lodge complaints in the WTO DSB if they are denied DFQF market access, if rules of origin are not transparent and simple, or if they are not provided with meaningfully enhanced market access? Such possibilities are unlikely.

6 Conclusion

LDCs are persistent in their demand for enhanced market access along with simplified, harmonised and preferential rules of origin. It has been widely recognised that LDCs are unable to utilise their market access for a number of factors regarded as supply-side constraints, which make the need for technical and financial assistance and capacity-building programmes indisputable.[314] The *2011 IPOA* recognised that 'enhanced financial resources are important to bring about structural transformation and to achieve sustainable development and poverty eradication in least developed countries'.[315] WTO Members expressed their unequivocal and extensive support for LDCs' market access and technical assistance needs in the *2005 Hong Kong Ministerial Declaration.* Nevertheless, not much has been done regarding their implementation. A comparative analysis between GSP and DFQF treatment reveals that the latter is a step up concerning country and product coverage and reciprocity. However, rules of origin still remain the most troubling area of LDCs, as they are too onerous for LDCs to comply.

[313] Andrew D Mitchell and Tania Voon, 'Operationalising Special and Differential Treatment in the World Trade Organization: Game Over?' (2009) 15 *Global Governance* 343, 352.

[314] Prowse, above n 282, 1235.

[315] *Programme of Action for the Least Developed Countries for the Decade 2011–2020* Para 27(i).

LDCs need market access in a stable, secured and predictable manner for their traders and investors to make long-term business decisions that would contribute to their sustainable development. That can only be possible through a binding and comprehensive DFQF treatment; simplified and harmonised rules of origin; stable and enhanced technical and financial assistance without any conditionality attached. However, it is futile to demand DFQF market access without addressing the loopholes created in the WTO agreements in specific sectors. Hence, Chapters Four, Five and Six examine the market access regime of LDCs for agricultural and non-agricultural products and services with the objective of analysing the efficacy of the provisions for LDCs' market access.

Chapter Four:
Market Access in Agricultural Products and Sustainable Development of LDCs

1 Introduction

Agriculture occupies a significant space in sustainable development discourse.[1] As stated in the *Framework for Action on Agriculture*,[2] prepared for the 2002 WSSD, '[a]griculture plays a crucial role in sustainable development and in hunger and poverty eradication'.[3] However, when the concept of sustainable development is employed in the area of international trade in agriculture, the perceptions of developed countries and LDCs essentially differ. The EU, supported by Norway, Switzerland, Japan and Korea, upholds the notion of multifunctionality of agriculture to maintain the economic, social and environmental functions of rural areas and rural ecosystems, including their aesthetic beauty.[4] They employ domestic support measures holding the importance of such measures for food security, environmental protection and rural employment and development, which will promote sustainable development of agriculture.[5] The concept

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[1] Stefan Oeter, 'Trade, Agriculture and Sustainability in Land Use' in Markus W Gehring and Marie-Claire Cordiner Segger (eds), *Sustainable Development in World Trade Law* (2005) 331, 333.

[2] WEHAB Working Group, 'A Framework for Action on Agriculture' (Paper prepared for the WSSD, Johannesburg, 2002).

[3] Ibid 7.

[4] Bruno Losch, 'Debating the Multifunctionality of Agriculture: From Trade Negotiations to Development Policies by the South' (2004) 4(3) *Journal of Agrarian Change* 336, 341. European Commission observed that

> Apart from its production function, agriculture encompasses other functions such as the preservation, management and enhancement of the rural landscape, and the protection of the environment … It is a fact that European society does care about the multiple functions of agriculture and therefore polices to ensure their supply have been established.

European Commission Directorate General of Agriculture, *Agriculture: Process of Analysis and Information Exchange of the WTO: Contribution of the European Community on the Multifunctional Character of Agriculture* (Info-Paper, October 1999) paras 7, 8 <http://www.econ.univpm.it/eaae/documents/multifunctionality.pdf> 3 August 2011.

[5] Surya P Subedi, 'Managing the "Second Agricultural Revolution" through International Law: Liberalisation of Trade in Agriculture and Sustainable Development' in Nico Schrijver and Friedl Weiss (eds), *International Law and Sustainable Development: Principles and Practice* (2004) vol Developments

of sustainable development is engaged by developed countries, including the US, Australia and Canada, to maintain their higher environmental, health and food safety standards.[6]

The viewpoint of developed countries does not take into account the essential role that agriculture plays in LDCs in ensuring LDCs' food security, rural development and poverty eradication. Rather, developed countries use the concept of agricultural multifunctionality and sustainable development as disguised protectionism in order to compensate their lowered tariffs and costs incurred for complying with internal environmental and health-related requirements.[7]

Indeed, agriculture has historically been the 'epitome of a protected and subsidised sector'.[8] At the insistence of developed countries, trade in agriculture was retained out of the ambit of the GATT 1947 for seven rounds preceding the Uruguay Round.[9] Finally, it was brought within the WTO through the Uruguay Round Agreement on Agriculture (AoA)[10] with its ostensibly even-handed three-pronged structure of market access, domestic support and export subsidies. In reality, the rules were cautiously crafted to maintain existing protectionism in developed world to the detriment of low-cost LDC farmers.[11] Rules of multilateral regime were shaped and reshaped for endorsing the existing trade protectionism of the two economic leviathans of the

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in International Law, 161, 174–5; Clive Potter and Jonathan Burney, 'Agricultural Multifunctionality in the WTO: Legitimate Non-Trade Concern or Disguised Protectionism?' (2002) 18(1) *Journal of Rural Studies* 35, 35–6.

[6] Subedi, above n 5, 182.

[7] Hans-Ulrich Gossl, 'EU Trade Policy and Non-Trade Issues: The Case of Agricultural Multifunctionality' (2008) 13 *European Foreign Affairs Review* 211, 220–1.

[8] Tim Josling and Stefen Tangermann, 'Production and Export Subsidies in Agriculture: Lessons from GATT and WTO Disputes Involving the US and the EC' in Ernst-Ulrich Petersmann and Mark A Pollack (eds), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (2003) 208, 208.

[9] WTO Committee on Agriculture Special Session, *Refocusing Discussions on the Special Safeguard Mechanism (SSM): Outstanding Issues and Concerns on its Design and Structure*, WTO Doc TN/AG/GEN/30 (28 January 2010) (Submission by the G33) [2] <http://www.tradeobservatory.org/library.cfm?refID=107163> at 16 January 2011.

[10] *Agreement on Agriculture*, 1867 UNTS, I-31874 (1995) 410. Also in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 33.

[11] James Thuo Gathii, 'Process and Substance in WTO Reform' (2004) 56 *Rutgers Law Review* 886, 912.

opposite sides of the Atlantic—the US and the EU.[12] The insurmountable domestic support programmes of developed countries led to an upsurge of agricultural production, which was then dumped in LDCs' markets by means of export subsidies.[13] This turned the less cost-efficient producers of developed countries into the major exporters of commodities of which they used to be the net importers.[14] Correspondingly, the export shares of more efficient producers in LDCs decrease as they become unable to compete with the subsidised agriculture of developed countries.[15] Conversely, LDCs' exports of agricultural products often cannot make their way into developed countries' markets due to their high tariffs and numerous NTBs in the form of SPS and TBT measures.[16]

These protectionist agricultural policies of developed countries, as permitted by the inauspicious rules of the AoA, hinder the sustainable development of LDCs.[17] They pose challenges to the sustainable development of LDCs by aggravating their rampant poverty, endemic food insecurity, environmental degradation and building obstacles to rural development and livelihood. Hence, LDCs' perception of sustainable development

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[12] Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture* (2002) 387. Section 3 of this chapter analyses this point in further detail.

[13] Oxfam, *Rigged Rules and Double Standards: Trade. Globalisation, and the Fight against Poverty* (2002) 110 –17.

[14] For instance, in the early 1970s, both the EU and US were the net importers of sugar. The US was then the net importer of more than 5 million tons per year and the EU was the net importer of 2.5 million tons per year. They employed the highest protection in sugar. During 1999–2001, support to OECD sugar producers totalled US$6.35 billion, which was equal to developing country exports of about US$6.5 billion. During this period, the EU provided US$2.71 billion and the US$1.30 billion of support for sugar: Donald O Mitchell, 'Sugar Policies: An Opportunity for Change' in M Ataman Aksoy and John C Beghin (eds), *Global Agricultural Trade and Developing Countries* (2005) 141, 141, 150.

[15] As the sugar exports from developed countries increased, the share of developing countries in total sugar exports declined from 71 per cent during 1980–85 to 54 per cent in 1995–2000: ibid 147; UNCTAD, 'Recent Commodity Market Developments: Trends and Challenges' (UNCTAD, 2008) 13.

[16] The Trade Policy Review of the EU and US explains they retain the highest tariff protection as well as other rigid SPS requirements for agricultural products: WTO Trade Policy Review Body, *Trade Policy Review: European Communities*, WTO Doc WT/TPR/S/248 (1 June 2011) (Report by the Secretariat) 101–11 (hereinafter *2011 Trade Policy Review of the EC*); WTO Trade Policy Review Body, *Trade Policy Review: United States*, WTO Doc WT/TPR/S/235/Rev.1 (25 August 2010) (Report by the Secretariat) 26 (hereinafter *2010 Trade Policy Review of the US*).

[17] Stefan Oeter observed that the mainstream 'neo-liberal' economists also hold that traditional forms of protectionism that dominate the EU and US markets prevent sustainable development: Oeter, above n 1, 342.

in trade in agricultural products lies in ensuring their market access by eliminating these barriers, and by providing technical and financial assistance to enable them to raise agricultural productivity and market access.[18]

This chapter is echoed in the view of Fiona Smith,[19] who argued that the concept of 'international agricultural trade' is 'shaped by our own cultural values and understandings of what international agricultural trade is and how the rules should be construed to fulfil' some defined goals.[20] Accordingly, this chapter examines the rules and policies of international agriculture trade, as enumerated in the AoA as well as in the Doha Round negotiations, to evaluate their implication on LDCs' sustainable development. The chapter emphasises the importance of agricultural market access for LDCs' sustainable development.

2 Significance of Market Access in Agricultural Products towards the Achieving of Sustainable Development Goals of LDCs

Market access in agricultural products plays a significant role in the sustainable development of LDCs by generating foreign exchange earnings,[21] contributing to the GDP, poverty reduction and food security, employing large portion of labour force, and providing subsistence and income for large rural populations, in particular rural women.[22] Agriculture contributes to development as an economic activity, as a livelihood, and as a provider of environmental services.[23] Most of these LDCs are agriculture-based countries, as per the World Bank's categorisation of the rural worlds.

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[18] Ibid 352.

[19] Fiona Smith, *Agriculture and the WTO: Towards a New Theory of International Agricultural Trade Regulation,* Elgar International Economic Law (2009).

[20] Ibid 24.

[21] Bruce F Johnston and John W Mellor, 'The Role of Agriculture in Economic Development' (1961) 51(4) *The American Economic Review* 566, 571–2.

[22] The World Bank, *World Development Report 2008: Agriculture for Development* (2007) 26–44.

[23] Ibid 2.

It is to be noted that the World Bank categorised countries into three groups on the basis of agriculture's contribution to growth and poverty reduction.[24] These are:

- Agriculture-based countries, where agriculture accounts for 32 per cent of GDP growth on average and most of the poor are in rural areas;[25]
- Transforming countries, where agriculture is no longer a major source of economic growth and contributes only seven per cent to GDP growth, but with larger number of rural population;[26] and
- Urbanised countries, where agriculture contributes only five per cent to GDP on average, and poverty is mostly urban.[27]

In the agriculture-based countries, composed of Sub-Saharan and South Asian LDCs, agricultural growth plays a significant role not only in the reduction of poverty but also for the overall growth.[28] Here, 65 per cent of the labour force is in the agricultural sector.[29] In some LDCs, such as Cote d'Ivoire, Malawi, Tanzania and Uganda, agriculture accounts for a significant percentage of total merchandised exports in 2009.[30] Seventy-one per cent of the world's poor and food insecure people live in rural areas.[31] Since agriculture is the predominant economic activity in rural areas, these rural poor strongly depend on it for their income, livelihood and food entitlements.[32] This

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[24] The World Bank categorised countries according to the share of agriculture in aggregate growth over the past 15 years and the current share of total poverty in rural areas, using the $2 per day poverty line: ibid 4.

[25] Ibid 4.

[26] These are the countries in South Asia, East Asia, the Pacific, the Middle East and North Africa: ibid 4.

[27] These are Latin American, the Caribbean and European and Central Asian countries: ibid 4.

[28] Ibid 6–7.

[29] Ibid 3.

[30] In 2009, the share of agriculture exports in these economies' total merchandised exports was 52.8 per cent, in Malawi 87.7 per cent, in Tanzania 31.6 per cent and in Uganda 37.2 per cent: WTO, *International Trade Statistics* (2010), 52 (Table II.16 Exports of Agricultural Products in Selected Economies, 1999–2009).

[31] Inger Anderson, 'Agricultural Development, Food Security and Climate Change: Intersecting at a Global Crossroads' (Paper presented at the Agriculture and Rural Development Day, COP 16, Cancun, Mexico, 4 December 2010) <http://beta.worldbank.org/content/agricultural-development-food-security-and-climate-change-intersecting-global-crossroads> at 17 February 2010.

[32] FAO, 'The Role of Agriculture in the Development of LDCs and their Integration into the World Economy' (Paper prepared for the Third United National Conference on the Least Developed Countries,

dependence is found more in LDCs than anywhere else, where rural population is on average 71 per cent of total population in 2009.[33] The data from the World Development Indicators 2010 indicates that agriculture contributes a significant part of the GDP of LDC Members of the WTO. Except three countries,[34] the average GDP contribution of agriculture in the rest of the LDC Members in 2009 is 33 per cent.[35] For some Members, such as Sierra Leone, this contribution is as much as 51 per cent in 2009. This is in stark contradiction to developed countries where agriculture contributes only one to two per cent in the GDP.[36]

Market access in agriculture contributes to sustainable development by empowering women and promoting economic opportunities for them, allowing them to build assets, increase incomes and improve family welfare.[37] Agriculture is also important for LDCs because of its strong linkages to other sectors as a source of supply for the unique consumption of goods, as a source of demand for non-agricultural products, and also as a potential source of labour and other productive resources, such as land and capital.[38] Market access in agricultural products increases agricultural productivity growth, which enable small-scale farmers and rural labourers spend the additional income largely on food and basic non-farm products and services in rural areas.[39]

Brussels, 14–20 May 2001) 3, 7 <http://www.fao.org/docrep/003/y0491e/y0491e00.HTM> at 17 February 2011.

[33] World Bank, *World Development Indicators 2010* <http://data.worldbank.org/indicator/SP.RUR.TOTL.ZS> at 17 February 2011.

[34] These Members are Angola, where agriculture contributed 10 per cent to the GDP in 2009; Djibouti, 4 per cent; and St. Vincent and the Grenadines, 7 per cent. The data has been taken from the World Development Indicators 2010 of the World Bank. The latest year for which data was found is 2009 <http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS> at 14 February 2011.

[35] Calculated from the World Development Indicators 2010 of the World Bank <http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS> at 14 February 2011. For some Members, such as Sierra Leone, this contribution is as much as 51 per cent in 2009. This percentage is 45 for Tanzania, 44 for Togo, 39 for Rwanda and Solomon Islands and 37 for Mali: World Bank, *World Development Indicators 2010* <http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS> at 14 February 2011.

[36] The World Development Indicators 2010 shows that agriculture is 1 per cent of the GDP of the US, UK and Japan; 2 per cent in Canada and 3 per cent in Australia: ibid.

[37] WEHAB Working Group, above n 2, 11.

[38] Doug Gollin, 'Agricultural Productivity, Economic Growth, and Food Security' (Paper presented at the Agriculture for Development—Revisited, UC Berkeley, 1 October 2010).

[39] WEHAB Working Group, above n 2, 7.

However, increased product concentration of LDCs[40] makes them vulnerable to market price fluctuations. Guled Yusuf found that exports of LDCs in SSA are extremely concentrated on sugar and cotton. He examined the crucial role market access in sugar and cotton plays in sustainable development of SSA by contributing to GDP and poverty alleviation, generating employment, ensuring food security, and above all making socio-economic benefits.[41] Given the significant contribution market access in agricultural products make towards the sustainable development of LDCs, it is evident that trade-distorting policies of developed countries have damaging consequences for LDCs depriving them of an important means to achieve sustainable development.

3 Major Trends in the Development of International Trade in Agriculture: From the GATT to the Doha

A historical overview of agricultural trade strengthens the argument of this chapter that the international regime in this sector is perforated by constellation of injustices. Hence, it prefers to identify some major trends and analyse agriculture's integration within the multilateral trading regime in two segments: in the GATT era and in the WTO era.

3.1 Trends in the GATT Era

First, in the early stage, domestic agricultural policies of developed countries restrained the progress of agricultural trade negotiations. The *1958 Haberler Report*[42] also recognised this fact and claimed that such policies made net agricultural imports into these countries more marginal in relation to their total domestic production and consumption of such products.[43] Finally, in 1986, in the *Punta del Este Declaration*,[44]

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[40] WTO Sub-Committee on Least-Developed Countries, *Market Access for Products and Services of Export Interest to Least-Developed Countries*, WTO Doc WT/COMTD/LDC/W/48/Rev.1 (9 March 2011) (Note by the Secretariat) 5.

[41] Guled Yusuf, 'The Marginalisation of African Agricultural Trade and Development: A Case Study of the WTO's Efforts to Cater to African Agricultural Trading Interests Particularly Cotton and Sugar' (2009) 17 *African Journal of International and Comparative Law* 213, 214–19.

[42] Gottfried Haberler et al, 'Trends in International Trade' (GATT Secretariat, 1958).

[43] Ibid 87.

launching the Uruguay Round, Members concurred about 'an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets'.[45]

Second, rules on agriculture were often adjusted 'to be consistent with the agricultural policies of the major signatories rather than vice versa'.[46] For instance, Article XI of the GATT 1947, though it imposed a general ban on quantitative restrictions, permitted such restrictions on agricultural imports.[47] This exception for agricultural products was made because of the US pressure to conform to a domestic law of the US,[48] which allowed quotas to be imposed whenever imports threatened to prejudice domestic support programmes.[49] The US even managed to obtain an open-ended waiver under Article XXV:5 when its price support programme for milk failed to satisfy the requirements of Article XI:2(c).[50] Through this waiver of unlimited duration, the US was free to impose quotas on a number of agricultural products.[51]

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[44] *Ministerial Declaration, Punta del Este*, GATT BISD, 33rd Supp (1987).

[45] Ibid 19, 24.

[46] John M. Breen, 'Agriculture' in Terence P. Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986-1992)* (1993) 125, 134.

[47] Article XI:2(c) of the GATT 1947 provides that prohibition of quantitative restriction in Paragraph 1 of ssArticle XI shall not apply to import restrictions on agricultural and fisheries products when such restriction is applied by way of government measures to restrict imports or to withdraw temporarily like domestic products or substitutable domestic products.

[48] *Agricultural Adjustment Act of 1933*, s 22.

[49] Joseph A McMahon, *The WTO Agreement on Agriculture,* Oxford Commentaries on International Law (2006) 1, 2.

[50] The use of Article XI(2)(c) was limited to situations in which the government had taken measures to restrict domestic production or marketing. Over time, there was wide-spread imposition of quotas by developed country Members on the import of agricultural products without complying with conditions imposed by Article XI(2)(c): Anwarul Hoda and Ashok Gulati, *WTO Negotiations on Agriculture and Developing Countries* (2007)15.

[51] Following the US example, some other GATT Members also managed to keep their farm policy immune from legal challenges, either through waivers (Belgium and Luxembourg) or through special clauses in their protocol of accession (Switzerland). During the dispute between Uruguay and 15 contracting parties in 1961, Canada, the Federal Republic of Germany and the United Sates cite these instruments to justify their import licenses or quotas on agricultural products: Ibid.

Third, agricultural negotiations in the GATT period were riddled with conflicts between the EU and the US,[52] which engaged them in litigation over farm-related issues.[53] The negotiations in the Uruguay Round involved more than 120 countries. Nevertheless, the debates on agriculture issues were more of a bilateral affair between these two leading trading powers.[54] The US, supported by a coalition of countries called the Cairns group,[55] desired major reforms in agricultural trade, whereas the EC was keen in minimising any interference in their own agricultural policy.[56] The AoA was adopted in Brussels, on 6 December 1993, on the basis of the Dunkel Draft,[57] which was later amended after the *Blair House Agreement* between the US and the EC.[58] The AoA came into force in 1995 with the establishment of the WTO as part of a single undertaking. Developing countries complained that due to the last minute negotiations between the EU and the US, they could not even assess what was offered to them.[59]

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[52] They had conflicting standpoints on agriculture issues in the Kennedy Round and Tokyo Round, which continued in the Uruguay Round. In the Kennedy Round, the EC sought to ensure international acceptance of the Common Agricultural Policy (CAP) and in particular, its variable levy system, while the US sought arrangements for the expansion of international agricultural trade. In the Tokyo Round, the principal goal of international agricultural trade for the EC was market stabilisation, while for the US, it was promoting greater efficiency: McMahon, *The WTO Agreement on Agriculture,* above n 49, 9.

[53] Between 1976 and 1986, as many as 25 out of 51 GATT disputes related to agriculture: WTO, *GATT Analytical Index: Guide to GATT Law and Practice (1947–1994)* (1995).

[54] Desta, *The Law of International Trade in Agricultural Products*, above n 12, 387.

[55] This is a group of exporters of farm products, which originally included Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand and Uruguay, and later when Hungary left the group, Bolivia, Costa Rica, Guatemala, Paraguay and South Africa joined: Mitsuo Matsushita, Thomas J Schoenbaum and Petros C Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (2nd ed, 2006) 292–3.

[56] McMahon, *The WTO Agreement on Agriculture,* above n 49, 11. The disagreements between the EC and the US led to several missing deadlines in concluding the Agriculture Agreement. There was an optimism to conclude the agreement in December 1990 and then again in April 1992. Both of these deadlines were missed: McMahon, *The WTO Agreement on Agriculture,* above n 49, 13.

[57] The Dunkel Draft was presented in December 1991 by Arther Dunkel, the Director of the GATT, during the Uruguay Round. It was a compromise proposal with a three-pronged approach aimed at reducing domestic supports and export subsidies, and improving market access: M Rafiqul Islam, *International Trade Law of the WTO* (2006) 72.

[58] John Croome, *Reshaping the World Trading System, A History of the Uruguay Round* (1999). The stalemate in negotiations was broken at the conclusion of the *Blair House Accord* between the US and the EC . Blair House was the name of the US President's Guest House in Washington for foreign dignitaries: Faizel Ismail, 'An Assessment of the WTO Doha Round July-December 2008 Collapse' (2009) 8(4) *World Trade Review* 579, 591.

[59] Croome, above n 58, 325; Ismail, above n 58, 591.

3.2 Trends in the WTO Era

Under the mandate of Article 20 of the AoA, negotiation commenced in early 2000[60] with the objective of establishing a fair and market-oriented agricultural trading system. The *2001 Doha Ministerial Declaration*[61] recognises this mandate and recalls the long-term objective of the AoA. It reconfirms its commitment to the programme of fundamental reform covering strengthened rules and specific commitments on support and protection to prevent distortions in world agricultural markets.[62] The negotiations in the WTO period are conducted among several negotiating groups, advocating their own interests.[63] Unlike the GATT era, negotiations in the Doha Round are marked with conflicting viewpoints of developed countries and developing countries.

The Cancun Ministerial Conference[64] in 2003 broke when developing countries found the *Draft Cancun Ministerial Text (the Derbez Text)*[65] to be based on the joint EU-US proposals with respect to all three pillars of the AoA, ignoring the proposals of developing countries.[66] This time being cautious about another 'Blair House' type of agreement,[67] the G-20 countries[68] immediately rejected the Derbez Text.[69] However, a

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[60] Hoda and Gulati, above n 50, 10.

[61] *Ministerial Declaration*, WTO Ministerial Conference, 4th Sess, Doha, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) (adopted on 14 November 2001) (hereinafter *Doha Ministerial Declaration*).

[62] Ibid para 13.

[63] Some of the most active groups are ACP (African, Caribbean and Pacific countries), African group, EU, Mercosur, LDCs, G-90 (African group, ACP and LDCs), Small, vulnerable economies (SVEs), Recent new Members (RAMs), Low-income economies in transitions, Cairns group, G-10, G-20, G-33 and Cotton-4. For more on these negotiating groups, visit Agriculture Negotiations: *Groups in the Agriculture Negotiations* <http://www.wto.org/english/tratop_e/agric_e/negoti_groups_e.htm> at 17 February 2011.

[64] This is the 5th WTO Ministerial Conference held in Cancun, Mexico from 10–14 September 2003: The 5th WTO Ministerial Conference <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm> at 26 July 2011.

[65] *Draft Cancun Ministerial Text* (24 August 2003) <http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_e.htm> at 26 July 2011.

[66] Hoda and Gulati, above n 50, 228.

[67] Ismail, above n 58, 592.

[68] G-20 is coalition of 23 developing countries pressing for ambitious reforms of agriculture in developed countries with some flexibility for developing countries. They are Argentina, Bolivia, Plurinational State of Brazil, Chile, China, Cuba, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, the Philippines, South Africa, Tanzania, Thailand, Uruguay, Bolivarian Republic of

preliminary agreement among the major developed countries on the elimination of export subsidies by a certain date revived the agriculture negotiations.[70] In the *Doha Work Programme*, also known as the *2004 July Framework*[71] Members agreed in principle on certain points, such as reduction in domestic support,[72] market access on the basis of a tiered formula,[73] with flexibilities for Sensitive and Special Products, Special Safeguard Mechanism (SSM); elimination of all forms of export subsidies.[74] However, they differed on the detail of these issues. The proposals made by the US, the EU and the G20 in the negotiations building up to the *2005 Hong Kong Ministerial Conference*,[75] highlighted these divergences.[76] The Hong Kong Ministerial Session did

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Venezuela, Zimbabwe: *Groups in the Agriculture Negotiations* <http://www.wto.org/english/tratop_e/agric_e/negoti_groups_e.htm> at 17 February 2011.

[69] Hoda and Gulati, above n 50, 228. This point is discussed later in the chapter.

[70] Ibid 228–9.

[71] WTO, *Doha Work Programme: Decision adopted by the General Council on 1 August 2004*, WTO Doc WT/L/579 (2 August 2004), Annex A: Framework for Establishing Modalities for Agriculture, A-1 (hereinafter *2004 July Framework (Agriculture)*.

[72] Members agreed on a reduction in the overall base level of trade-distorting domestic support, which includes the Final Bound Total AMS, the permitted *de minimis* level and blue box payments: Hoda and Gulati, above n 50, 229.

[73] This means deeper cuts in tariffs or domestic support in higher bands.

[74] This includes budgetary support for export subsidies as well as export credits and allied practices with a repayment period of more than 180 days, trade-distorting practices of exporting STEs and food aid that caused commercial displacement: Hoda and Gulati, above n 50, 230.

[75] Hong Kong Ministerial Conference is the 6th WTO Ministerial Conference held in Hong Kong, China, 13–18 December 2005: the 6th Ministerial Conference <http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm> at 26 July 2011 (hereinafter the *Hong Kong Ministerial Declaration*).

[76] For instances, the US agreed to accept a cap on the blue box at 2.5 per cent of the average total value of a Member's agricultural production during a historical period, while the EC asked for a ceiling of 5 per cent as agreed in the July Framework. The US envisaged that sensitive products would be limited to only 1 per cent of the dutiable tariff lines, while the EC demanded its extension to 8 per cent of the total tariff lines. Conversely, the G20 and G33 laid importance on the concept of special products and SSM. In the area of domestic support, the US offered a cut of 60 per cent in AMS and 53 per cent in the overall level of trade-distorting support (OTDS). It demanded from the EC a cut of 83 per cent in AMS and 75 per cent in OTDS. The EC offered to accept cuts of 70 per cent in both AMS and OTDS and demanded a 60 per cent reduction in both from the US. The G20 proposals made an across-the-board demand that the developing countries undertake cuts less than two-thirds of the cuts undertaken by the developed country Members. While G20 made extensive proposals on changes on green box support, both the EC and the US envisaged no substantial changes here: Hoda and Gulati, above n 50, 232–5.

not undertake any initiative to bridge the differences; rather it made a summary of the broadly agreed issues.[77]

The run-up to the July 2008 Ministerial Meeting was marked with 'charges, counter-charges, and personal venom'.[78] Both developed and developing countries accused each other of not doing enough to close the Doha deal on agriculture.[79] The most immediate cause of the collapse of the July 2008 negotiations on agriculture is the divergent viewpoints of the US and India on SSM. However, one of the underlying causes of the failure, as argued by Faizel Ismail, is the continuing protectionism within the EU and the US and their attempt to close the same door for developing countries.[80]

4 Three Pillars of the Agreement on Agriculture

The Uruguay Round takes the first herculean step in integrating agriculture into the rule-based multilateral trading system. The Preamble of the AoA recalls the long-term objective of establishing 'a fair and market-oriented agricultural trading system ... to provide for substantial progressive reductions in agricultural support and protection', which has been retained over a prolonged period and that has resulted in prohibitive restrictions and distortions in world agricultural markets.[81] The AoA incorporates the

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[77] Hoda and Gulati, above n 50, 242.

[78] Raj Bhala, 'Doha Round Schisms: Numerous, Technical, and Deep' (2008) 6(1) *Loyola University Chicago International Law Review* 5, 125, 127.

[79] Being self-admiring, the EU Trade Commissioner Peter Mandelson, through his spokesperson Peter Power, stated: 'The European Union has shown leadership. We have been forward in showing flexibility and we will maintain our offers. But it is really now down to *others* to show similar flexibility': Sandra O'Malley and Laura Macinnis, *WTO Summons Trade Powers for Doha Push,* Reuters, 25 June 2008 <http://news.ninemsn.com.au/article.aspx?id=586872> at 25 July 2011. Brazil's President Luiz Inicio Lula da Silva, shifting the blame on developed countries, said the stall in the Doha Round was over whether developed countries would offer meaningful concessions on agricultural market access and subsidies: 'That is the fight ... We are willing to be more flexible, as long as that does not mean forcing the stagnation of a country that is only now starting to grow, because we do not want to block the development of our industry': *Lula Confident of Deal in Doha Round during July* (3 July 2008) TopNews.in <http://www.topnews.in/lula-confident-deal-doha-round-during-july-250689> at 26 July 2011. The US made a counter argument: 'it was time leading developing countries made market-opening offers commensurate with their increasing participation and role in the world economy': *WTO Issues New Farm, Industry Texts for Doha Round* <http://www.polity.org.za/article/wto-issues-new-farm-industry-texts-for-doha-round-2008-07-11> at 26 July 2011: cited in Bhala, above n 78, 125-6.

[80] Ismail, above n 58, 589.

[81] *Agreement on Agriculture* Preamble.

principle of S&DT in its Preamble[82] and Article 15 recognising differential and more favourable treatment for developing countries as an integral part of the negotiation. The Preamble underlines the need for S&DT for the market access of developing countries. It urges developed-country Members 'to take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members'.[83] Again, Article 15 of the AoA provides for S&DT in relation to commitments,[84] and more specifically, reduction commitments.[85] However, it can be argued that S&DT for enhanced market access for developing countries is merely an aspiring provision, while S&DT for more flexibility in implementation commitments have been seriously given effect to in substantive provisions of the AoA.

4.1 Market Access

The rules on market access are contained in Part III of the AoA, specifically Article 4 and 5, Annex 5 and the Schedules of Concessions of Members. It is to be mentioned that market access concessions included in the Schedule of commitment are annexed not to the AoA, but to the GATT 1994.[86] The arrangement implies that a Member, by including terms and references in the Schedule, cannot deviate from the main legal obligations under the GATT 1994.[87] The combination of market access provisions arguably specifies the measures that Members can use to limit access to their markets

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[82] Ibid para 6.

[83] Ibid para 5.

[84] Article 15.1 of the AoA provides for S&DT in form of implementation commitments, which are set out in relevant provisions of the Agreement and embodied in the Schedules of concession.

[85] Article 15.2 of the AoA provides that 'developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments'.

[86] *Marakkesh Protocol to the General Agreement on Tariffs and Trade 1994*, para 1, reproduced in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 31.

[87] Due to this arrangement, the priority provisions of Article 21 of the Agriculture Agreement have been made inapplicable to terms and conditions on agricultural market access concessions included in Members' Schedules: Desta, *The Law of International Trade in Agricultural Products*, above n 12, 70.

for agricultural products.[88] The following analysis reveals how true this contention could be.

4.1.1 Tariff Reduction Commitments

Article 4.1 of the AoA states that 'market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein'. The AB explained the substantive effect of Article 4.1 in *EC–Bananas*:[89]

> In our view, Article 4.1 does more than merely indicate where market access concessions and commitments for agricultural products are to be found. Article 4.1 acknowledges that significant, new market access concessions, in the form of new bindings and reductions of tariffs as well as other market access commitments (i.e. those made as a result of the tariffication process), were made as a result of the Uruguay Round negotiations on agriculture and included in Members' GATT 1994 Schedules. These concessions are fundamental to the agricultural reform process that is a fundamental objective of the Agreement on Agriculture.[90]

The S&DT principle applies in relation to tariff reduction commitments. The *1993 Modalities Agreement*[91] sets minimum tariff requirements at two levels—the level of individual tariff lines and the overall averages for all agricultural products.[92] The average tariff reduction commitment for developed countries is 36 per cent over six years,[93] while for developing Members is 24 per cent (two-thirds of developed

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[88] Smith, above n 19, 57.

[89] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (1997) (Report of the Appellate Body).

[90] Ibid para 156.

[91] *Modalities for the Establishment of Specific Binding Commitments under the Reform Programme*, WTO Doc MTN.GNG/MA/W/24 (20 December 1993) (Note by the Chairman of the Market Access Group) (hereinafter *Modalities Agreement*). The AoA leaves the details of tariffication to be sorted out by the Modalities Agreement. The Modalities Agreement was a transient document whose legal status ended with the conclusion of the Round and it was kept beyond the scope of the DSB of the WTO. It means that if Members do not do their tariffication according to the Modalities Agreement, that action cannot be challenged in the DSB: Desta, *The Law of International Trade in Agricultural Products*, above n 12, 71.

[92] *Modalities Agreement*, para 5.

[93] Ibid.

countries) to be implemented over a ten-year period.[94] All participating Members are required to make minimum reductions on each tariff line: 15 per cent tariff line for developed countries[95] and 10 per cent for developing countries.[96]

In both cases, the figures refer only to a simple average in the sense that it considers all tariff lines on an equal basis regardless of the amount or value of trade represented by each of those tariff lines.[97] This has significant practical implications, since it lays open the possibility of spreading the reduction requirement unevenly across products and enables countries to continue providing particular high protection to their 'sensitive' products.[98] In fact, in achieving the agreed 36 per cent average tariff reduction on agriculture, developed countries 'reduced their low tariffs by high rates and high tariffs by low rates'.[99] Harry de Gorter et al argued that one of the reasons for the limited impact of the market access provisions is that the reduction commitments were expressed as an average reduction in tariffs rather than a reduction in the average tariff.[100] Countries do not even comply with the absolute minimum 15 per cent required by the Modalities Agreement. Merlinda D. Ingco found that the overall EC reduction

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[94] Ibid para 15.

[95] Ibid para 5.

[96] Ibid para 15.

[97] In other words, the averages referred to here are not *trade-weighted* averages.

[98] Stefan Tangermann, 'Implementation of the Uruguay Round Agreement on Agriculture by Major Developed Countries' (UNCTAD, 1995) (Distr. GENERAL, UNCTAD/ITD/16) 7.

[99] UNCTAD, *The Uruguay Round and Its Follow-up: Building a Positive Agenda for Development* (1997) [45] <http://www.unctad.org/en/docs/psitcdtedd2_intro.en.pdf> at 26 July 2011; Kym Anderson, 'Agriculture and the WTO into the 21st Century' (Paper prepared by the Cairns Group Farm-leaders' Trade Strategy Seminar, Sydney, 2–3 April 1998) 3; Karen Z Ackerman et al, 'Agriculture in the WTO' (US Department of Agriculture, 2008) 9 <http://usda.mannlib.cornell.edu/usda/ers/WRS/1990s/1998/WRS-12-11-1998_WTO.pdf> at 21 February 2011.

[100] Harry de Gorter et al, 'Market Access: Agricultural Policy Reform and Developing Countries' (Trade Note 6, World Bank, 2003) <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/10/14/000090341_20031014090935/Rendered/PDF/269240TradeNote06.pdf>.

commitment for sugar throughout the implementation period was only six per cent of the base level.[101]

4.1.2 Tariffication

Regarding market access, the AoA introduces a device of tariffication through which all NTBs to agricultural imports are to be converted into their tariff equivalents.[102] The WTO Panel in *Chile–Price Band System*[103] refers positively to Article 4.2 as providing for legal foundation for a practice devised 'to enhance transparency and predictability in agricultural trade, establish or strengthen the link between domestic and world markets, and allow for a progressive negotiated reduction of protection in agricultural trade'.[104] However, the tariff equivalents are set in such a manner that the old levels of protection guaranteed by NTBs would still be guaranteed, though by means of ordinary customs duties.

4.1.3 Dirty Tariffication

Since the actual conversion of NTBs into their tariff equivalents was left to the individual countries concerned, they used this opportunity to give themselves the maximum protection by using data that allowed them to bind tariffs 'as high as possible'. The data used for this purpose mostly exaggerated the domestic market prices and/or understated the world market prices that prevailed during the 1986 to 1988 base

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[101] Merlinda D Ingco, 'Agricultural Trade Liberalisarion in the Uruguay Round: One Step Forward, One Step Back?' (Supplementary paper prepared for a World Bank Conference 'The Uruguay Round and the Developing Countries', Washington DC, 26–27 January 1995) 50.

[102] Article 4.2 of the AoA provides: 'Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5'. Footnote 1 to Article 4.2 provides an illustrative list of the measures required to be converted into a tariff:

> quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947.

[103] *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WTO Doc WT/DS207 (3 May 2002) (Report of the Panel).

[104] Ibid para 7.15.

period. This practice came to be widely known as 'dirty tariffication', where the resulting tariff contains an overhang 'dirt' (sometimes referred to as water) in the sense that they are higher than the exact equivalents of the NTBs prevailing in the base period.[105] The base period chosen also contributed to the settling of high tariffs under tariffication since this was a period of very high protection levels.[106]

This process resulted in unprecedented tariff levels in the history of international trade. An example of Swiss tariffs for dairy products shows what an excessively high rate tariff was bound. According to an assessment made by Dale E. Hathaway and Merlinda D. Ingco, the estimated *ad valorem* tariff equivalent in Switzerland for non-tariff restrictions on the import of dairy products would be 321 per cent while the tariff rate that was declared for purposes of market access commitments in the Uruguay Round was a shocking 795 per cent. The 474 percentage figure difference exhibited in this specific case is the 'dirt' included in the tariffs.[107] Therefore, it was not at all surprising that the final bindings by the end of the implementation period in 2000 for several Members were much higher than the actual tariff equivalents for the pre-Uruguay Round days.[108]

In a detailed study of the results of the process of tariffication, Ingco found that in many countries, dirty tariffication appears to have occurred in the 'sensitive' commodities such as dairy, sugar and grains and these are the products where developing countries have comparative advantage.[109] However, it is common to apply actual tariff at much

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[105] Tangermann, above n 98, 6; Dale E Hathaway and Merlinda D Ingco, 'Agricultural Liberalisation and the Uruguay Round', (Paper presented at the World Bank Conference on Uruguay Round and the Developing Economies, Washington DC, 26–27 January 1995) 18. Even the US Department of Agriculture (USDA) admitted that dirty tariffication and new ceiling bindings resulted in new bound tariffs in some cases that provided greater protection than had previously existed: Ackerman et al, above n 99, 8.

[106] Ackerman et al, above n 99. During that period, the highest internal prices coincided with the lowest external prices: Desta, *The Law of International Trade in Agricultural Products*, above n 12, 72–3.

[107] Desta, *The Law of International Trade in Agricultural Products*, above n 12, 75.

[108] Ibid 76. Merlinda D Ingco found that in most countries, the post-Uruguay base and final tariff equivalents and bindings were significantly higher than those of the immediate 10 to 15 years of the pre-Uruguay period: Ingco, 'Agricultural Trade Liberalisarion in the Uruguay Round', above n 101, 52.

[109] Merlinda D Ingco, 'Tariffication in the Uruguay Round: How much Liberalisation?' (1996) 19(4) *The World Economy* 425, 433.

lower rates where the bound tariff is set at a very high rate, often called 'megatariffs'.[110] These high bound tariffs leave the option open to the importing countries to raise tariffs without triggering the compensation provisions. This practice raises questions regarding two of the basic principles of the WTO: transparency and predictability.

4.1.4 Minimum and Current Access Commitments

The flexibility allowed in the tariffication process led to the rational apprehension that the new tariff could turn out to be more trade-restrictive than their non-tariff precursor. To avoid this situation, Members agreed to include current and minimum access commitments in their Schedules for all tariffied products to guarantee the importation of certain minimum amounts of imports.[111] However, the introduction of these minimum levels required the institution of another protectionist device, tariff-rate quotas (TRQs), which require intensive government involvement in their implementation and hence there is scope for more discretionary practices.

4.1.5 Tariff-rate Quotas

The current and minimum access commitments of Members expressed themselves in the introduction of TRQs. It comprises two-level tariffs, with a limited volume of imports allowed at the lower 'in-quota' tariff and all subsequent imports charged the higher 'out-of-quota' tariff.[112] The Quad countries[113] have well over half of their total production in tariff quota commodities, while the Republic of Korea, Norway, and the Poland have close to 90 per cent.[114] According to a WTO study, fruits and vegetables,

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[110] Ackerman, above n 99, 9

[111] Desta, *The Law of International Trade in Agricultural Products*, above n 12, 76–7. Minimum access commitments would come into play where the historic level of imports was below 5 per cent of domestic consumption while current access commitments apply where imports of a product represented at least 5 per cent of domestic consumption in the 1986–88 base period: *Modalities Agreement*, paras 5, 6 and Annex 3, paras 11–15.

[112] Ingco, 'Tariffication in the Uruguay Round: How Much Liberalisation', above n 109, 425; Harry de Gorter and Erika Kliauga, 'Reducing Tariffs Versus Expanding Tariff Rate Quotas' in Kym Anderson and Will Martin (eds), *Agricultural Trade Reform and the Doha Development Agenda* (2006) 117.

[113] Canada, EU, Japan and the US.

[114] Gorter and Kliauga, above n 112, 119.

meat, cereals, dairy products and oilseeds are the sectors most affected by tariff quotas.[115]

Both the US and the EU, by means of TRQs, maintain a trade regime similar to the one in place before the 1994. The EU uses TRQs to continue preferential trading arrangements that often act much like pure import quotas.[116] TRQs enable the US to continue bilateral quotas for dairy and sugar imports. The approach often gives preferential access to politically favoured trading partners. Contrarily, LDCs are not in a position to use TRQs since they rarely have markets large enough to effectively implement bilateral quotas, nor do they have the same political incentives to establish them, often being the receiver of foreign aid programmes.[117]

Though the average applied MFN tariff in the US is 8.9 per cent for 1,595 tariff lines, tariff rates vary a great deal from one product group to another. For products like tobacco, the tariff rate is as high as 350 per cent.[118] The US retains the highest tariffs on tobacco, sugar, peanuts and dairy products, followed by beef, cotton and certain horticultural products.[119] Similarly, the EU maintains the highest average tariffs for dairy products, live animals, tobacco and grains.[120] Some of these products, such as cotton, coffee, groundnuts and horticultural products are of export interest of LDCs.[121] By maintaining high tariffs on these products, LDCs' access to developed countries' markets are virtually closed unless LDCs are given preferential treatment. However, as Chapter Three demonstrated, preferential market access depends upon many factors,

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[115] WTO Secretariat, 'Market Access: Unfinished Business—Post-Uruguay Round Inventory and Issues' (Special Studies 6, WTO, 2001) 52 <http://www.wto.org/english/res_e/booksp_e/special_study_6_e.pdf> at 26 July 2011.

[116] Philip Abbott and B Adair Morse, 'How Developing Countries Are Implementing Tariff-Rate Quotas' in Merlinda D Ingco and L Alan Winters (eds), *Agriculture and the New Trade Agenda: Creating a Global Environment for Development* (2004) 74, 75–6.

[117] Ibid 76.

[118] *2010 Trade Policy Review of the US*, 90.

[119] Ibid.

[120] *2011 Trade Policy Review of the EC* 109.

[121] UNCTAD, 'Export Competitiveness and Development in LDCs: Policies, Issues and Priorities for Least Developed Countries for Action During and Beyond UNCTAD XII' (UN, 2008) 21–5.

including product eligibility and rules of origin. If the strict conditions of preferential schemes are not satisfied, LDCs' exports face the MFN-applied rate, set at very high levels.

4.1.6 Special Safeguard Provisions and Special Treatment

Article 5 of the AoA provides for Special Safeguard (SSG) measures to prevent the inflow of unduly low-priced products or imports surge in a manner disruptive of domestic production of competing products. For SSG measure to be taken, the import must exceed either a price trigger level or a volume trigger level.[122] Article 5 allows only the countries that have converted their agricultural NTBs into ordinary customs duties some flexibility to raise import duties.[123] Accordingly, developed countries such as the US have reserved the right to use SSG on 189 tariff lines, mostly dairy products, sugar products, products containing sugar and/or dairy ingredients, and cotton.[124] It used safeguards 61 times in 2007, and 53 times in 2008.[125] Conversely, most of the LDCs failed to register SSGs during the Uruguay Round negotiations. Hence, they are deprived of this tool to protect their domestic markets from cheap imported products from developed countries.[126] Annex 5 to the AoA provides for special treatment as one of the last minute compromises reached in the agricultural negotiations of the Uruguay Round.[127] The special treatment exceptions under Annex 5A and Annex 5B lapsed

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[122] *Agreement on Agriculture* art 5.

[123] Desta, *The Law of International Trade in Agricultural Products*, above n 12, 87.

[124] *2010 Trade Policy Review of the US*, 90.

[125] Ibid.

[126] Christopher Stevens et al, *The WTO Agreement on Agriculture and Food Security* (2000) 41.

[127] Mainly due to the insistence of Japan and Korea, exceptions were introduced to the universal tariffication requirement in Article 4 of the AoA: McMahon, *The WTO Agreement on Agriculture,* above n 49, 54. Annex 5 exempts measures from tariffication in two circumstances. First, under Annex 5A, when imports of the product are only equivalent to 3 per cent of domestic consumption during the base period (1986–88), when no export subsidies are applied to the products, when effective production-restricting measures are applied and when products are designated as subject to special treatment based on non-trade concern such as food security and environmental protection. Second, measures on primary agricultural products are exempt from conversion in accordance with Annex 5B if they form part of the traditional staple diet of a developing country Member. Such products must also comply with the provisions of Annex 5A(a)-(d).

consecutively in 2000 and 2004. However, there is provision for renegotiation of both Annex 5A and 5B through multilateral trade talks.[128]

Market access rules of the AoA provide ample latitude of protectionism for developed countries through devices such as dirty tariffication, TRQs and SSG. These rules were designed for denying access rather giving market access. In most cases, LDCs cannot even take advantage of these mechanisms to protect their domestic markets. At the same time, their access to developed countries' markets has been curtailed through the instruments that are in place. These rules are a double-edged sword that decreases the export opportunities of LDCs, accentuating their poverty, unemployment and food insecurity.

4.1.7 Development in the Doha Round

Soon after the advent of the WTO, developing countries realised what an unfair agricultural trade regime was left for them. To correct these injustices, Members submitted proposals from the beginning of the Doha Round to amend the tariff reduction commitments, improving the administration of the TRQ and the SSM. This chapter examines whether there has been any improvement in LDCs' market access issues.

4.1.7.1 Market Access Reduction Commitments

For a substantial reduction of high tariffs, Members agreed to apply a tiered formula of tariff reductions.[129] The *2005 Hong Kong Ministerial Declaration* takes notice of the fact that in the area of market access, there has been consensus on four bands of structuring tariff cuts.[130] According to the *December 2008 Agriculture Modalities*,[131] for

[128] Annex 5A(3) and Annex 5B(8) to the AoA provides for such renegotiation opportunity.

[129] In a tiered formula, higher tariffs have steeper cuts than lower tariffs (i.e. products with higher tariffs are put in a higher category or tier, which has a steeper cut than lower tiers). This formula is also used for cutting domestic support. WTO, *Unofficial Guide to the Revised Draft Modalities—Agriculture* (6 December 2008) <http://www.wto.org/english/tratop_e/agric_e/ag_modals_dec08_e.pdf> at 15 January 2011.

[130] Hoda and Gulati, above n 50, 235.

developed countries the tariff cuts would rise from 50 per cent for tariffs below 20 per cent, to 70 per cent for tariffs above 75 per cent,[132] subject to a 54 per cent minimum average.[133] For developing countries, the cuts in each tier would be two-thirds of the equivalent tier for developed countries,[134] subject to a maximum average of 36 per cent.[135] Developed-country Members shall reduce their final bound tariffs in six equal annual instalments over five years,[136] which are 11 instalments over 10 years for developing countries.[137]

These tariff reductions would be subject to several exceptions and flexibilities that might diminish any benefit that could ensue therefrom. These include: Sensitive Products (available to all countries), Special Products (for developing countries for specific vulnerabilities), and SSM (also for developing countries). As the section reveals, these three negotiating elements are also significant from food security perspectives.[138]

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[131] WTO Committee on Special Session, *Revised Draft Modalities for Agriculture*, WTO Doc TN/AG/W/4/Rev.4 (6 December 2008) (hereinafter *December 2008 Agriculture Modalities*). This is the most recent draft modalities.

[132] Paragraph 61 of the *December 2008 Agriculture Modalities* states that in the bottom tier, where the final bound tariff or *ad valorem* equivalent is greater than 0 and less than or equal to 20 per cent, the reduction shall be 50 per cent; in the lower middle tier where the above tariff is greater than 20 per cent and less than or equal to 50 per cent, the reduction shall be 57 per cent; in the upper middle tier, where the tariff is greater than 50 per cent and less than or equal to 75 per cent, the reduction shall be 64 per cent; and finally, in the top tier, where the tariff is greater than 75 per cent, the reduction shall be 70 per cent: ibid 14.

[133] Ibid para 62.

[134] Paragraph 63 of the *December 2008 Agriculture Modalities* states that in the bottom tier, where the final bound tariff or *ad valorem* equivalent is greater than 0 and less than or equal to 30 per cent, the reduction shall be two-thirds of the cut for developed country Members in the bottom tier; in the lower middle tier where the above tariff is greater than 30 per cent and less than or equal to 80 per cent, the reduction shall be two-thirds of the cut for developed country Members in the lower middle tier; in the upper middle tier, where the tariff is greater than 80 per cent and less than or equal to 130 per cent, the reduction shall be two-thirds of the cut for developed country Members in the lower middle tier; and finally, in the top tier, where the tariff is greater than 130 per cent, the reduction shall be two-thirds of the cut for developed country Members in the top tier: ibid 14–15.

[135] Ibid para 64.

[136] Ibid para 61.

[137] Ibid para 63.

[138] Christian Haberli, 'Food Security and WTO Rules' in Baris Karapinar and Christian Haberli (eds), *Food Crisis and the WTO* (2010) 297, 311.

4.1.7.2 Sensitive Products

Consensus was reached in the July 2004 Framework[139] that both developing and developed countries will be able to designate Sensitive Products for which tariff cuts will be more moderate than those required by the formula to be agreed upon for overall tariff reduction. The *December 2008 Agriculture Modalities* accord developed countries the right to designate up to four per cent of tariff lines as such Sensitive Products.[140] It bestows upon developing country Members the right to designate up to one-third more tariff lines as Sensitive Products.[141] In exchange, developed countries (and perhaps some developing countries) will have to increase TRQ.[142] The terminology of Sensitive Products is all the more appropriate because of its politically sensitive character. Not surprising, there has still not been any consensus on several aspects of Sensitive Products. This formulation of Sensitive Products not only implies a reduction of trade liberalisation benefits, but also protects less competitive domestic producers.[143] That is why trade economists warned that classifying even a small number of farm products as 'Sensitive' and subject to lesser tariff cuts would greatly diminish the gains from agricultural reform for LDCs.[144] Christian Haberli argued that at best, such a mechanism could be considered a short-term improvement of domestic food security especially in net food-importing developing countries (NFIDCs). However, shielding staple food from foreign competition may also inhibit structural reform in existing production systems, perhaps by maintaining the very same inefficiencies that caused food security problems in the first place.[145]

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[139] WTO, *Doha Work Programme: Decision adopted by the General Council on 1 August 2004*, WTO Doc WT/L/579 (2 August 2004) para 31.

[140] *December 2008 Agriculture Modalities* para 71. The paragraph also states that where such Members have more than 30 per cent of their tariff lines in the top band, they may increase the number of sensitive products by two per cent.

[141] Ibid para 72.

[142] Ibid paras 74, 78.

[143] Haberli, above n 138, 311.

[144] Kym Anderson, Will Martin and Dominique van der Mensbrugghe, 'Doha Merchandise Trade Reform: What is at Stake for Developing Countries?' (2006) 20(2) *World Bank Economic Review* 169, 170.

[145] Haberli, above n 138, 311.

4.1.7.3 Special Products

The *2005 Hong Kong Ministerial Declaration* affirms that 'developing country Members will have the flexibility to self-designate an appropriate number of tariff lines as Special Products guided by indicators based on the criteria of food security and rural development'.[146] The *July 2008 Agriculture Modalities* adds one more criteria: livelihood security.[147] It is also agreed that these products will be exclusively exempted from any tariff reduction to be agreed on in the Doha Round. However, the discrepancy is over the product coverage to be designated as Special Product to enjoy tariff exemption. The *December 2008 Agriculture Modalities* proposed that 12 per cent tariff lines of developing countries shall be available for self-designation as Special Products of which up to five per cent of lines may have no cut, with the overall average cut shall, in any case, be 11 per cent.[148] This agitated developing countries since they persisted on a claim of much higher product coverage for Special products.[149]

Developed countries view Special Products as a category of 'black box' to protect farm products from tariff reduction. They also regard this as redundant since developing countries could protect their farm products within the 'Sensitive Product' category that is available for all WTO Members.[150] Conversely, developing Members allege that their developed counterparts retain protectionist tariffs through the Sensitive Product category while maintaining that Special Product provides S&DT for developing

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[146] *Hong Kong Ministerial Declaration* para 7.

[147] WTO Committee on Agriculture Special Session, *Revised Draft Modalities for Agriculture*, WTO Doc TN/AG/W/4/Rev.3 (10 July 2008) para 129.

[148] Ibid.

[149] The G-33 proposed that developing countries be given the right to designate 20 per cent of their agricultural tariff lines as Special Products: Hoda and Gulati, above n 50, 235. China, India and Indonesia, and the rest of the G-33 called for: (1) complete exemptions from tariff cuts up to 40 per cent of the products designated as 'Special'; (2) 8 per cent tariff cuts on 30 per cent of the Special Product tariff lines; and (3) a 12 per cent tariff cut on the remaining 30 per cent of Special products: Daniel Pruzin, 'Developing Nations Insist on Zero Tariff Cuts for Certain Agricultural Goods at Doha Talks' (2008) 25 *International Trade Representative (BNA)* 10, cited in Bhala, above n 78, 13.

[150] Bhala, above n 78, 13.

countries.[151] In fact, both Sensitive and Special Product categories shelter agricultural products from tariff reduction and aggravate the food crisis in LDCs.

4.1.7.4 Special Safeguard Mechanism

The *Hong Kong Ministerial Declaration* agrees that developing countries should 'have the right of recourse to an SSM based on import quantity and price triggers to protect their domestic products against both price slumps and import surges'.[152] SSM emerged as a major stumbling block for the whole Doha Round negotiations. It was the deal breaker at the WTO Mini-Ministerial in July 2008 where no agreement could be reached on the SSM-trigger and the extent to which developing countries would be able to raise tariffs to protect farmers from import surges.[153]

The *December 2008 Agriculture Modalities* proposes possible disciplines to avoid the safeguard being triggered frequently and frivolously, and suggests when (if at all), and by how much, the increase in tariffs can exceed present bound ceilings (or 'Pre-Doha Round bindings').[154] The G-33[155] provided a scathing critique of the December 2008

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[151] WTO Committee on Agriculture Special Session, *Revised Draft Modalities for Agriculture Special Safeguard Mechanism*, WTO Doc TN/AG/W/7 (6 December, 2008) para129.

[152] *Hong Kong Ministerial Declaration*, para 7. For details on recent developments, see Christine Kaufmann and Simone Heri, 'Liberalising Trade in Agriculture and Food Security—Mission Impossible?' (2007) 40(3) *Vanderbilt Journal of Transnational Law* 1039.

[153] WTO Committee on Agriculture in Special Session, *Report to the Trade Negotiations Committee by the Chairman of the Special Session of the Committee on Agriculture, Ambassador Crawford Falconer*, WTO Doc JOB(08)/95 (11 August 2008).

[154] *December 2008 Agriculture Modalities* paras 132–46. The chairperson also issued an additional paper offering draft text (with options) for when the SSM raises tariffs above pre-Doha bound rates: when it would be triggered, how high the tariff would go, how long it would last, when it could be triggered again and whether it could be triggered when prices are not falling. He observes that Members remain wide apart on several issues. He regards the negotiations on SSM as so 'uneven' and 'fragile' that it could not be 'consolidated into a single structure': at paras 132–46.

[155] G-33 is a coalition of developing countries pressing for flexibility for developing countries to undertake limited market opening in agriculture. Antigua and Barbuda, Barbados, Belize, Benin, Bolivia, Plurinational State of, Botswana, Côte d'Ivoire, China, Congo, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Korea, Republic of, Madagascar, Mauritius, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, the Philippines, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Bolivarian Republic of, Zambia, Zimbabwe. G-33 is also called 'Friends of Special Products' in agriculture: *Groups in the Agriculture Negotiations*, <http://www.wto.org/english/tratop_e/agric_e/negoti_groups_e.htm> at 17 February 2011.

agricultural draft modalities for allowing developed countries to carry on their trade-distorting practice while obstructing the valid effort of developing countries of strengthening food security and maintaining livelihood.[156] Gorter et al observed that the most serious point of contention between these two blocks was on differences in alternative triggers and remedies.[157] However, if viewed from the perspective of LDCs, SSM is a protectionist measure sought for by advanced developing countries.

4.1.7.5 LDCs

LDC-specific provisions on market access have been steady since the Hong Kong Ministerial Conference.[158] The December 2008 Draft Modalities Text incorporates the language of *Decision on Measures in Favour of Least-Developed Countries* verbatim and imposes the obligation of developed countries and other developing countries to accord DFQF market access for at least 97 per cent of products originating from LDCs.[159]

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[156] The major allegations of the G-33 regarding the *December 2008 Agriculture Modalities* include its failure to accept the rationale of invoking such SSM by developing countries; allowing trade-distorting practices of developed countries; imposing more restrictive conditions on the SSM of developing countries than on the Special Safeguards (SSG), which is mainly being used by developed countries; and introducing ambiguous conditions, such as the concept of 'normal trade' to make the use of SSM by developing countries difficult. The Text has suggested higher volume triggers to prevent the disruption of 'normal trade'. G-33 regards the discourse around 'normal trade' a mere distraction from an SSM that 'supports food security, livelihood security and rural development'. Therefore, they asked for a simple and less burdensome SSM, regarding it as a 'fundamental S&D instrument' for developing countries: WTO Committee on Agriculture Special Session, *Refocusing Discussions on the Special Safeguard Mechanism (SSM): Outstanding Issues and Concerns on its Design and Structure, Submission by the G33*, WTO Doc TN/AG/GEN/30 (28 January 2010) 2–5, 8.

[157] Harry de Gorter, Erika Kliauga and Andre Nassar, 'How Current Proposals on the SSM in the Doha Impasse Matter for Developing Country Exporters' (Institute for International Trade Negotiations, 2009) 2. The vital issues that led to the stalemate of two years from July 2008 are: (i) by how much imports would have to increase before such a remedy would be triggered; (ii) how much developing countries would be allowed to raise tariffs beyond current (pre-Doha) 'bound' tariff ceilings; and (iii) on how many products: at 2.

[158] *Hong Kong Ministerial Declaration* Annex F, para 36: *Decision on Measures in Favour of Least-Developed Countries.*

[159] *December 2008 Agriculture Modalities* para 152.

4.2 Domestic Support

All subsidies within the AoA have been broadly divided into export subsidies and domestic subsidies. Unlike the concept of export subsidy, the concept of domestic subsidy is a very confounding one, since it involves a vast range of government policies that are absolutely justifiable in pursuing legitimate sovereign activity within a country.[160] Perhaps due to its perplexing nature, the AoA dropped the term 'domestic subsidies' and preferred to use the term 'domestic support'.[161] Widespread domestic support programmes in developed countries are often at the root of other trade-distorting measures including export subsidies and import restricting tariffs, NTBs and quantitative restrictions.[162]

Article 20 of the AoA recognises that 'the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process'. By terming this objective as 'long-term' both in this Article and the Preamble of the AoA, it is recognised that the pathway to further liberalisation could be full of impediments.[163] The AoA devises rules categorising the various forms of agricultural support according to their market distorting effects. Using the analogy of traffic lights, it puts the domestic supports that are considered most trade-distorting in the 'Amber Box' and supports that are considered minimally trade-distorting in the 'Green Box'.

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[160] John H Jackson, *The World Trading System: Law and Policy in International Economic Relations* (2nd ed, 1997) 280. Historically, the predominant consideration behind domestic subsidies is the desire to achieve domestic self-sufficiency in food items, which has a national security aspect: Desta, *The Law of International Trade in Agricultural Products*, above n 12, 308. Policy underpinnings of domestic support can be found in Article 39:1 of the *Treaty of Rome* (25 March 1957), listed the objectives of the Common Agricultural Policy. These are: to increase agricultural productivity, to ensure a fair standard of living for agricultural community, to stabilise markets, to ensure the availability of supplies and to ensure that supplies reach consumers at reasonable prices: Thorvuldur Gylfason, 'Prospects of Liberalization of Trade in Agriculture' (1998) 32(1) *Journal of World Trade Laws* 29. However, underlying factors behind the declared ones are often the political influence of the agricultural communities in developed countries, highly cultural concern to keep the traditional agricultural way of life intact and to maintain a peasant class: Desta, *The Law of International Trade in Agricultural Products*, above n 12, 309.

[161] Desta, *The Law of International Trade in Agricultural Products*, above n 12, 384. In fact, these two terms have similar meaning and implications. Hence, they are often used interchangeably: at 306.

[162] To dispose of the surplus production resulting from the domestic support, programmes in developed countries are often dumped in developing countries through export subsidies. Since domestic support raises the price of domestic products, it always attracts cheaper imports. Hence, to maintain domestic price, other policies in the form of import restrictions take place: ibid 315.

[163] Hoda and Gulati, above n 50, 214.

Towards the end of the negotiations, a new category of 'Blue Box' support was included to accommodate government payments under production-limiting arrangements.[164] However, the terms Amber Box, Blue Box and Green Box do not appear in the AoA. Commitments in the area of domestic support are articulated in the concept of the Aggregate Measurement of Support (AMS). This part critically investigates how the domestic support system of the AoA, designed in AMS and the three-fold boxes, in fact, endorses the trade-protectionist policies of developed countries. It also examines ongoing reform of domestic support in the Doha Round. This section focuses on Green Box payments since they represent an increasing share of agricultural support in the major developed Members: the EU, the US and Japan.[165]

4.2.1 Aggregate Measurement of Support

Article 1(a) of the AoA defines AMS as 'the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general'. The AMS limit is based on a particular Member's agricultural support over a base period, usually 1986–88. Members that signed the AoA agreed to limit Amber Box spending to a level at or below their AMS for their base period. Implementation of the reforms began in 1995. Developed countries were to reduce their AMS by 20 per cent over six years, while developing countries by 13 per cent over 10 years.[166]

The most fundamental obligation of Members in relation to domestic support is that expressed under Article 3.2 of the AoA, which obligates Members not to provide support to domestic producers in excess of the commitment levels specified in Section I of Part IV of its schedule. However, this obligation is subject to the provision of Article

[164] Ivan Roberts, 'WTO Agreement on Agriculture: The Blue Box in the July 2004 Framework Agreement' (Australian Bureau of Agricultural and Resource Economics, 2005) 4.

[165] Christophe Bellmann and Jonathan Hepburn, 'Overview' in Ricardo Melendez-Ortiz, Christophe Bellmann and Jonathan Hepburn (eds), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (2009) 1, 3.

[166] WTO Committee on Agriculture Special Session, *Domestic Support*, WTO Doc G/AG/NG/S/1, Geneva (13 April 2000) (Background Paper by the Secretariat).

6 of the AoA.[167] Article 6 of the AoA sets out that the Members commit to reduce their domestic support measures in favour of agricultural producers, as expressed in terms of the total AMS. This apparently strong provision is followed by a number of exemptions from the AMS. Under this provision Green Box support measures,[168] agricultural and rural development programmes of developing countries (also known as S&DT subsidies or development box),[169] *de minimis* support[170] and blue box measures[171] are exempt from reduction commitments.

Domestic support, as devised in the AoA, may be viewed as a pretext for maintaining the existing trade-distorting supports and this is an overall a failure to reduce the level of domestic support.[172] First, in order to understand how the reduction commitments operate, it is imperative to consider the meaning of certain terms. These are 'Total AMS', 'Base Total AMS' and 'Current Total AMS'. Total AMS means the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support to agricultural products.[173] Total AMS determined by each country for the base period is called the Base Total AMS.[174] The Base Total AMS is the benchmark on the basis of which to negotiate the extent of subsequent reduction commitments. Current Total AMS is the actual amount of support provided during any year of the implementation

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[167] Article 3.2 of the AoA states: Subject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule.

[168] *Agreement on Agriculture* art 6.1, Annex 2.

[169] Ibid art 6.2. These subsidies are also regarded as the S&DT subsidies. They are the investment subsidies that are generally available for: agriculture for developing country Members; agricultural input subsidies, generally available to low-income or resource-poor producers in developing country Members; and domestic support for producers in developing countries to encourage them to cease growing illicit narcotic crops. The first two are to encourage agricultural and rural development of developing countries.

[170] Ibid art 6.4.

[171] Ibid art 6.5.

[172] McMahon, *The WTO Agreement on Agriculture,* above n 49, 85.

[173] *Agreement on Agriculture* Art I(h).

[174] Ibid art I(h)(i).

period,[175] and is calculated in accordance with the provisions of AoA, particularly Article 6.[176]

Now the implication of these terms implies that when Base Total AMS is calculated, all domestic support measures, including the blue box and Green Box measures, Amber Box measures within the *de minimis* limit and development box measures are incorporated. But they are excluded when Current Total AMS is calculated. This is because Article 6 exemptions apply only in the calculation of Current Total AMS and not in that of Base Total AMS. Their inclusion in the Base Total AMS inflates its amount, allowing Members to start from higher benchmarks. Their exclusion from the calculation of Current Total AMS enables Members to reduce domestic support in a very meagre scale. This helps developed Members to conform to the WTO rules even after granting higher subsidies.[177]

Second, AMS, though calculated in a manner that takes into account the product-specific support provided to producers, the final reduction commitments were made at an aggregate level, instead of on a product-by-product or policy-by-policy basis.[178] Hence, the effect of the reduction commitments is limited by the flexibility accorded to Members to manage the reduction and to meet the aggregate reduction commitment while shifting support among commodities.[179] This enabled them to increase support in some sectors while decreasing it in others.[180]

Third, the complete exemption of Blue Box and Green Box and partial exemption of Amber box measures (through the *de minimis rule*) allowed developed Members to continue their trade-distorting subsidies merely by switching supports from Amber Box

[175] Ibid art I(h)(ii).

[176] Ibid art I(h)(ii).

[177] Desta, *The Law of International Trade in Agricultural Products*, above n 12, 403–7.

[178] Ibid 401.

[179] David Blandford, 'Are Disciplines Required on Domestic Support?' (2001) 2 *Estey Centre Journal of International Law and Trade Policy* 35, 42.

[180] McMahon, *The WTO Agreement on Agriculture,* above n 49, 85.

to these safe havens.[181] This implies only 'a superficial and expedient change of appearance'.[182]

4.2.2 Amber Box Support

This box comprises most trade-distorting domestic support measures. Within the Amber Box, support is divided into product-specific and non-product-specific groups. Amber box policies can be exempted from the AMS if they are termed *de minimis*. The *de minimis* rule states that for developed (developing) countries, AMS values below five (10) per cent of the product's value of production for product-specific support and AMS values below five (10) per cent of the country's overall value of agricultural production for non-product-specific support are exempted from the domestic support reduction commitments.[183] When countries design their policies accordingly, most of them effectively treat these two constraints additively to 10 (20) per cent. For instance, the US arguably used such an approach with market loss assistance payments in 1999–2001, stating that the payments were non-product-specific and qualified as non-specific *de minimis*.[184] No other criteria or conditions, except monetary limits, are imposed on measures declared under *de minimis*. The main underlying idea behind this exception is that relatively small amounts of support can have only small impacts on production and trade.[185] In recent years, the Amber Box expenditure has been reduced in the EU,

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[181] Blandford, above n 179, 42; Haberli, above n 138, 305.

[182] Joanne Scott, 'Tragic Triumph: Agricultural Trade, The Common Agricultural Policy and the Uruguay Round' in Nicholas Emiliou and David O Keefe (eds), *The European Union and World Trade Law: After the GATT Uruguay Round* (1996) 165, 177.

[183] Article 6.4 of the AoA stipulates: A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:

(i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year; and

(ii) non-product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of the value of that Member's total agricultural production.

[184] Chad E Hart and John C Beghin, 'Rethinking Agricultural Domestic Support under the World Trade Organization' in Kym Anderson and Will Martin (eds), *Agricultural Trade Reform and the Doha Development Agenda* (2006) 221, 224.

[185] Jesus Anton, 'An Analysis of EU, US and Japanese Green Box Spending' in Ricardo Melendez-Ortiz Christophe Bellmann and Jonathan Hepburn (eds), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (2009) 137.

showing a clear sign of shift of support towards other boxes.[186] Conversely, the US shows a clear indication of increasing expenditure towards Amber Box measures.[187]

4.2.3 Blue Box Support

Another exception to domestic support reduction commitments is towards the Blue Box measures. These are 'direct payments under production-limiting programmes'.[188] This box was originally designed to accommodate subsidies provided under the *1992 MacSharry Reforms* of the EC's Common Agriculture Policy (CAP)[189] and the target price deficiency payments system maintained under the *Food, Agriculture and Conservation and Trade Act of 1990*[190] in the US.[191] The underlying idea behind this exception was to create a box between the Amber and Green Box in order to facilitate reform towards the Green Box. However, no mechanism was incorporated to reduce support under the Blue Box, which could be an incentive for shifting policies towards the Green Box.[192]

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[186] The EU Amber Box support, which accounted for 88 per cent of total support in the reference period 1986 to 1988, was reduced to only 39 per cent in 2003: ibid 152–3.

[187] The US notified the WTO in October 2007 of its agricultural support for the 2002–2005 marketing years (MYs). This notification shows that the US Amber Box spending rose from US$6.95 billion in 2003 to US$12.9 billion in 2005 and averages $10.3 billion: Bhala, above n 78, 10.

[188] *Agreement on Agriculture* art 6.5(a).

[189] They are also known as compensatory payments. It is to be noted that the MacSharry Reforms of 2002 involved a reduction in the intervention prices for cereals and beef, and compensation to farmers for the implied revenue loss. Here, the farmers became entitled to area payments on the land sown to cereals and set aside under the scheme, and a complex array of headage payments on the number of beef cattle kept. After the conclusion of the Uruguay Round, these area and headage payments were declared as Blue Box payments: Alan Swinbank, 'The Reform of the EU's Common Agricultural Policy' in Ricardo Melendez-Ortiz, Christophe Bellmann and Jonathan Hepburn (eds), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (2009) 70, 71–3.

[190] *Food, Agriculture and Conservation and Trade Act of 1990* (P.L.101–624). See US Department of Agriculture, 'Provision of the Food, Agriculture and Conservation and Trade Act of 1990' (Agriculture Information Bulletin Number 624, June 1991) <http://www.ers.usda.gov/Publications/aib624/aib624fm.pdf> at 26 July 2011.

[191] For details on the use of the blue box, see background papers by the Secretariat, G/AG/NG/S/1 and TN/AG/S/14.

[192] Anton, 'An Analysis of EU, US and Japanese Green Box Spending', above n 185, 140.

Blue Box measures do not have a limit on expenditure. However, they include some constraints on implementation rules that are weaker than the constraints specified for Green Box measures.[193] There is no limitation on the objectives of the programme, except that they have to be 'production-limiting'. There is no definition of what these programmes have to be. The main constraint that may have implications on reducing the potential impact on production is that payments have to be based on fixed area or yields or a fixed number of head (in case of livestock payments), or on a percentage (85 per cent or less) of the base level of production.[194] The EU Blue Box support increased from €0.4 billion in 1986–88 to €25 billion in 2003,[195] the US recently has not notified any measure in Blue Box.[196]

4.2.4 Green Box Support

Annex 2 to the AoA deals with Green Box, the most innocent of all the domestic support measures. To be within the Green Box, domestic support measures have to meet 'the fundamental requirement' in Paragraph 1 of Annex 2 to the AoA that 'they have no, or at most minimal, trade-distorting effect or effects on production'.[197] Other conditions in Annex 2 are that Green Box policies must be provided through 'publicly funded government programme' that must not engross 'transfers from consumers', and must not 'have the effect of providing price supports to producers'.[198] Annex 2 then continues to catalogue a series of 'policy-specific criteria and conditions' with which each

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[193] Ibid 146.

[194] *Agreement on Agriculture* art 6.5(a).

[195] Anton, 'An Analysis of EU, US and Japanese Green Box Spending', above n 185, 152.

[196] Carlos Galperin and Ivana Doporto Miguez, 'Green Box Subsidies and Trade-distorting Support: Is There a Cumulative Impact?' in Ricardo Melendez-Ortiz, Christophe Bellmann and Jonathan Hepburn (eds), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (2009) 239, 247.

[197] There is no indication as to how the word 'minimal' might be attuned. In *US – Cotton Subsidies*, the Panel decided on grounds of 'judicial economy' that it need not rule on 'Brazil's claim that the US measures at issue fail to conform with the "fundamental requirement" of paragraph 1'. It had already decided that the US had infringed one of the policy-specific criteria of paragraph 6 of the Annex 2. This was not appealed, and so the AB does not indicate how it might have ruled on this issue. *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R, AB-2004-5 (2005) [126, footnote 331] (Report of the Appellate Body).

[198] Annex 2, paragraph 1 of the AOA.

particular type of Green Box programme must comply. Overall, 12 types of Green Box measures, with defined objectives,[199] are enumerated:

- general services, which includes research and training services; pest and disease control; extension and advisory services; inspection services; marketing and promotion services and infrastructural services[200]
- public stockholding for food security purposes[201]
- domestic food aid[202]
- direct payments to producers[203]
- decoupled income support[204]
- government financial participation in income insurance and income safety-net programmes[205]
- government financial participation in income insurance and income safety-net programmes[206]
- payments for relief from natural disasters[207]
- structural adjustment assistance provided through producer retirement programmes[208]
- structural adjustment assistance provided through resource retirement programs[209]
- structural adjustment assistance provided through investment aids[210]

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[199] Anton, 'An Analysis of EU, US and Japanese Green Box Spending', above n 185, 137.

[200] *Agreement on Agriculture*, Annex 2, para 2.

[201] Ibid Annex 2, para 3.

[202] Ibid Annex 2, para 4.

[203] Ibid Annex 2, para 5.

[204] Ibid Annex 2, para 6.

[205] Ibid Annex 2, para 7.

[206] Ibid.

[207] Ibid Annex 2, para 8.

[208] Ibid Annex 2, para 9.

[209] Ibid Annex 2, para 10.

[210] Ibid Annex 2, para 11.

- payments under environmental programmes[211]
- payments under regional assistance programmes.[212]

Therefore, in order to qualify as Green Box, a measure must satisfy the criteria stipulated for particular type of support as well as the requirements of Paragraph 1 of Annex 2. In *US–Cotton Subsidies*,[213] the US and Brazil disputed the classification of direct payments to the US upland cotton producers under the 2002 Farm Bill as a Green Box subsidy being a decoupled income support measure.[214] Brazil contended that the US direct payment measure is inconsistent with Annex 2 to the AoA and should be classified as Amber Box and subject to the reduction and *de minimis* limits of the AoA.[215] The Panel (supported by the AB) determined that Paragraph 6(b) had been infringed. This was because the US legislation insisted that land used to grow fruits and vegetables could not be enrolled in the programme.[216] The AB held that:

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[211] Ibid Annex 2, para 12.

[212] Ibid Annex 2, para 13.

[213] *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R, AB-2004-5 (2005) (Report of the AB); *United States—Subsidies on Upland Cotton*, WT/DS267/R (2004) (Report of the Panel).

[214] The process in which governments reform towards measures that have 'minimal' impact on production and trade is often labelled as 'decoupling': Anton, 'An Analysis of EU, US and Japanese Green Box Spending', above n 185, 139. Desta explained that decoupling generally requires 'that the amount of income support payments should not be related to the type or volume of production, the domestic or international price of products, or the factors of production employed in any year after the base period. Furthermore, no production should be required in order for the producer to receive such payments': Melaku Geboye Desta, 'Agriculture and the Doha Development Agenda: Any Hopes for Improvement?' in Kim Van der Borght, Eric Remacle and Jarrod Wiener (eds), *Essays on the Future of the WTO: Finding a New Balance* (2003) 149, 177.

[215] In September 2002, Brazil made a request with the US concerning certain subsidies granted to producers, users and exporters of upland cotton under the Agreement of Agriculture and the Subsidies Agreement.

[216] Swinbank, above n 189, 78. The AB implies that each provision of Paragraph 6 has to be met in full:

> Paragraph 6(a) sets forth that eligibility for payments under a decoupled income support program must be determined by reference to certain 'clearly-defined criteria' in a 'defined and fixed base period'. Paragraph 6(b) requires the severing of any link between the *amount of payments* under such a program and *the type or volume of production* undertaken by recipients of payments under that program in any year after the base period. Paragraph 6(c) and 6(d) serve to require that payments are also decoupled from *prices* and *factor of production employed* after the base period. Paragraph 6(e) makes it clear that 'no production shall be required in order to receive ... payments' under a decoupled income support program.

Unites States—Subsidies on Upland Cotton, WT/DS267/AB/R (2004) (paras 120–1) (Report of the Panel).

> Decoupling of payments from production under paragraph 6(b) can only be ensured if the payments are not related to, or based on, either a positive requirement to produce certain crops or a negative requirement not to produce certain crops or a combination of both positive and negative requirements on production of crops.[217]

Alan Swinbank observed that the Single Payment System, introduced in the EU in 2003,[218] imposed a similar restriction on the planting of fruits and vegetables on eligible land. This raised questions about the Green Box compatibility of the new scheme. Though this restriction was abolished in its 2007 reform of the fruit and vegetables regime, the Single Payment System is still susceptible to be challenged.[219] This is because payments under the Single Payment System are related to several factors: the land area at a farmer's disposal in that year; the recipient's status as a farmer; whether the land has been kept in good agricultural or environmental condition; and whether various cross-compliance requirements have been respected. All these reinforce the notion that the payment is 'related to, or based on, the factors of production employed' in the year of claim. This is inconsistent with Paragraph 6(d), which requires payments to be decoupled from the factors of production.[220]

Why is this so important to be qualified within the Green Box? The answer is under Article 13(a) of the AoA, as Green Box subsidies that fully conform to the provisions of Annex 2 are to be considered non-actionable subsidies for the purposes of countervailing duties, exempted from actions based on Article XVI of the GATT and Part III of the *Agreement on Subsides and Countervailing Measures* (SCM),[221] and also exempt from actions based on non-violation nullification or impairment of the benefits

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[217] Ibid para 325.

[218] The Single Payment System is emerged from the Fischler Reforms of 2003. Under this system, a farmer's entitlement would be based upon his or her historic pattern of receipts of area and headage payments, but future payments would no longer be linked to crops grown or animals kept as was required under the compensation payments under the MacSharry Reforms of 1992. Swinbank, above n 189, 71–3.

[219] Alan Swinbank and Richard Tranter, 'Decoupling EU Farm Support: Does the New Single Payment Scheme Fit within the Green Box?' (2005) 6(1) *The Estey Centre Journal of International Law and Trade Policy* 47.

[220] Swinbank, above n 189, 79.

[221] *Agreement on Subsides and Countervailing Measures*, reproduced in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 231.

of tariff concessions. This chapter brings forward some of the concerns recently raised against the innocence of Green Box supports. While some programmes have stayed relatively undisputed, such as the provision of general services or domestic food aid, others such as decoupled income support have attracted much criticism.[222]

4.2.3.1 Shifting of Boxes

The AoA obliges Members to reduce Amber Box support, but leaves the door open for them to shift support from the Amber box to the Green Box.[223] There are no monetary limits on expenditure under the Green Box.[224] Jesus Anton notified significant box shifting from the WTO notifications by the EU, US and Japan particularly since 1995. This occurred in the same direction envisaged in the AoA: from Amber to Blue, from Blue to Green, or directly from Amber to Green.[225] It seems to be the case that developed Members have found ways of providing support to achieve their own defined domestic objectives through the different categories in the Green Box. This is particularly the case for the US, with its domestic food aid programmes, and the EU, with its rural development and environmental programmes and Japan, with its environmental programmes.[226] Dissonance exists as to whether these measures truly concentrate on environment, human rights, food security, food aid and broader development goals or whether they are simply the shield to support agricultural production.[227]

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[222] Bellmann and Hepburn, above n 165, 5.

[223] Anton, 'An Analysis of EU, US and Japanese Green Box Spending', above n 185, 139.

[224] Ibid.

[225] This box shifting, in fact, was triggered by an underlying policy change. For instance, in the EU shifting from Amber to Blue box occurred when the market price support was substituted by the direct compensation payments based on land in 1992: ibid 185.

[226] Anton, 'An Analysis of EU, US and Japanese Green Box Spending', above n 185, 187.

[227] Christopher Rodgers and Michael Cardwell, 'The WTO, International Trade and Agricultural Policy Reform' in Mechael N Cardwell, Margaret Rosso Grossman and Christopher P Rodgers (eds), *Agriculture and International Trade: Law, Policy and the WTO* (2003) 1, 17–18; Andre Nassar et al, 'Agricultural Subsidies in the WTO Green Box: Opportunities and Challenges for Developing Countries' in Ricardo Melendez-Ortiz, Christophe Bellmann and Jonathan Hepburn (eds), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (2009) 329, 350–1.

4.2.3.2 Trade-distorting Effects of Decoupled Payments

Anton[228] studied the ways in which decoupled payments may have trade-production-distorting effects. These include:

- wealth effects, when a guaranteed stream of income influences a producer's willingness to plant;
- risk/insurance effects, which reduce income risk from agricultural production activities, and by changing farmer's attitude towards risk lead to more production and trade;[229] and
- dynamic effects, which affect the farmer's present and future decisions with consequential effect on production and trade.[230]

The OECD has also found that the presence of dynamic effects (making returns more certain) creates incentives to invest, and the possibility of updating the base in the future to calculate payment according to present production affects farmer's present decisions.[231] Additionally, Harry de Gorter[232] found infra-marginal effects in Green Box subsidies, such as the US direct payments, which is actually a decoupled income support. Gorter explains several ways in which the US direct payments have these infra-marginal effects on production. First, by requiring land to be kept in 'good agricultural use', these payments induce farmers to produce. Otherwise they might have kept the

[228] Anton, 'An Analysis of EU, US and Japanese Green Box Spending', above n 185; Jesus Anton, 'Decoupling: A Conceptual Overview' (Organisation for Economic Cooperation and Development, 2001).

[229] Risk effects make farmers less sensitive to income variability from farming. They can potentially occur with many types of support measures, including price support.

[230] For instance, *ad hoc* government decisions about base updating or the size of the payment may generate expectations about the future and potentially affect production. Anton, 'An Analysis of EU, US and Japanese Green Box Spending', above n 185, 142–3.

[231] OECD, *Decoupling: Policy Implications* (2005) <http://www.oecd.org/dataoecd/34/10/39283467.pdf> at 26 July 2010.

[232] Harry de Gorter, 'The Distributional Structure of US Green Box Subsidies' in Ricardo Melendez-Ortiz, Christophe Bellmann and Jonathan Hepburn (eds), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (2009) 304, 317. For more on infra-marginal effects of decoupled subsidies see Harry de Gorter, David R Just and Jaclyn D Kropp, 'Cross-Subsidization Due to Infra-marginal Support in Agriculture: A General Theory and Empirical Evidence' (2008) 89(1) *American Journal of Agricultural Economics* 45.

land idle.[233] Second, by imposing restrictions on fruits and vegetable production, they induce farmers to crop production.[234] Third, the updating of base acres and programme yields give the farmers impression that the extra acres will help them in future.[235] Farmers act as if they do not receive any payments if they do not produce.[236]

4.2.3.3 Accumulation of Subsidies

There is no limitation on the accumulation of different types of subsidy, either for the same product or for the same farmer. The G-20 has argued that the accumulation of subsidies, when producers receive concurrent support under different boxes, may present a swelling impact on the producer's decision of what and how much to produce.[237] Carlos Galperin and Ivana Doporto analysed the cumulative effect of Green Box subsidies when producers receive simultaneous support from other boxes.[238] They argued that if a product derives benefits from Amber box, Blue box and Green Box measures, then various degrees of distorting impacts are added. They established their claim by examining the case of US corn, which receives support from different measures in the same box and/or different boxes.[239] They concluded that corn receives both Amber box payments (55 per cent corresponding to AMS, and 20 per cent to *de minimis* and Green Box payments (25 per cent in the form of decoupled direct payments). The combination of these two payments intensifies the harmful effects of the Amber Box subsidies.[240]

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[233] Gorter, above n 232, 319–20, 322.

[234] Ibid 323.

[235] The Farm Bill 2002 updated these base acres. This is contrary to the provision of paragraph 6(d) of the Annex 2 of the AOA, which states that 'the amount of such payments in any given year shall not be related to, or based on, the type or volume of production employed in any year after the base period'. Ibid 306.

[236] Gorter, above n 232, 321.

[237] WTO Committee on Agriculture Special Session, *G-20 Comments on the Chair Reference Paper on Green Box*, WTO Doc JOB(06)/145 (16 May 2006).

[238] Galperin and Miguez, above n 196, 240.

[239] They have chosen corn because of its importance to the US economy and the support that it receives. For fiscal years 2003 to 2006, total programme payments by commodity averaged US$10.8 billion per year, of which the largest share went to corn (43.7 per cent): Ibid 248.

[240] Ibid 247.

Current WTO requirements set no ceiling on the amount of Green Box subsidies that governments can provide, on the grounds that these payments cause only minimal trade distortion. Governments are thus increasingly shifting their subsidy spending into this category, as they come under pressure to reduce subsidies that are more directly linked to production.[241] In fact, Green Box subsidies in developed countries can impair the livelihood of poor farmers in LDCs who cannot afford to provide such support to their farmers. However, developing countries cannot make meaningful use of Green Box support because of their lack of funds and inability to implement more appropriate domestic policies to fit their needs.[242]

4.2.5 Development in the Doha Round

In the 2001 Doha Declaration, Members commit for 'a substantial reduction in trade-distorting domestic support'.[243] Accordingly, the *2005 Hong Kong Ministerial Declaration* agrees on a linear formula[244] for reduction in the Final Bound Total AMS and in overall trade-distorting domestic support (OTDS).[245] To obviate the flawed reduction commitment in the AoA where it is made on Current Total AMS, Members in the Hong Kong Declaration committed to cut domestic support in the Final Bound Total AMS.[246] This does not imply that the Doha Round reduction commitments are flawless since it still excludes *de minimis* Amber Box support and Green Box support while introducing a *de minimis* rule for the Blue Box. Developing countries under the inbuilt

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[241] ICTSD, 'Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals' (Information Note No 16, September 2009) 1 <http://ictsd.org/downloads/2009/10/green-box-web-1.pdf> at 26 July 2011.

[242] Most developing countries' green box expenditure is well below that of developed countries. For most, annual expenditure is below US$1 billion, while the expenditure of the US, Japan and EU is over US$20 billion each. Their programmes are strongly confined to general services and consumer subsidies category (public stockholding for food security and domestic food aid): Nassar et al, above n 227, 362.

[243] *Doha Ministerial Declaration* para 13.

[244] This means higher linear cuts in a higher band: *Hong Kong Ministerial Declaration* para 5.

[245] Ibid.

[246] Final Bound Commitment Levels is the maximum support permitted to be provided during any year of the implementation period or thereafter: *Agreement on Agriculture* art 1: (h)(i).

S&DT provisions are liable to a lesser cut (two-third of the formula cut) of developed countries.[247]

4.2.5.1 OTDS

The *December 2008 Agriculture Modalities* envisages a reduction in the OTDS in three bands from figures from a base period of 1995–2000[248] by applying a tiered formula:

- The highest tier consists of base OTDS[249] greater than US$60 billion. This will be cut by 80 per cent. Currently, the OTDS for the EU is above US$60 billion. The base OTDS for the EU is estimated at €110.2 billion. The cut would bring the ceiling down to €22.06 billion.[250]
- The middle tier consists of base OTDS in the range of US$10 billion to US$60 billion. The reduction shall be 70 per cent.[251] In the middle tier are the US and Japan. The base OTDS for the US is estimated at US$48.2 billion. The cut would bring the ceiling down to US$14.46 billion. Since Japan's overall support ceiling is more than 40 per cent of the value of agricultural production, it has to make more cuts: 75 per cent.[252]
- The lower tier consists of the base OTDS, which is equal to or below US$10 billion. This would be cut by 55 per cent.[253] All other developed countries belong to this group.

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[247] It is to be mentioned that under the AoA, developing countries were also liable to a two-third cut of the developed countries.

[248] Developing countries are given flexibility of choosing either 1995–2000 or 1995–2004 as a base period. The reduction commitments are to be implemented in six equal annual steps over five years for developed countries and nine steps over eight years for developing countries: *December 2008 Agriculture Modalities* paras 5, 8.

[249] Base OTDS or the base level for reductions in OTDS shall be the sum of Amber Box commitment ceiling plus 15 per cent of the value of production (comprising 5 per cent for current '*de minimis*' support for agriculture in general, another 5 per cent for '*de minimis*' support targeted at specific products, and 5 per cent for blue box support). For developing countries, figures are more flexible: ibid paras 1–2.

[250] Ibid para 3(a); *Unofficial Guide to the Revised Draft Modalities*, above n 129, 5 para 3(a).

[251] Ibid para 3(b).

[252] Ibid.

[253] *December 2008 Agriculture Modalities* para 3(c).

The top three subsidiser countries (EU, US and Japan) have to make a 'down-payment' through a cut of 33.3 per cent from the start of the implementation period. Other developed countries will have to make a 'down-payment' by 25 per cent cut.[254] Developing countries with Amber Box reduction commitments will have to cut by two-thirds of the formula cut. This excludes NFIDCs. Developing countries without any Amber Box reduction commitments would not have to reduce overall distorting support.[255]

4.2.5.2 Amber Box (Final Bound Total AMS)

The *December 2008 Agriculture Modalities* provides that the Amber Box support will also be reduced in three tiers:

- In the highest tier are those countries whose Final Bound Total AMS is greater than US$40 billion. This would be cut by 70 per cent.[256] For instance, the EU's current ceiling is €67.16 billion. The cut would bring it down to €20.1 billion.[257]
- In the middle tier are Members whose Final Bound Total AMS is between US$15 billion to US$40 billion. This would be cut by 60 per cent.[258] The US and Japan belong to this tier. The current ceiling of the US is US$19.1 billion. The 60 per cent cut would bring it down to US$7.6 billion.[259] However, Members, such as Japan, whose Amber box support is more than 40 per cent of the value of their agricultural production, would make a bigger cut.[260]
- All other developed countries that provide Amber Box support of less than US$15 billion are in the lower tier and a reduction of 45 per cent would apply to them.[261]

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[254] Ibid para 5.

[255] Ibid paras 6, 7.

[256] Ibid para 13(a).

[257] *Unofficial Guide to the Revised Draft Modalities*, above n 129, 6.

[258] *December 2008 Agriculture Modalities* para 13(b).

[259] *Unofficial Guide to the Revised Draft Modalities*, above n 129, 6.

[260] *December 2008 Agriculture Modalities* para 14.

[261] Ibid para 13(c).

- S&DT would apply to developing countries, which would make two-thirds of the formula cut. The developing Members whose present ceilings are below US$100 million or net foot importers would be exempt from such cuts.[262]
- The *December 2008 Agriculture Modalities* reduces the cap of five per cent *de minimis* support to 2.5 per cent. Developing countries with Amber Box commitments would make two-thirds of the above cut.[263]

In order to prevent 'product support focusing', the *December 2008 Agriculture Modalities* proposes to limit spending levels for each commodity.[264] However, product-specific support caps are applied only at base period levels.[265] Christian Haberli argued that this could leave scope for the subsequent increase of the current low levels of support. In terms of food security, this means that producers in LDCs would face the possibility that the governments of rich countries could concentrate support on certain commodities, including food-security-sensitive products such as rice or maize.[266]

4.2.5.3 Blue Box

Several limitations have been proposed for the Blue Box. The *December 2008 Agriculture Modalities* requires Members to choose between two types of Blue Box support: (a) direct payments under production-limiting programmes or (b) direct payments that do not require production.[267] Members are required to specify in their Schedules which of the Blue Box support they have chosen.[268] If they make an exception to this universal application, it has to be approved by other Members before

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[262] Ibid paras 16–18.

[263] Ibid paras 30–2.

[264] Ibid paras 21–9.

[265] Paragraph 22 of the *December 2008 Agriculture Modalities* states that the 'product-specific AMS limits specified in the Schedules of all developed country Members other than the US shall be the average of the product-specific AMS during the Uruguay Round implementation period (1995–2000)'.

[266] Haberli, above n 138, 313.

[267] *December 2008 Agriculture Modalities* para 35.

[268] Ibid para 36.

its finalisation in the Schedules.[269] However, both these domestic support programmes cannot be provided for any particular product or products.[270] Progressing ahead of the AoA, the *December 2008 Agriculture Modalities* imposes a cap on Blue Box support—it shall not exceed 2.5 per cent of the average total value of agricultural production in the 1995–2000 base period.[271] If a country provides the bulk of its trade-distorting support in the Blue Box (40 per cent), it would be cut by the same percentage as the Amber Box was cut over two years.[272] Developing countries would enjoy a larger cap of five per cent, with flexibility in some special circumstances.[273] A product-specific limit is also imposed on this support. Generally, the limits are the average value of support provided to those products at an individual product level in 1995–2000, with adjustments if there are gaps on spending in some years.[274] More flexibilities are accorded to developing countries.[275]

4.2.5.4 Green Box

The *December 2008 Agriculture Modalities* leaves the Green Box support beyond any reduction commitments. The *Hong Kong Ministerial Declaration* calls for a review of the Green Box criteria to guarantee that the developing countries' programmes that cause only minimal trade distortion are covered within the Green Box.[276] On Green Box issues, the sharp distinction between developing and developed countries are reflected in their proposals. The proposals from the G-20[277] and the African Group[278] highlighted

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[269] Ibid.

[270] Ibid.

[271] Ibid para 38.

[272] Ibid para 39.

[273] Ibid paras 48–50.

[274] Ibid paras 40–7.

[275] Ibid para 50.

[276] *Hong Kong Ministerial Declaration* para 5.

[277] WTO, *Review and Clarification of Green Box Criteria*, WTO Doc G20/DS/Greenbox FINAL (2 June 2005).

[278] WTO Committee on Agriculture Special Session, *Review and Clarification of Green Box Criteria*, WTO Doc TN/AG/GEN/15 (6 April 2006) (Communication by the African Group).

the need to prevent the abuse of Green Box support by developed countries through, inter alia, box shifting and decoupled income support. Their proposals also emphasised the need to adapt the box better to developing countries' policies.[279] Conversely, the US, the EU and the G-10[280] demonstrated their relentless positions against any change in the existing Green Box principles and criteria.[281] Accordingly, the December 2008 Draft Text suggests a number of reforms in the Green Box criteria in Annex B.

Firstly, it proposes to amend some Green Box criteria to allow more development programmes by developing countries, such as including policies and services related to farmer settlement, land reform programmes, rural development and rural livelihood security in developing country Members by adding a new clause (h) within the general services category.

Second, it amends several Green Box criteria to ensure that government intervention in developing countries is counted in the Green Box rather than in the Amber Box. For example, footnote 5 and footnote 5&6 would be amended to accommodate the acquisition of stocks of foodstuffs by developing country Members for supporting low-income and resource-poor producers as well as the government purchase of foodstuffs at subsidised prices from the low-income and resource-poor producers in developing countries to fight hunger and rural poverty.[282] But for this specific inclusion, these support programmes would otherwise have been placed in Amber Box.

Third, in a bid to tighten the criteria for developed countries, the Devcember 2008 Agriculture Modalities suggests 'defined, fixed and unchanging' base periods for decoupled income support,[283] structural adjustment[284] and regional assistance

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[279] Nassar et al, above n 227, 356–7.

[280] G-10 is a coalition of nine WTO Members lobbying for agriculture to be treated as diverse and special because of non-trade concerns. They are Chinese Taipei, Iceland, Israel, Japan, Korea, Republic of Liechtenstein, Mauritius, Norway and Switzerland: *Groups in the Agriculture Negotiations* <http://www.wto.org/english/tratop_e/agric_e/negoti_groups_e.htm> at 17 February 2011.

[281] Nassar et al, above n 227, 356–7.

[282] *December 2008 Agriculture Modalities* Annex B.

[283] *Agreement on Agriculture*, Annex 2, para 6. Annex B to the *December 2008 Agriculture Modalities* proposes to amend Paragraph 6 of the Annex 2 to the AoA: ibid 40.

programmes'.[285] However, in each of these cases, the 'defined, fixed and unchanging' base period is followed by the clause 'an exceptional update is not precluded'. The conditions that have to be satisfied for an 'exceptional update' of the base period have been crafted in such vague language that it cannot be monitored effectively. In updating the base period, a government must ensure that such an update does not affect the producer expectation and decisions. One of the means of ensuring this is that the administering authority will make the update in such a way that 'the updated base concerned could not have been reasonably anticipated by producers such that their production decisions could be materially altered'.[286] It can be argued that the nebulous nature of this type of condition leaves it up to developed countries to update the concerned base periods.

It is apparent that the *December 2008 Agriculture Modalities* recognises the need to amend the criteria to cater for developing countries' needs while ignoring their plea to stop developed countries from abusing Green Box supports. It does not prohibit box shifting or prevent the accumulation of domestic support.

4.3 Export Subsidies

4.3.1 Provisions of the Agreement on Agriculture

Article 1(e) of the AoA defines 'export subsidies' as 'subsidies contingent upon export performance' and include the export subsidies listed under Article 9 of the AoA.[287] Article 9.1 provides a non-exhaustive list of six types of export subsidies that are subject to the reduction commitments. Included in this list are governmental acts, such as:

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[284] Ibid para 11. Annex B to the *December 2008 Agriculture Modalities* proposes to amend Paragraph 11 of the Annex 2 to the AoA: *December 2008 Agriculture Modalities* 41.

[285] Ibid para 13. Annex B to the *December 2008 Agriculture Modalities* proposes to amend Paragraph 13 of the Annex 2 to the AoA: *December 2008 Agriculture Modalities* 43.

[286] *December 2008 Agriculture Modalities* Annex B, 40, 41, 43.

[287] Article 3.1 of the SCM Agreement defines export subsidies without even using the term as such, rather it employed the generalised term 'prohibited subsidies'. It prohibits export subsidies by characterising them as 'subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance'.

- the provision of direct subsidies contingent upon export performance;[288]
- the sale or disposal for export of non-commercial stocks of agricultural products at prices lower than on the domestic market;[289]
- payments on the export of an agricultural product financed by virtue of governmental action;[290]
- the provision of subsidies to reduce the costs of marketing agricultural exports;[291]
- internal transport and freight charges on export shipments provided on terms more favourable for domestic shipments;[292] and
- subsidies on agricultural production contingent on their incorporation in exported products.[293]

To briefly relate the rules on export subsidies, Article 8 of the AoA prohibits Members from providing export subsidies that do not conform to the AoA and the commitments in their Schedule. This is supported by Article 3.3 of the AoA, which prohibits Members from providing export subsidies listed above regarding the agricultural products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein. If the Member does not have any Schedule commitment regarding any agricultural product, it shall refrain from providing such subsidies. Hence, the products that are unscheduled cannot benefit from export subsidies. Under the AoA, each Member is required to make two forms of reduction commitments on export subsidies: quantitative and budgetary.[294] Members are to undertake such commitments for each year of the implementation period and specify the same in their Schedules.[295]

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[288] *Agreement on Agriculture* art 9:1(a).

[289] Ibid art 9:1(b).

[290] Ibid art 9:1(c).

[291] Ibid art 9:1(d).

[292] Ibid art 9:1(e).

[293] Desta, *The Law of International Trade in Agricultural Products*, above n 12, 213–14.

[294] *Agreement on Agriculture* arts 3.3 and 9:2(a).

[295] Ibid.

4.3.2 US–Cotton Subsidies

These provisions on export subsidies are called into play in *US–Cotton Subsidies*[296] where Brazil made several claims against various US programmes that provided export subsidies for upland cotton, a product for which the US had no scheduled commitments.[297] The Panel examined one of these measures, namely the User Marketing Payments to exporters under Section 1207(a) of the *Farm, Security and Rural Investment Act (FSRI Act) of 2002*.[298] Brazil claimed that User Marketing Payments are export subsidies within the meaning of Article 9.1(a)[299] and hence are in violation of Article 3.3 and 8 of the AoA.[300] The US claimed that since the FSRI Act provides subsidies to both exporters and domestic users, they should be treated as a single situation, which rendered them not contingent on export performance as required by Article 9.1(a). The claim of the US was that the user marketing payment was not a prohibited subsidy.[301]

The Panel found that the text of the US legislation 'explicitly identifies, on its face, two distinct factual situations involving two distinct types of eligible recipients: one in

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[296] *United States—Subsidies on Upland Cotton*, WTO Doc WT/DS267/R (2004) (Report of the Panel); *United States—Subsidies on Upland Cotton* WTO Doc WT/DS267/AB/R, AB-2004-5 (2005) (Report of the Appellate Body).

[297] Brazil challenged the legality of three export subsidy measures of the US: user-marketing payments to exporters under the Farm, the *Security and Rural Investment Act*, provisions of the *2000 Extraterritorial Income Act*, and three export credit guarantee programmes. Total costs of these programmes amounted to not less than US$5,500,000,000 each fiscal year.

[298] *Farm, Security and Rural Investment Act (FSRI Act) of 2002* (O:\END\END02.380) <http://www.farmlandinfo.org/documents/30900/2002_Farm_Bill.pdf> at 26 July 2011.

[299] Article 9.1(a) of the AoA provides that the provision by governments or their agencies of direct subsidies, including payments-in-kind to a firm, an industry, producers of an agricultural product, a cooperative or other association of such producers, or to a marketing board that is contingent on export performance, is subject to reduction commitments.

[300] Brazil alternatively claimed that if such subsidies satisfy to be not within the meaning of Article 9:1(a), then they are inconsistent with Article 10:1 of the AoA because of their application in a manner as to circumvent or threaten to circumvent the US export subsidy commitments. Article 10:1 of the AoA provides that subsidies that are not listed in paragraph 1 of Article 9 shall not be applied in a manner that results in, or that threatens to lead to, circumvention of export subsidy commitments. However, the panel did not decide upon this issue on grounds of judicial economy: *United States – Subsidies on Upland Cotton*, WTO Doc WT/DS267/R (2004) [paras 678–92](Report of the Panel).

[301] Ibid paras 678–92.

which the payment is made to eligible exporters, and another in which the payment is made to eligible domestic users'. This clearly indicated that there was not one single situation addressed by the legislation.[302] The Panel concluded that the US legislation, in fact, provided two prohibited subsidies, one export subsidy and the other import-substitution subsidy through the same legal provision. To the Panel, inclusion of these two prohibited subsidies in the same provision (to make the export subsidy look like it was not contingent on export performance) cannot make them or one of them 'unprohibited' just in the same way two wrongs cannot make a right.[303]

On this basis, the Panel found that section 1207(a) of the FSRI Act of 2002, providing for User Marketing Payments to exporters, constitutes a subsidy 'contingent on export performance' within the meaning of Article 9.1(a) of the AoA. Given that the US has no scheduled export subsidy reduction commitments for upland cotton, the Panel concluded that the US has acted inconsistently with the obligation in Article 3.3 not to 'provide subsidies in respect of any agricultural product not specified in ... its Schedule' as well as the obligation in Article 8 'not to provide export subsidies otherwise than in conformity with the AoA and with the commitments as specified in [its] Schedule'.[304]

4.3.3 Evaluation

Similar to the provisions on domestic support, the provisions on export subsidies are weak. The AoA provides that Members who do not provide export subsidies in the base period are not allowed to introduce them.[305] It does not provide any special provision for LDCs. This is in sharp contradiction to the provisions of the SCM Agreement, where LDCs are allowed to provide prohibited subsidies.[306] The AoA only provides for a reduction of commitments in relation to export subsidies. All other measures of export competition, such as export credits, exporting State Trading Enterprises, and

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[302] *United States—Subsidies on Upland Cotton*, WTO Doc WT/DS267/R (2004) [para 7.722] (Report of the Panel).

[303] Ibid paras 7.740–7.741.

[304] Ibid paras 7.748–7.749.

[305] *Agreement on Agriculture* art 8; McMahon, *The WTO Agreement on Agriculture,* above n 49, 143.

[306] *Agreement on Subsides and Countervailing Measures* arts 27:2(a), 3:1(a) and Annex VII.

international food aid are basically untouched. This pillar of the AoA is not only incomplete and unbalanced; it has even had negative effects on food security, especially through its lacuna on international food aid disciplines.[307] The issue of food aid, though relevant to the issue of export subsidies, is discussed in-depth in Section 4.7. The AoA simply provides that food aid is not to be tied to commercial exports and it should be provided in grant form. It does not address the vital issue for LDCs where developed countries often dump their surplus production in the international market in the name of food aid and cause disruption in market prices. These drawbacks of the AoA regarding export subsidies are addressed in the Doha Round, which aims to achieve substantial reforms in this area. The next sub-section analyses pertinent Doha Round reforms on export subsidies.

4.3.4 Development in the Doha Round

Remarkable progress has been made in the Doha Round on the issue of export subsidies. The *December 2008 Agriculture Modalities* reaffirms the commitment made in the *Hong Kong Ministerial Declaration* for parallel elimination of all forms of export subsidies by the end of 2013.[308] The text provides for the elimination not only of export subsidies, but also of other forms of export competition measures that have trade-distorting effects similar to that of export subsidies. These are various forms of export financing support by the government, agricultural exporting State Trading Enterprises (STEs) and international food aid. Their elimination is likely to have the long-term positive effect on the food security issues of LDCs.[309]

4.3.4.1Budgetary Export Subsidies

As per the *December 2008 Agriculture Modalities*, the 2013 target for developed countries will be achieved by a reduction of 50 per cent of the budgetary outlay commitments by the end of 2010 from the date of entry into force. The rest would be cut to zero in equal annual instalments to eliminate all export subsidies by the end of

[307] Haberli, above n 138, 307.

[308] *Hong Kong Ministerial Declaration* para 6; *December 2008 Agriculture Modalities* para 162.

[309] Haberli, above n 138, 314.

2013. The text prohibits the introduction of any export subsidies on new products or new markets during the implementation period.[310] Developing countries would eliminate their export subsidies by the end of 2016 through a reduction in equal annual instalments.[311] However, they would receive an extended period of elimination: the end of 2021 for eliminating export subsidies relating to marketing and transport costs.[312]

4.3.4.2 Export Credits, Export Credit Guarantees or Insurance Programmes

The Doha Round negotiations aim to discipline various export financing support programmes. The *December 2008 Agriculture Modalities* maintains the basic principles agreed in the *2005 Hong Kong Ministerial Declaration* for such programmes to be 'self-financing, reflecting market consistency, and that the period should be of a sufficiently short duration so as not to effectively circumvent real commercially-oriented discipline'.[313] Annex J to the text details the disciplines on export credits, export credit guarantees and insurance programmes. It puts a maximum time limit on repayment terms,[314] with more flexibilities for LDCs and NFIDC for the acquisition of basic

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[310] *December 2008 Agriculture Modalities* para 162.

[311] Ibid para 163.

[312] Ibid para 164. Paragraph 164 refers to Article 9(4) of the AoA, which gives privilege to developing countries in respect of two types of export subsidies enumerated in Articles 1(d) and (e). Article 1(d) provides for the provision of subsidies to reduce the costs of marketing exports of agricultural products including handling, upgrading and other processing costs, and the cost of international transport and freight. Article 1(e) provides for internal transport and freight charges of export shipments that are provided by the governments, on more favourable terms than those applied in respect to domestic shipments.

[313] *Hong Kong Ministerial Declaration* para 6.

[314] The maximum repayment terms for these export financing supports shall be no more than 180 days. For developed countries, it would be implemented from the first day of implementation: The *2008 December Text*, Annex J, Para 3(a). Developing countries would receive a phase-in period of four years to fully comply with this maximum repayment term of 180 days: *December 2008 Agriculture Modalities*, Annex J: *Possible New Article to Replace the Current Article 10.2 of the Agreement on Agriculture* para 4.

foodstuffs.[315] These export financing programmes must be self-financing, both for developed and developing countries.[316]

4.3.4.3 Agricultural Exporting State Trading Enterprises

To ensure that trade-distorting practices of STEs are eliminated, the *Hong Kong Ministerial Declaration* states that disciplines relating to exporting STEs will extend to the future use of monopoly powers so that such powers cannot be exercised in any way that would circumvent the direct disciplines on STEs on export subsidies, government financing and the underwriting of losses.[317]

Accordingly, the *December 2008 Agriculture Modalities* provides for the elimination of agricultural export monopoly powers by the STEs by 2013.[318] The text provides for a substantial S&DT for developing countries by permitting their STEs to maintain or use export monopoly powers when their objective is to 'preserve domestic consumer price stability and to ensure food security'.[319] However, even if this particular objective is not there, the STEs of developing countries may still continue to use these monopoly powers, if their share of world exports of the agricultural products is less than five per cent.[320] The text provides more flexibility to LDCs by removing this five per cent requirement for STEs of LDCs.[321]

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[315] LDCs and NFIDC, based on 'differential and more favourable treatment' would receive an extended repayment time of 360 and 540 days for the acquisition of basic foodstuffs. They would receive an option of further extension should any of them 'face exceptional circumstance which still preclude financing normal levels of commercial imports of basic foodstuffs and/or in accessing loans granted by multilateral and/or regional financial institutions within these time-frames': Ibid para 5.

[316] Ibid paras 3(b) and 4(b).

[317] *Hong Kong Ministerial Declaration* para 6.

[318] *December 2008 Agriculture Modalities*, Annex K: *Possible New Article 10 BIS of the Agreement on Agriculture: Agricultural Exporting State Trading Enterprises* para 3.

[319] Ibid para 4.

[320] Ibid para 5.

[321] Ibid para 6.

4.4 Implications for Sustainable Development of LDCs

Long-standing agricultural protectionism through market access barriers, export subsidies and domestic support policies in developed countries remain a critical obstacle to sustainable development in LDCs. LDCs' agricultural products still face MFN tariffs of more than eight per cent in the US and preferential tariffs that are six per cent higher than the average of developing countries.[322] LDCs were encouraged to liberalise trade too quickly under the structural adjustment programme of the IMF and the World Bank only to end up in struggle with low-priced and subsidised food exports from developed countries. Following trade liberalisation, major food import surges into LDCs occurred regularly and have been increasing over time. These were particularly acute in the case of African LDCs.[323] Thus, many LDCs that were traditionally food exporters have become net food importers over the past few decades.[324] The trade-protectionist policies of developed countries undermine LDCs' production for both export markets and domestic markets. They even retard the ability of farmers to generate the supply response that the food crisis situation requires. The situation has worsened since the 2007–2008 food price crisis, which handed them a US$23 billion food import bill in 2008.[325] Besides, trade-distorting subsidies of developed countries force the commodity prices down. Hence, in order to survive through agricultural export, LDCs put more pressure on their environment through subsistence farming and the use of fertilisers and pesticides.

Regarding the impact of domestic support, it is well established that such support has the effect of inducing greater supply than market prices would warrant. It allows for excess production to be sold more easily in world markets at prices below net production costs.[326] This chapter finds that domestic support disciplines in the AoA did

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[322] UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs* (2010) 62.

[323] Ibid 271.

[324] Ibid 105.

[325] Ibid.

[326] Haberli, above n 138, 304.

not oblige developed Members to meaningfully cut domestic support after 1995, nor do the Members have to undertake major WTO-imposed farm policy reforms. On the contrary, the possibilities for surplus dumping on world markets including through food aid remain unaffected. This AoA-enshrined feature therefore allows for the continuous depression of global food prices.[327]

The deleterious impact of export subsidies on LDCs is found in the US expenditure towards upland cotton. In May 2003, four Western African cotton-producing countries, Benin, Burkina Faso, Chad, and Mali, made a submission[328] drawing attention to the disastrous effects of industrialised countries' agricultural subsidies for LDCs. They highlighted the fact that the support given to the cotton sector by China, the EU and the USA was US$6 billion in 2001–2.[329] While the level of support was decreasing in China, it had registered an increase in the US, where the annual level of domestic support was estimated at US$3.7 billion. The EU gave producers in Spain and Greece support of around US$700 million. In 2001–2, the Spanish producers of cotton received support corresponding to 180 per cent of global prices, Greek producers 160 per cent, and US producers 60 per cent. As a result of these subsidies, there was a drastic fall in the international price of the product between May 1995 (US$2.53 per kg) and October 2001 (US$0.82 per kg) before it recovered in January 2003 (US$1.25 per kg). Cotton production accounted for 30 per cent of their export earnings of the Western African countries. As a result of the decline in international price, these countries sustained a loss of UD$250 million in export revenue in 2001–2. The combined direct and indirect effects were estimated to be about US$1 billion a year.

Anderson et al estimated that developing countries' share of global output as of 2015 would rise by 75 per cent for primary agricultural products, if all trade-distorting measures were to be removed.[330] The removal of such measures would also raise their

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[327] Ibid 305.

[328] WTO Committee on Agriculture Special Session, *WTO Negotiations on Agriculture, Poverty Reduction: Sectoral Initiatives in favour of Cotton*, WTO Doc TN/AG/GEN/4 (16 May 2003) (Joint Proposal by Benin, Burkina Faso, Chad, and Mali).

[329] This assertion was based on the estimation by the International Cotton Advisory Committee (ICAC).

[330] Kym Anderson, Will Martin and Dominique van der Mensbrugghe, 'Impact of Global Trade and Subsidy Policies on Developing Country Trade' (2006) 40(5) *Journal of World Trade* 945, 945.

share of global exports in agriculture: from 47 to 63 per cent in primary farm products and from 34 to 40 per cent in processed farm products.[331] This would also increase cotton exports by more than US$4 billion for developing countries, half of which would be enjoyed by SSA.[332] The same study also found that if all trade-distortion policies are phased out, low-income countries would earn an extra US$160 million as foreign exchange, which could then be employed to purchase other goods.[333] Conversely, market access barriers to agricultural exports from LDCs cause loss of employment in rural areas, which leads to migration towards cities, mushrooming of urban slums, social disintegration and poverty.[334]

Whether elimination of protectionism in agricultural sector would contribute to the sustainable development of LDCs is not a very straightforward question given the enormously heterogeneous features of LDCs.[335] For the net food-importing LDCs, such cheaper imports are more than welcome from the perspective of poor consumers.[336] Reductions in domestic support for the OECD agriculture will mean higher-priced imports for them. Reforms in the OECD market price support may significantly affect the trade patterns in these countries.[337] Conversely, those LDCs that rely heavily on the OECD as an export destination or that compete with the OECD products in third markets stand to gain from measures that decouple domestic support from production decisions.[338] Even though net food-importing LDCs will suffer from increased food import bills if domestic support and export subsidies of developed Members are

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[331] Ibid.

[332] Ibid.

[333] Ibid 952.

[334] FAO, 'The Role of Agriculture in the Development of LDCs and their Integration into the World Economy' (Paper prepared for the Third United National Conference on the Least Developed Countries, Brussels, 14–20 May 2001) <http://www.fao.org/docrep/003/y0491e/y0491e00.HTM> at 17 February 2011.

[335] Betina Dimaranan, Thomas Hertel and Roman Keeney, 'OECD Domestic Support and Developing Countries' in Basudeb Guha-Khasnobis (ed), *The WTO, Developing Countries and the Doha Development Agenda: Prospects and Challenges for Trade-Led Growth* (2004) 63, 66.

[336] Haberli, above n 138, 305.

[337] Dimaranan, Hertel and Keeney, above n 335, 71.

[338] Ibid.

removed, ultimately their economies will concentrate on domestic production. In the meantime, these countries must be provided with effective technical and financial assistance and capacity building programmes to strengthen their agro-production sector.

5 Non-Tariff Barriers to LDCs' Market Access

In recent years, there has been rising concern about the trade-restrictive effects of food safety and agricultural health standards adopted in developed countries. Tariffs and quantitative restrictions are considered relatively less important impediments to trade in agricultural and food products, tariff being substituted by the plethora of NTBs.[339] Among these NTBs, SPS and TBT measures have the most trade-restraining impact for agricultural exports from LDCs.[340] As NTBs are addressed in Chapters Two and Five, this sub-section concentrates on SPS measures.

5.1 SPS Measures on Agricultural Products

The products for which SPS requirements have been a particular problem are meat/meat products,[341] fish/fish products,[342] and fruit, vegetables and cut flowers, known together

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[339] Spencer Henson and Rupert Loader, 'Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements' (2001) 29(1) *World Development* 85, 91; Spencer Henson et al, 'How Developing Countries View the Impact of Sanitary and Phytosanitary Measures on Agricultural Exports' in Merlinda D Ingco and L Alan Winters (eds), *Agriculture and the New Trade Agenda: Creating a Global Trading Environment for Development* (2004) 359, 363.

[340] Uttam Kumar Deb, 'Rules of Origin and Non-Tariff Barriers in Agricultural Trade: Perspectives from Bangladesh and Cambodia' in Economic and Social Commission for Asia and Pacific (ESCAP) (ed), *Agricultural Trade: Planting the Seeds of Regional Liberalisation in Asia: A Study by the Asia-Pacific Research and Training Network on Trade* (2007) 225, 287 <http://www.unescap.org/tid/publication/tipub2451.pdf> at 13 July 2011>. In this book chapter, Deb analyses NTMs applied in selected developed and developing countries as well as their impact on export of agricultural products from LDCs.

[341] Strict microbiological and animal health requirements are generally applied to meat and meat products. Animal disease controls exclude many developing countries from world markets for these products, partly because of the pervasiveness of endemic infectious diseases of animals in many low- and middle-income countries. In fact, the high costs of establishing and maintaining disease-free areas can be beyond the means of many of the poorest countries: Steven M Jaffee and Spencer Henson, 'Agro-food Exports from Developing Countries: The Challenges Posed by Standards' in M Ataman Aksoy and John C Beghin (eds), *Global Agricultural Trade and Developing Countries* (2005) 91, 103.

[342] It is to be mentioned that fish and fish products are outside the ambit of agricultural products since they are not covered by Annex 1 to the AoA. Fish and forestry products are therefore non-agricultural, along with industrial products in general <http://www.wto.org/english/thewto_e/glossary_e/non_agricultural_products_e.htm> at 20 January 2011.

as horticultural products,[343] spices, beverages, herbal products, honey, tea, milk products, egg products, nuts, reflecting that these products are typically subject to SPS control.[344] The largest proportion of SPS measures affecting LDCs' agricultural products are concerned with chemical and other contaminants in food, especially veterinary drug residues, pesticide residues and mycotoxins, microbial pathogens, problems associated with the packaging or labelling of canned food products for which botulism is a risk.[345]

Originally, these standards may not have been intended to discriminate.[346] However, the intrinsic complexity and lack of harmonisation of these standards coupled with LDCs' dearth of administrative, technical and scientific capacity constrict the profitability of high-value agricultural exports of LDCs.[347] Quite opposite to this picture, it has also been argued that food safety standards can act as a 'catalyst' to modernise the export supply chain of LDCs that not only can benefit the domestic agricultural health standards but also can augment their competitive advantage.[348] Still, the panorama of standards as a catalyst has not been as convincingly established by substantive evidence as the perception of standards as barriers.

Bearing in mind that market access in agricultural products frequently needs to deal with SPS measures, the AoA expressly mentions Members' agreement to give effect to

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[343] Fruit and vegetables are typically subject to strict controls against pests and plant diseases. For instance, some plants and plant produces are prohibited from entering into the UK, while some others are restricted and must have to be accompanied by phtyosantitary or plant health certificate: Md. Akmal Hossain, 'National Case Study on Environmental Requirement, Market Access/Entry & Export Competitiveness in Horticulture in Bangladesh' (Sub-Regional Workshop on Environmental Requirements, Market Access/Entry and Export Competitiveness in the Horticultural Sector, Bangkok, 29 September to 1 October 2004) 12.

[344] Henson and Loader, above n 339, 91–2; Henson et al, above n 339, 364; Kasturi Das, 'Coping with SPS Challenges in South Asia' in B S Chimni et al (eds), *South Asian Yearbook of Trade and Development* (2009) 105.

[345] Jaffee and Henson, above n 341, 101.

[346] Ibid 92.

[347] Ibid.

[348] Ibid 93.

the SPS Agreement.[349] Though significant for agricultural market access for LDCs, to give an extensive analysis of the SPS Agreement is not within the scope of the thesis. However, this section highlights its most pertinent provisions having effect on LDCs' market access with reference to the WTO cases.

5.2 Flexibility for Imposing Higher Standards

SPS Agreement allows flexibility for national governments in their regulation of health, plant and food safety measures within their jurisdictions. However, it is the degree of this flexibility that gives LDCs cause for concern. They find this flexibility creating the possibility of abuse for protectionist purposes.[350] Article 2.1 of the SPS Agreement gives Members 'the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health', with the proviso that such measures have to be consistent with the provisions of the SPS Agreement. Article 3.1 obliges Members to base their SPS measures on 'international standards, guidelines or recommendations, where they exist'.[351] For the purpose of harmonisation, the SPS Agreement refers to three international instruments: the Codex Alimentarius Commission (Codex), the International Office of Epizootics (OIE), and the International Plant Protection Convention (IPPC).[352] However, the strong obligation of Members in Article 3.1 is eased as it makes an exception by referring to Article 3.3 of the SPS Agreement. Article 3.3 provides WTO Members with the flexibility to introduce or maintain SPS measures resulting in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on international standards, if there is scientific justification for the higher standards. Article 3.3 further states that even if such scientific justification is not available, Members can apply higher standards when they determine such standards to be appropriate on the basis of their risk

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[349] *Agreement on Agriculture*, art 14.

[350] Denise Prévost and Mariëlle Matthee, 'The SPS Agreement as a Bottleneck in Agricultural Trade between the European Union and Developing Countries: How to Solve the Conflict' (2002) 29(1) *Legal Issues of Economic Integration* 43, 47.

[351] The term 'shall' used in Article 3:1 of the SPS Agreement implies a legal requirement to base SPS measures on the basis of international standards.

[352] *SPS Agreement* art 3.4.

assessment in accordance with relevant provisions of Articles 5.1 to 5.8 of the SPS Agreement.

LDCs do not have the technical capacity and expertise to challenge SPS measures that deviate from international standards on grounds of lack of scientific justification. Further, since scientists often disagree on issues of risk, and a risk assessment does not have to embody a majority view,[353] much scope is left for Members to impose more stringent SPS measures than those embodied in international standards. This diminishes the harmonising effect of Article 3 of the SPS Agreement in facilitating increasing market access for agricultural and food products.[354]

5.3 The Science-Based Approach: Taking the SPS Agreement out of the Reach of LDCs

The SPS Agreement turns to science as a means of distinguishing between protectionist and legitimate health measures.[355] Article 2.2 requires that SPS measures be based on 'scientific principles' and must not be maintained 'without sufficient scientific evidence'. As mentioned previously, Article 3.3 allows Members to impose a higher level of SPS measures if there is a scientific justification for it or if the measure is taken in accordance with the provision of Article 5, Clause 1 to 8. Article 5 of the SPS Agreement is a complex provision giving guidelines on the assessment of risk and also on the appropriate level of SPS protection.

These provisions were analysed in the recent WTO dispute *Australia–Apple*,[356] where New Zealand challenged the Import Risk Analysis (IRA)[357] of Australia, which

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[353] See *EC Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1997) para 175 (Report of the Appellate Body).

[354] Prévost and Matthee, above n 350, 48.

[355] Tracey Epps, *International Trade and Health Protection: A Critical Assessment of the WTO's SPS Agreement,* Elgar International Economic Law (2008) 181.

[356] *Australia—Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/AB/R, AB-2010-2 (2010) (Report of the Appellate Body); WTO Doc WT/DS367/R (2010) (Report of the Panel).

imposed a number of 'requirements' that New Zealand must comply with for permission to export apples to Australia. However, before imposing SPS measures on New Zealand apples, Australia was required to make risk assessment. This is because Article 5.1 requires Members to ensure that their SPS measures are 'based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organisations'. Australia claimed that 'as appropriate to the circumstances' in Article 5.1 provides 'a measure of flexibility in terms of how a risk assessment is conducted when there is little available scientific evidence'.[358] On this basis, it claimed that the Panel 'erred in requiring that the IRA expert judgement was reached at intermediate steps in the IRA'.[359] The AB, by upholding the action taken by the Panel, concludes that the phrase 'as appropriate to the circumstances' does not prevent the panel from assessing the coherence and objectivity of a risk assessment under Article 5.1 in situations in which there is some degree of scientific uncertainty and where the risk assessor has come to conclusion on the basis of expert judgement.[360]

The AB in this dispute also examines the phrase 'appropriate level of sanitary or phytosanitary protection' in Article 5.6 of the SPS Agreement. The AB takes note that the phrase is defined in Annex A(5) to the SPS Agreement as 'the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measures to protect human, animal or plant life or health within its territory'.[361] New Zealand contented that the SPS measures employed by Australia are inconsistent with Article 5.6 since Australia failed to ensure that such measures were not more trade-restrictive than required to achieve its appropriate level of SPS protection. The AB held that in order to find a violation of Article 5.6, the complaining party must provide for an alternative

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[357] The IRA is a risk assessment done by the Australian Quarantine and Inspection Service (AQIS) for New Zealand apples, which is the subject of this dispute. The risk assessment was commenced in 1996 and the final IRA was published in 2006: *WorldTradeLaw.net Dispute Settlement Commentary* <http://www.worldtradelaw.net.simsrad.net.ocs.mq.edu.au/dsc/ab/Australia–Apples(dsc)(ab).pdf> at 27 July 2011.

[358] *Australia—Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/AB/R, AB-2010-2 (2010) [paras 232–4] (Report of the Appellate Body).

[359] Ibid paras 232–4.

[360] Ibid paras 238–42.

[361] Ibid paras 342–4.

measure so that the panel makes a comparison between the proposed alternative measure with the contested SPS measures.[362] Then the AB places an onerous obligation on to the complainant in stating that 'the totality of the evidence identified and/or adduced by the complainant will have to be sufficient to establish that an alternative measure would meet the appropriate level of protection'.[363] The AB also suggests that the complainant may rely upon risk assessment as a source of evidence relevant to the proposed alternative measure.[364] For the purpose of this thesis, if we place an LDC, such as Angola or Mali, on the footing of New Zealand as a complainant against the SPS measures of a developed country, the SPS provisions seem to be a closed territory for LDCs.

LDCs are also concerned about the provisional application of SPS measures under Article 5.7 of the SPS Agreement. By applying the precautionary principle, to some extent, Article 5.7 states:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information … Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review sanitary or phytosanitary measure accordingly within a reasonable period of time.

The terms used in Article 5.7 are rather vague and undefined. It is not clear what would constitute 'pertinent information' sufficient to justify a provisional measure, how long such a measure may be maintained while keeping its character as 'provisional' or what the obligation to 'seek to obtain ... additional information' entails.[365] This might give the impression that insufficiently justified measures could be maintained for long periods of

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[362] Ibid paras 336–7.

[363] Ibid paras 365–6.

[364] Ibid paras 232–4.

[365] The AB observed in *Japan—Measures Affecting Agricultural Products (Japan–Agricultural Products)* that 'neither Article 5.7 nor any other provision of the SPS Agreement sets out explicit prerequisites regarding the additional information to be collected or a specific collection procedure. Furthermore, Article 5.7 does not specify what actual results must be achieved; the obligation is to "seek to obtain" additional information': *Japan—Measures Affecting Agricultural Products,* WTO Doc WT/DS76/AB/R, AB-1998-R (1999) [para 92] (Report of the Appellate Body).

time.[366] The WTO case laws deal with these issues. For instance, in *Japan–Agricultural Product*,[367] the AB stated that the additional information to be sought must be 'germane' to conducting a more objective risk assessment and that 'reasonable period of time' has to be established on a case-by-case basis.[368] In *Japan–Apples*[369] the AB holds that Article 5.7 is triggered by insufficiency of scientific evidence, rather than by the existence of scientific uncertainty.[370] According to the AB, insufficiency of scientific evidence is a situation 'where a lot of scientific research has been carried out on a particular issue without yielding reliable evidence'.[371] In *EC–Biotech*,[372] the Panel rejected the EC's argument that Article 5.7 contains specific rules for the assessment of provisional measures.[373] The Panel observed that '[p]rovisional adoption of an SPS measure is not a condition for the applicability of Article 5.7. Rather, the provisional adoption of an SPS measure is permitted by the first sentence of Article 5.7',[374] which is 'where relevant scientific evidence is insufficient'. Hence, it appears that the AB and panels are not flexible in allowing provisional SPS measures under Article 5.7.

Several criticisms from variant ideological spectrums have spurred on the role of science in the SPS Agreement.[375] According to Jeffery Atik, such a science-based approach represents a swing back towards greater national discretion and a move away

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[366] Prévost and Matthee, above n 350, 49.

[367] *Japan—Measures Affecting Agricultural Products,* WTO Doc WT/DS76/AB/R, AB-1998-R (1999) (Report of the Appellate Body).

[368] Ibid paras 92–93.

[369] *Japan—Measures Affecting the Importation of Apples*, WTO Doc WT/DS245/AB/R, AB-2003-4 (2003) (Report of the Appellate Body).

[370] Ibid para 184.

[371] Ibid para 185.

[372] *European Communities—Measures Affecting the Approval and Marketing of Biotech Products,* WTO Docs WT/DS291/R, WT/DS292/R, WT/DS293/R (2006) (Report of the Panel).

[373] This issue is discussed in Joseph A McMahon, 'Standards in the WTO—Attitudes to Biotechnology' in Shawkat Alam, Natalie Klein and Juliette Overland (eds), *Globalisation and the Quest for Social and Environmental Justice: The Relevance of International Law in an Evolving World Order* (2011) 94, 104.

[374] *European Communities—Measures Affecting the Approval and Marketing of Biotech Products,* WTO Docs WT/DS291/R, WT/DS292/R, WT/DS293/R (2006) [para 7.2939] (Report of the Panel).

[375] Epps, above n 355, 183.

from the 'monolithic prescriptions' of the WTO.[376] Their main objection is focused on science's lack of objectivity,[377] as they argue that science is not a source of neutral principles to resolve disputes between Members.[378] The implication of this line of argument for LDCs is that the science-based approach gives more discretion to developed countries to apply more stringent SPS standards. It is only possible for other developed countries or countries with scientific and technological capacity to disagree on the basis of science that the SPS measures of the importing countries are not based on proper risk assessment or without scientific justification. Hence, LDCs with a lack of technical know-how and advanced scientific knowledge are absolutely unable to prove that the SPS measures of importing country are inconsistent with the SPS Agreement. This is evident in the participation of developing countries in the eight disputes thus far resolved in the WTO DSB where SPS measures have been challenged. These are:

1. *Canada/US–Hormones Suspension*[379] (complainant the EC; respondent Canada, the US)
2. *US–Poultry (China)*[380] (complainant the US; respondent China)
3. *Australia–Apple*[381] (complainant New Zealand; respondent Australia)
4. *EC–Biotech Products*[382] (complainant Argentina, Canada, the US; respondent the EC)

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[376] Jeffery Atik, 'Science and International Regulatory Convergence' (1996–7) 17 *New York Journal of International Law and Business* 736, 740

[377] Robert Hudec, 'Science and "Post-Discriminatory" WTO Law' (2003) 26(2) *Boston College Internatioanl and Comparative Law Review* 185, 189.

[378] Atik, above n 376, 758; Vern Walker, 'Keeping the WTO from Becoming the "World" Trans-science Organization: Scientific Uncertainty, Science Policy, and Fact-finding in the "Growth Hormones Dispute"' (1998) *Cornell International Law Journal* 251, 260.

[379] *Canada/United States—Continued Suspension of Obligations in the EC—Hormones Dispute,* WTO Docs WT/DS320/AB/R, WT/DS321/AB/R, AB-2008-5, AB-2008-6 (2008) (Report of the AB); WTO Docs WT/DS320/R, WT/DS321/R (2008) (Report of the Panel).

[380] *United States—Certain Measures Affecting Imports of Poultry from China,* WTO Doc WT/DS392/R (2010) (Report of the Panel).

[381] *Australia—Measures Affecting the Importation of Apples from New Zealand,* WTO Doc WT/DS367/AB/R, AB-2010-2 (2010) (Report of the Appellate Body); WTO Doc WT/DS367/R (2010) (Report of the Panel).

[382] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products,* WTO Docs WT/DS291/R, WT/DS292/R, WT/DS293/R, (2006) (Report of the Panel).

5. *EC–Hormones*[383] (complainant the EC; respondent Canada)
6. *Japan–Apples*[384] (complainant the US; respondent Japan)
7. *Japan–Agricultural Products*[385] (complainant the US; respondent Japan)
8. *Australia–Salmon*[386] (complainant Canada; respondent Australia)

But these disputes brought before the dispute settlement system are just the 'tip of the tip, of the iceberg'.[387] SPS measures applied on agricultural products from LDCs are not even reported.

6 Technical and Financial Assistance, Capacity Building and Waiver for LDCs

A communication from Zambia on behalf of LDCs revealed their need for assistance regarding market access in agricultural products.[388] It called for assurance that improved market access provided under the DFQF market access provisions is not inhibited by NTBs to trade, SPS provisions and other technical barriers to trade. To that end, it urged WTO Members to work with LDCs to ensure that they receive the necessary trade-related technical assistance, capacity building and Aid for Trade to allow them to conform to non-tariff regulations that govern imports into WTO Members' markets.[389]

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[383] *EC Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1997) (Report of the AB); WTO Doc WT/DS26/R/USA, WT/DS48/R/CAN (1997) (Report of the Panel).

[384] *Japan—Measures Affecting the Importation of Apples*, WTO Doc WT/DS245/AB/R, AB-2003-4 (2003) (Report of the AB); WTO Doc WT/DS245/AB/R (2003) (Report of the Panel).

[385] *Japan-Measures Affecting Agricultural Products,* WTO Doc WT/DS76/AB/R, AB-1998-R (1999) (Report of the AB); WTO Doc WT/DS76/R (1999) (Report of the Panel).

[386] *Australia—Measures Affecting the Importation of Salmon*, WTO Doc WT/DS18/AB/R, AB-1998-5 (1998) (Report of the AB); WTO Doc WT/DS18/R (1998) (Report of the Panel).

[387] Henrik Horn and Petros C Mavroidis, 'International Trade: Dispute Settlement' in Andrew T Guzman and Alan O Syles (ed), *Research Handbook in International Economic Law* (2007) 204.

[388] WTO CTDSS, WTO NGMA, WTO Committee on Agriculture Special Session, *Duty-free and Quota-free Market Access Implementation of the Decision on Measures in Favour of Least-Developed Countries of Annex F of the Hong Kong Ministerial Declaration of December 2005*, WTO Docs TN/CTD/W/31, TN/MA/W/78, TN/AG/GEN/23 (30 June 2006) (Communication from Zambia on behalf of the LDC Group).

[389] Ibid para 2.

To address this need of LDCs, both the SPS Agreement and TBT Agreement provide for technical and financial assistance. Article 9 of the SPS Agreement states the consensus of Members to 'facilitate the provision of technical assistance to other Members, especially developing country Members' in order to allow them to adjust to and comply with SPS standards in their export markets.[390] This assistance can take the form of 'advice, credits, donations or grants'. Where compliance with the SPS measure would entail 'substantial investments' by a developing country, the importing Member 'shall consider' providing the technical assistance necessary for the developing country Member to maintain or expand its market access opportunities for the relevant product.[391] Article 10 of the SPS Agreement obliges Members to take developing country Members' special needs into account in the preparation and application of SPS measures.[392] Further, it provides that Members 'should' accord longer timeframes for compliance with new SPS measures on products of interest to developing country Members, where the appropriate level of SPS protection allows,[393] and that they 'should' encourage and facilitate active developing country participation in the international standard-setting bodies.[394]

Unlike the 'best endeavour' language of the SPS Agreement, a legally binding requirement (by using the word 'shall') is contained in Article 11 of the TBT Agreement that provides for technical assistance to other Members and especially developing Members when such a request is made by them. Article 11 states that in providing technical assistance 'Members shall give priority to the needs of the least developed country Members'. However, the binding implication is minimised when the granting of technical assistance is made subject to 'mutually agreed terms and conditions'.[395] This clearly implies that the requesting LDCs have no right to a specific

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[390] *SPS Agreement* art 9.1.

[391] Ibid art 9.2.

[392] Ibid art 10.1.

[393] Ibid art 10.2.

[394] Ibid art 10.4.

[395] *TBT Agreement* arts 11.2, 11.3, 11.4, 11.5, 11.6.

form or amount of technical assistance.[396] The legal implication is further reduced when the means of assistance take the form of giving advice,[397] granting technical assistance[398] and taking of reasonable measures to arrange for or to encourage advice and assistance by their national standardising bodies.[399] Advice might take a very minimal contribution; granting assistance does not specify any particular measure; while Members might not oblige national bodies to provide assistance.[400] Article 11 provides for technical assistance targeting the particular difficulties of developing Members and LDCs in relation to TBT measures. Hence, it mandates for assistance to LDCs for:

- the preparation of technical regulations[401]
- the establishment of national standardisation bodies[402]
- the establishment of regulatory bodies[403]
- the establishment of bodies for assessment of conformity[404]
- providing access to producers of LDCs to systems for conformity assessment operated by the bodies in the importing country[405]
- the establishment of institutions and legal framework necessary for participation in international and regional system of conformity assessment.[406]

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[396] Markus Krajewski, 'Article 11 TBT: Technical Assistance to Other Members' in Rudiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO—Technical Barriers and SPS Measures*, Max Planck Commentaries on World Trade Law (2007) 315, 319.

[397] *TBT Agreement* arts 11.1, 11.2, 11.5, 11.6.

[398] Ibid arts 11.2, 11.3, 11.4, 11.5, 11.6.

[399] Ibid arts 11.3, 11.4, 11.7.

[400] Krajewski, above n 396, 319–20.

[401] TBT Agreement, art 11.1.

[402] Ibid art 11.2.

[403] Ibid art 11.3.1.

[404] Ibid art 11.3.

[405] Ibid art 11.5.

[406] Ibid art 11.6.

Finally, it can be argued that the technical assistance provisions in the SPS and TBT Agreement contain no binding obligations beyond a 'best endeavour' commitment or are qualified in a way that makes evasion easy.[407] The inadequacy of the implementation of these provisions is a common complaint of LDCs and has been raised in the framework of the implementation discussions in the General Council[408] and in the Seattle preparatory process as well.[409] There is a clear need for the operationalisation of S&DT and there have been many calls for the strengthening of these rules.[410]

LDC Members are not required to undertake any reduction commitments, although they are required to tariffy in the first place and then bind their tariffs.[411] Under the *December 2008 Agriculture Modalities*, LDCs are exempt from tariff reduction commitments in relation to bound duties.[412]

7 Non-Trade Concerns

The Preamble of the AoA addresses non-trade concerns, which are closely associated with trade concerns, as follows:

> Noting that commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and

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[407] Prévost and Matthee, above n 350, 50. Denise Prevost, '"Operationalising" Special and Differential Treatment of Developing Countries under the SPS Agreement' (2005) 30 *South African Yearbook of International Law* 82.

[408] The Doha Implementation Decision refers to implementation concerns regarding S&D treatment and mandates the CTD to examine the possibility of making non-mandatory S&D provisions binding as well as other ways of improving the effectiveness of these provisions, and to report to the General Council with recommendations in this regard by July 2002: *Implementation Related Issues and Concerns*: *Decision on 14 November 2001*, WTO Ministerial Conference, 4th Session, (Doha, 9–14 November 2001) WTO Doc WT/MIN(01)/17 (20 November 2001) para 12. This work programme is endorsed in the 2001 *Doha Ministerial Declaration*: at para 44.

[409] See, e.g., WTO General Council, *Concerns Regarding Implementation of Provisions Relating to Differential and More Favourable Treatment of Developing and Least Developed Countries in Various WTO Agreements*, WTO Doc WT/GC/W/108 (13 November 1998) (Communication from India) para 16.

[410] Prévost and Matthee, above n 350, 50–1.

[411] *2003 Modalities Agreement* paras 15 and 16; *Agreement on Agriculture* art 15.2.

[412] *December 2008 Agriculture Modalities* para 151.

the need to protect the environment, having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations.[413]

The negotiating proposals submitted in the lead up to the Doha Ministerial Conference reveal the divergent positions of developed and developing countries on issues of S&DT and non-trade concerns. A group of developing countries and LDCs stressed the need for a 'real, robust and operational' S&DT provisions to provide them with food security.[414] They emphasised that the food security issue is related to their national security, economic and political stability and even to their political independence and sovereignty issues. They pointed out that chronic food insecurity puts national security in jeopardy by endangering the health of a large number of people and this incites internal turmoil and instability.[415] Again, dependence on food imports compel them to accept the unfair conditions imposed by lending agencies and foreign countries.[416] Putting forward all these reasons, they called for S&DT provisions to provide them with more flexibility in agricultural trade policy, including exempting their food staples from liberalisation and strengthening their domestic production capacity.[417]

In their proposals, a group of developed countries[418] argued that agriculture, in addition to supplying the populations with their requirements of food and fibre, also provides them with certain public goods that fulfil important societal goals.[419] These public

[413] *Agreement on Agriculture*, preamble, para 6.

[414] WTO Committee on Agriculture Special Session, *Agreement on Agriculture: Special and Differential Treatment and a Development Box*, WTO Doc G/AG/NG/W/13 (23 June 2000) (Proposal by Cuba, Dominican Republic, Honduras, Pakistan, Haiti, Nicaragua, Kenya, Uganda, Zimbabwe, Sri Lanka and El Salvador) 1.

[415] Ibid.

[416] Ibid.

[417] Ibid 1–2.

[418] WTO Committee on Agriculture Special Session, *EC Comprehensive Negotiating Proposal*, WTO Doc G/AG/NG/W/90 (14 December 2000); WTO Committee on Agriculture Special Session, *WTO Agriculture Negotiations*, WTO Doc G/AG/NG/W/101 (16 January 2001) (Proposal by Norway); WTO Committee on Agriculture Special Session, *Proposal for WTO Negotiations on Agriculture*, WTO Doc G/AG/NG/W/98 (9 January 2001) (Submitted by the Republic of Korea); WTO Committee on Agriculture Special Session, *WTO Negotiations on Agriculture*, WTO Doc G/AG/NG/W/94 (21 December 2000) (Proposal by Switzerland); WTO Committee on Agriculture Special Session, *Negotiating Proposal by Japan on WTO Agricultural Negotiations*, WTO Doc G/AG/NG/W/91 (21 December 2000); See also WTO Committee on Agriculture Special Session, *Note on Non-Trade Concerns*, WTO Doc G/AG/NG/W/36/Rev.1 (9 November 2000) (Revision).

[419] Hoda and Gulati, above n 50, 218.

goods include their food security, food safety issues, animal welfare, viability of rural areas and preservation of the landscape for environmental or aesthetic reasons.[420] Proposals from these countries also incorporate the need for S&DT provisions for developing countries, but with much less importance placed on this. In a bid to make a compromise between these concerns, the 2001 *Doha Ministerial Declaration* incorporates both S&DT and non-trade concerns as negotiating issues. On S&DT treatment for developing countries, the *Doha Declaration* in Paragraph 13 states 'special and differential treatment for developing countries shall be an integral part of all elements of the negotiations'. On non-trade concerns, the same paragraph confirms that 'non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture'. The term 'including' in the Preamble of the AoA implies that non-trade concerns are not limited to the issues of food security and environmental protection. However, the specific mention expresses their importance as non-trade concerns that affect sustainable development.

7.1 Food Security for LDCs

Food security is a multifaceted issue. According to the *1996 Rome Declaration on World Food Security,*[421] food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.[422] The absence of this situation can be regarded as food insecurity. This undermines one of the fundamental

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[420] Ibid 218–19.

[421] FAO, *Rome Declaration on World Food Security*, World Food Summit 13–17 November 1996 <http://www.fao.org/docrep/00s/w3613e/w36163E00.htm> at 10 January 2010>. The Declaration was adopted at the 1996 World Food Summit where the heads of the States gathered to discuss food security issues and committed to implement polices aimed at eradicating poverty and inequality and improving food security situation.

[422] The FAO definition of food security is similar to the earlier definitions made at World Food Conference in 1974 where food security was defined as 'availability at all times of adequate world supplies of basic food-stuffs ... to sustain a steady expansion of food consumption ... and to offset fluctuations in production and prices': UN, 'Report of the World Food Conference' (1975) (held in Rome on 5-16 November 1974). Food security was defined by the World Bank as 'access by all people at all times to enough food at/for an active, healthy life': World Bank, 'Poverty and Hunger: Issues and Options for Food Security in Developing Countries' (World Bank, 1986), cited in Ruosi Zhang, 'Food Security: Food Trade Regime and Food Aid Regime' (2004) 7 *Journal of International Economic Law* 565, 566 (footnote 1).

human rights—the right to be free from hunger and malnutrition recognised under the *International Covenant on Economic, Social and Cultural Rights*.[423] Food insecurity inhibits the achievement of sustainable development goals, since reduced availability or affordability of food compromises expenditure on health, education, maternal well-being and many other social indicators, as well as the capacity to earn a living.[424]

7.1.1 Factors Contributing to Food Insecurity

The food security issue is influenced by a number of factors such as food price inflation, price volatility, dependence on very few primary export commodities,[425] monoculture induced by Green Revolution, the monopolistic market structure dictated by transnational agribusiness,[426] the Structural Adjustment Programmes (SAPs) of the IMF and the World Bank,[427] trade-distorting policies of developed countries, and factors such as climate-related causes (for example, flood and drought), conflict, natural disasters, soil degradation, depleted water resources, ecological balance, resource

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[423] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 6 ILM 360 (entered into force 3 January 1976).

[424] UNCTAD, 'Addressing the Global Food Crisis: Key Trade, Investment and Commodity Policies in Ensuring Sustainable Food Security and Alleviating Poverty' (UN, 2008).

[425] This export-dependence exposed the poorest countries to bad harvests, fluctuations in world market prices for agricultural products and the declining terms of trade for agricultural commodities *vis-à-vis* manufactured goods. Hence, the trend could seriously trim down their export earnings and affect their ability to purchase food and other essential items in international markets: Carmen G Gonzalez, 'Markets, Monocultures, and Malnutrition: Agricultural Trade Policy through an Environmental Justice Lens' (2006) 14 *Michigan State Journal of International Law* 345, 356; Carmen G Gonzalez, 'Trade Liberalization, Food Security, and the Environment: the Neoliberal Threat to Sustainable Rural Development' (2004) 14(XXX) *Transnational Law & Contemporary Problems* 419, 434.

[426] By dictating agricultural commodity prices MNCs can prevent the benefits of higher process from being transferred to the small farmers of poor countries: M Rafiqul Islam and Md. Rizwanul Islam, 'The Global Food Crisis and Lacklustre Agricultural Trade Liberalisation: Demystifying their Nexus Underpinning Reform' (2009) 10(5) *Journal of World Investment and Trade* 679, 689–90. MNCs may also obtain control over agricultural trade through biotechnology and by making farmers vulnerable to price disruptions of agricultural inputs, including seeds and agrochemicals: Liz Orton, *GM Crops-Going Against the Grain* (May 2003), 23 <http://www.actionaid.org/docs/gm_against_grain.pdf> at 5 February 2010.

[427] These programmes require developing countries to withdraw agricultural subsidies to reduce or eliminate import barriers whereas the industrialised countries, not being under any kind of programmes like this, continued to use tariff, subsidies and other protectionist measures. The 'double standard' maintained by these programmes subjected small farmers of developing countries to unfair competition from highly subsidies US and EU agricultural producers: John Madeley, *Hungry for Trade: How the Poor Pay for Free Trade* (2000); Gonzalez, 'Markets, Monocultures, and Malnutrition', above n 425, 364.

preservation and population growth.[428] We are still living in the world food crisis situation that struck in 2008. A recent report entitled *Price Volatility in Food and Agricultural Markets: Policy Responses*[429] prepared by 10 international organisations[430] stated that 'as of Spring 2011, world price levels … have once again reached the levels of 2007/8, giving rise to concerns that a repeat of the earlier crisis is underway'.[431]

The current food crisis has emerged from the accelerating food prices, especially of staples,[432] coupled with shortages and diminishing food stocks, which have reduced access to food for many people in LDCs. This, in turn, has increased their food import bill.[433] Again, the natural expectation that increased food price has its positive effect on the farmers is reversed by the fact that these farmers are often not adequately linked to markets.[434]

As most of these causes of food insecurity are outside the ambit of the WTO, their solution also lies beyond the WTO. Hence, the next sub-section deals with some of the factors that can be addressed through the WTO.

7.1.2 Trade-Distorting Agricultural Policies

Our Common Future identifies the long-standing agricultural export subsidies and domestic support policies in developed countries as the most critical obstacles to food

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[428] Zhang, above n 422, 566; UNCTAD, *The Least Developed Countries Report 2009: The State and Development Governance* (2009) 100.

[429] FAO et al, 'Price Volatility in Food and Agricultural Markets: Policy Responses' (2 June 2011) <http://www.ifad.org/operations/food/documents/g20.pdf> at 4 August 2011.

[430] FAO, IFAD, IMF, OECD, UNCTAD, WFP, the World Bank, the WTO, IFPRI and the UN HLTF.

[431] *Price Volatility in Food and Agricultural Markets: Policy Responses*, above n 429, 9.

[432] Wheat, rice and soybean prices have increased by 40 per cent and 60 per cent in case of rice since early 2007.

[433] The cereal import bill of low-income food-deficit countries increased in 2007–2008 from $6.5 billion to $14.6 billion in Africa, from $7.0 billion to $15.4 billion in Asia and from $0.3 billion to $0.7 billion in Latin America and Caribbean: UNCTAD, 'Addressing the Global Food Crisis: Key Trade, Investment and Commodity Policies in Ensuring Sustainable Food Security and Alleviating Poverty' (UN, 2008).

[434] UNCTAD, 'Addressing the Global Food Crisis: Key Trade, Investment and Commodity Policies in Ensuring Sustainable Food Security and Alleviating Poverty' (UN, 2008) 14–15.

security in developing countries.[435] Decades of artificially depressed world market prices, caused by agricultural protectionism of developed countries, seriously affected the agricultural production of many LDCs. Their self-sufficiency rates declined and they turned into NFIDCs. Now hit by the soaring food prices, they find themselves without the necessary capital and know-how to respond.[436] Previous sections in this chapter have elaborated on how the issues of market access, export subsidies and domestic support are riddled with trade protectionism. This cause of food insecurity can be removed by reforming agricultural trade, putting in place strong disciplines on market access and domestic support and prohibiting export subsidies along with Aid for Trade to address the supply-side constraints of LDCs.[437]

7.1.3 Biofuel

Another factor recently added to the list of causes of the food insecurity problem is the excessive use of biofuel along with biofuels subsidies.[438] Biofuels subsidies increased to US$7 billion in the US and €3.5 billion in the EU.[439] In fact, the reckless biofuel policies of the US and the EU were widely blamed as an immediate cause for the food price hike leading to a global food crisis in 2008.[440] In a bid to protect the environment, both the EU and the US subsidise ethanol production, which diverts a large quantity of agricultural land and crops from food to fuel. There has also been active encouragement of farmers to move on to corn production, which ultimately diminishes the supply of other staples.[441] These biofuel projects increase food prices, causing food crises and

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[435] World Commission on Environment and Development, *Our Common Future* (Australian ed, 1987) 21, 166–7.

[436] Haberli, above n 138, 300–1.

[437] Susan Prowse, 'Responses by the International Trade and Aid Community to Food Security' in Baris Karapinar and Christian Haberli (eds), *Food Crisis and the WTO* (2010) 273, 290–1.

[438] Biofuel subsidies increased to US$7 billion in the US and 3.5 billion euro in the EU. They reduce availability of food crops and increase world market prices: Haberli, above n 138, 300.

[439] Ibid 299.

[440] Islam and Islam, above n 426, 688.

[441] F William Engdahl, *The Hidden Agenda behind the Bush Administration's Biofuel Plan* (25 July 2007) Global Research <http://www.globalresearch.ca/index.php?context=va&aid=6407> at 5 February 2010.

thereby worsening the food insecurity problem. Though concern regarding biofuel subsidies has increased in recent years, the issue has not yet been addressed in the Doha Round. It is even reported that Brazil, China and the US are lobbying against proposals for a reduction in biofuel usage.[442]

7.1.4 Export Restriction

Export restriction is a significant cause of food insecurity. Haberli reported that up to 50 food-exporting countries took 'self-security' measures such as export restrictions, prohibitions and differential export taxes.[443] Article XI(1) of the GATT 1994 permits a temporary export prohibitions or restrictions 'to prevent or relieve critical shortage of foodstuffs'.[444] Article 12 of the AoA requires Members instituting any new export prohibition or restriction to give due consideration to the effects of such a prohibition or restriction on importing Members' food security.[445] The Doha Round does not bring any meaningful change in the export prohibition or restriction, particularly to address the food security concerns of the importing developing countries. The *December 2008 Agriculture Modalities* suggests only a procedural amendment of this provision.[446] However, ICTSD reported that in June 2011, G-20 economies called for a ban on those export restrictions that interfere with the ability of humanitarian relief agencies to provide food in times of crisis by the December 2011 WTO Ministerial Conference.[447]

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[442] ICTSD, 'G-20 Agriculture Ministers Unveil Plan to Tackle High Food Prices' (29 June 2011) 15(24) *Bridges Weekly Trade News Digest*.

[443] Haberli, above n 138, 300.

[444] GATT 1994 art XI(2)(a).

[445] *Agreement on Agriculture* art 12(a).

[446] *December 2008 Agriculture Modalities* paras 171–80.

[447] ICTSD, 'Geneva Delegates Exploring Options on Export Bans' (29 June 2011) 15(24) *Passerelles Sythese*.

7.1.5 Food Aid

Susan Prowse depicted the negative impact of food aid on food security issues of LDCs:

> In terms of poverty and food security, of particular concern to low-income subsistence and small-scale farmers, has been the highly distortionary impact on production resulting from the provision of food in kind (food aid). While food aid can be indispensable in cases of disasters when normal supply channels are completely disrupted, it has in many instances undesirable and unintended consequences. Food aid in kind, delivered in significant quantities, has a potentially very large impact on local market prices.[448]

Our Common Future also recognised:

> Non-emergency food aid and low-priced imports … keep down prices received by Third World farmers and reduce the incentive to improve domestic food production.[449]

AoA addresses the food aid issue by referring to the *Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries* (hereinafter *Marrakesh Decision*).[450] The *Marrakesh Decision* does not confer any rights to the affected countries to receive food aid in times of food crises, rather it refers to a system falling outside the WTO framework and lacking in any effective enforcement mechanism.[451] The ineffectiveness of this instrument was evident in 2007 when food aid was reduced to its lowest level although it was needed more due to the unprecedented price increase.[452]

As a trade organisation, the primary concern of the WTO regarding food aid should be to prevent food aid from turning into 'a mechanism for surplus disposal', while at the same time ensuring that WTO disciplines do not cause impediments to food aid in cases

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[448] Prowse, above n 437, 277; Haberli, above n 138, 306.

[449] *Our Common Future*, above n 435, 167.

[450] The text of the *Marrakesh Decision* is reproduced in WTO, *The Legal Texts*, above n 10, 448–9.

[451] Melaku Geboye Desta, 'Food Security and International Trade Law: An Appraisal of the World Trade Organization Approach' (2001) 35(3) *Journal of World Trade* 449, 453–5, 467.

[452] Haberli, above n 138, 306.

of emergencies and humanitarian crises. In fact, the proposals by developing countries predominantly reflected this concern.[453] It can be argued that the *December 2008 Agriculture Modalities* went in the opposite direction. Annex L of the text proposes to amend Article 10.4 of the AoA.[454] Paragraph 1 reaffirms Members' commitment 'to maintain an adequate level of international food aid ... to ensure that the disciplines contained hereafter do not unintentionally impede the delivery of food aid provided to deal with emergency situations'.[455] The objective of 'preventing commercial displacement', which should have been the main objective, comes later.

The *December 2008 Agriculture Modalities* suggests a number of conditions with which the food aid transactions need to comply to prevent them from having the effect of export subsidies.[456] It does not prohibit in-kind food aid, rather in a soft language states Members' commitment 'to making their best efforts to move increasingly towards more untied cash-based food aid'.[457] The provisions on in-kind food aid can be argued to be contradictory. It suggests that Members shall refrain from providing in-kind food aid where it could have an adverse effect on the local or regional production of the same or substitute products.[458] However, it encourages Members to depart from the strict application of this obligation when an emergency situation lessens the capacity of a Member to meet food aid needs.[459]

The text proposes to create a Safe Box to accommodate all types of emergency food aid (both in-kind and cash). The key to this Safe Box is given to a wide range of entities, from the recipient country to the top UN official to the relevant UN agency to the

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[453] WTO, *Negotiations on Agriculture: Overview*, WTO Doc TN/AG/6 (18 December 2002) para 59.

[454] *December 2008 Agriculture Modalities*, Annex L: Possible New Article 10.4 to Replace the Current Article 10.4 of the *Agreement on Agriculture: International Food Aid* (hereinafter *December 2008 Agriculture Modalities*: *Annex L*).

[455] *December 2008 Agriculture Modalities*: *Annex L* para 1 (emphasis added).

[456] Ibid. Paragraph 2 provides that food aid transactions must be needs driven, in fully grant form, not be tied to commercial exports, not be linked to the market development objectives of donor Members, not be re-exported except in an emergency case.

[457] Ibid para 3.

[458] Ibid para 3.

[459] Ibid footnote 2 to para 3.

International Committee of the Red Cross, Red Crescent Societies to a relevant regional or international intergovernmental organisation and even to an NGO.[460] The most striking point is that it does not have to be an emergency situation to provide in-kind food aid. This is because the text permits in-kind food aid in non-emergency situation outside the Safe Box to redress a food deficit situation giving rise to chronic hunger and malnutrition. This can even be based on a targeted assessment 'by a donor government', when such assessment cannot be reasonably obtained from an international or regional intergovernmental organisation.[461]

Thus, virtually all present forms of food aid would qualify the proposed discipline on food aid as being either in the Safe Box or not. This discipline might increase the food security of the hungry. Nevertheless, when such food aid reaches consumers with the means to purchase food, it will mean the Doha Round results come at the expense of local, unsubsidised food production.[462]

To address the food aid problem, the *Marrakesh Decision* should be replaced by an unequivocal commitment in the Doha Round to at least maintain the food aid volumes at a certain average level, which would remain static irrespective of the increase or decrease in world market prices.[463] As a rapid and short-term response to the increase in food prices, a cash-based aid system should be put in place, while as a long-term basis, there should be reform of the AoA eliminating all trade-distorting agricultural protectionism.[464] Financial assistance can be provided under the Aid for Trade mechanism. An effective food aid discipline would facilitate the sustainable development of LDCs.

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[460] Ibid para 6.

[461] Ibid para 11.

[462] Haberli, above n 138, 316.

[463] Ibid 317.

[464] Prowse, above n 437, 273–4, 282–3.

7.2 Environmental Degradation in LDCs

Monoculture induced by the Green Revolution and biotechnology are harmful for the environment of developing countries in the same way it is harmful for their food security. The environmental and food security effects of the Green Revolution include loss of crop genetic diversity, increased vulnerability to pests and disease, loss of traditional food crops, pesticide and fertiliser contaminations of surface waters and groundwater, increased pesticide-related death and illness, soil degradation, and loss of ecosystem biodiversity.[465] The economic policies that promote monoculture production techniques jeopardise the biological diversity necessary to protect the health and elasticity of the world's agro-ecosystems.[466] Again, from an environmental and food security standpoint, one of the greatest risks of industry-driven biotechnology is the loss of agro-biodiversity. Other environmental risks from biotechnology include genetic contamination resulting in the emergence of herbicides-resistant 'superweeds',[467] accelerating resistance to insecticides and herbicides,[468] and harm to non-target organisms often causing ecosystem disturbances by killing beneficial insects.[469]

8 Conclusion

This chapter emphasised that market access in agriculture is immensely important for the sustainable development of LDCs, mostly because their comparative advantage still

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[465] Gonzalez, 'Trade Liberalization, Food Security, and the Environment', above n 425, 450–1. See generally Vandana Shiva, *The Violence of the Green Revolution: Third World Agriculture, Ecology and Politics* (1991).

[466] Gonzalez, 'Markets, Monocultures, and Malnutrition', above n 425, 356; Fred Gale, 'Economic Specialisation versus Ecological Diversification: The Trade Policy Implications of Taking the Ecosystem Approach Seriously' (2000) *Ecological Economics* 285, 289–90; Lori Ann Thrupp, *Linking Biodiversity and Agriculture: Challenges and Opportunities for Sustainable Food Security* (1997) 17.

[467] Gene can be transferred from the genetically modified crops to wild relatives through cross-pollination. In this process genes can be transferred from herbicide tolerant crops to weeds to create this type of 'superweeds'; Jules Pretty, 'The Rapid Emergence of Genetic Modification in World Agriculture: Contested Risks and Benefits' (2001) 28(3) *Environmental Conservation* 248, 250; FAO, 'The State of Food and Agriculture' (Food and Agriculture Organisation, 2003–2004) 66–7.

[468] Pretty, above n 467, 252; FAO, 'The State of Food and Agriculture' (Food and Agriculture Organisation, 2003–2004) 71–2.

[469] Pretty, above n 467, 253; FAO, 'The State of Food and Agriculture' (Food and Agriculture Organisation, 2003–2004) 67–8.

lies in primary commodities, and because a vast number of rural poor supported by agriculture live in LDCs. This chapter provided a comprehensive analysis of the market access regime for LDCs for agricultural products from a sustainable development viewpoint. It traced the drafting history of the GATT/WTO on agriculture and found that agriculture was kept out of the free trade ideology and has always been protected because of its sensitive character for developed countries' rural livelihood, food security and aesthetic beauty. In this regard, the chapter demonstrated how the rules of the AoA have been drafted to retain the existing protectionism of developed countries. It took developing countries quite a while to realise that the trade-off between agriculture with the TRIPS and the GATS was a bad deal for them.

Through an examination of the AoA provisions and the Doha Round instruments, this chapter found that the lofty objective in the Preamble of the AoA regarding market access for LDCs has not materialised in the formulation of detailed and complex rules on market access, domestic support and export subsidies. Rather, it found that the rules were crafted to essentially deny market access to LDCs while giving more leverage to developed countries.

This chapter found that enduring agricultural protectionism through market access barriers, including SPS and TBT measures, export subsidies and domestic support policies in developed countries remain significant obstacles to sustainable development in LDCs.[470] This chapter showed that LDCs simply do not have the technical capacity to challenge the SPS measures often imposed by developed countries on their agricultural products. Referring to the recent *Australia–Apple* case, the chapter revealed how vulnerable LDCs could be as a complainant since the WTO jurisprudence on SPS measures requires some scientific assessment on the part of the complainant.[471] Unfolding the ineffectiveness of the provisions on technical assistance of the SPS Agreement, the chapter recommended operational S&DT provisions in this regard.

Finally, this chapter addressed food insecurity and environmental degradation, regarded as non-trade concerns in the AoA Preamble. It briefly examined the factors that

[470] See this chapter, s 4.4.

[471] See this chapter, s 5.

contribute to the food crisis situation and environmental degradation in LDCs. It observed that the tension between food aid and food trade regime is aggravating the food crisis situation.

By analysing the impact of the rules of the AoA on the market access regime of LDCs and also on their sustainable development, this chapter addressed the third research question of the thesis as articulated in Chapter One, and found that the market access regime for agricultural products is unfavourable for LDCs in terms of achieving sustainable development.

Chapter Five:
Market Access in Non-Agricultural Products and Sustainable Development of LDCs*

1 Introduction

Market access in non-agricultural products is often referred to as the 'core business' of the WTO.[1] From the very beginning of the GATT in 1947, it has been regulating non-agricultural market access (NAMA). The Doha Ministerial Declaration makes a fresh start in the NAMA negotiations with a mandate for S&DT for developing countries and LDCs.[2] The optimistic aspect of NAMA negotiations for LDCs is the unequivocal consensus among developed and developing countries to provide DFQF market access for their products. However, LDCs cannot count on the DFQF market access provisions if such schemes are designed upon the existing unilateral preferential schemes in which LDCs need to satisfy the rigorous rules of origin.[3] Further, the DFQF market access commitments do not promise LDCs any exemptions from the plethora of NTBs that are currently frustrating their market access.

Within the non-agricultural sector, developed countries and LDCs have different viewpoints on sustaintable development. Developed countries advocate that sustainable development can be achieved by liberalising trade in environmental goods that will

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* This chapter was presented as 'A Reflection on LDCs' Position in Non-Agricultural Market Access Negotiations Explicating the Mandate of Paragraph 16 of the Doha Declaration' in the Macquarie Law School Postgraduate Research Seminar Series, 2010 on 14 April 2010.

[1] Marc Bacchetta and Bijit Bora, 'Industrial Tariffs, LDCs and the Doha Development Agenda' in Basudeb Guha-Khasnobis (ed), *The WTO, Developing Countries and the Doha Development Agenda: Prospects and Challenges for Trade-Led Growth* (2004) 161, 161.

[2] *Ministerial Declaration*, WTO Ministerial Conference, 4th sess, Doha, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) (adopted on 14 November 2001) para 16 (hereinafter *Doha Ministerial Declaration*).

[3] Both country eligibility and product eligibility can nullify the benefits of DFQF market access.

create a 'win-win-win' situation for trade, environment and development.[4] However, as Chapter Two discussed, within the list of environmental goods are the products made of advanced technology.[5] Hence, an environmental goods agenda primarily benefits developed countries by promoting the export of these products to developing countries and LDCs. Conversely, from the perspective of LDCs, sustainable development can be achieved by ensuring DFQF market access for all products that are not obstructed by stringent rules of origin, taking due consideration of their preference erosion, eliminating NTBs and obtaining technical and financial assistance to address their supply-side constraints and upgrade environmental and health-related standards for their non-agricultural products. For LDCs, market access in non-agricultural products contributes to sustainable development by 'raising standards of living, ensuring full employment and a large and steadily growing volume of real income'.[6] It is to be mentioned that LDCs' perspective is also different from the perspective of other developing countries that are concerned over the large tariff reduction they will be bound to undertake as an outcome of NAMA negotiations. Their fear emanates from the conjecture of the impact that this tariff reduction may have upon their socio-economic situation by taking away policy space and tariff revenue while contributing to the unemployment problem.[7] However, since the focus of this chapter is on LDCs, the stakes of other developing countries are not discussed. Rather, the objective of this chapter is to examine how far NAMA negotiations establish an effective market access regime for LDCs that can enable them to achieve sustainable development.

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[4] WTO, *Eliminating Trade Barriers on Environmental Goods and Services* <http://www.wto.org/english/tratop_e/envir_e/envir_neg_serv_e.htm> at 27 June 2011. Paragraph 31 of the *December 2008 NAMA Modalities* instructed Members to negotiate for 'reduction or, as appropriate, elimination of tariffs and NTBs on non-agricultural environmental goods': WTO NGMA, *Draft Modalities for Non-Agricultural Market Access*, WTO Doc TN/MA/W/103/Rev.3 (6 December 2008) (Revision).

[5] Chapter Two, s 7.2.5.

[6] *Marrakesh Agreement Establishing the World Trade Organization*, 1867 UNTS, I-31874 (1995) (entered into force 1 January 1995) 154, Preamble.

[7] Prabhash Ranjan, 'Industrial Tariff Reduction: Why the Best Might Still Turn Out to Be the Worst?' (2008) 42(5) *Journal of World Trade* 953, 954; Hakim Ben Hammouda, Stephen N Karingi and Mustapha Sadni Jallab, 'Non-Agricultural Market Access Negotiations in the World Trade Organization: Modalities for a Positive Post-Hong Kong African Agenda' (2007) 41(1) *Journal of World Trade* 99, 122; Sam Laird, David Vanzetti and Santiago Fernandez de Cordoba, 'Smoke and Mirrors: Making Sense of the WTO Industrial Tariff Negotiations' (Policy Issues in International Trade and Commodities Study Series No 30, Trade Analysis Branch, Division on International trade in Goods and Services, and Commodities, UNCTAD, 2006), 22–33.

Though non-agricultural products have always been within the ambit of the GATT, the same was not true for the T&C sector.[8] This sector, in which a large segment of LDCs have comparative advantage, had been protected until 2005 through several temporary arrangement.[9] Extreme dependence of LDCs on T&C for their export earnings, poverty alleviation, women's empowerment and employment generation mean the whole socio-economic setup of these countries is vulnerable to the slightest adverse impact on the T&C sector.[10] Given the importance of T&C for the sustainable development of LDCs, this chapter appraises LDCs' market access in this sector and the challenges they face in the post-quota period.

2 Significance of Market Access in Non-Agricultural Products in Achieving Sustainable Development for LDC

Non-agricultural products, also known as industrial products, account for almost 90 per cent of the world merchandise exports.[11] NAMA refers to all products not covered by the AoA, which includes, in practice, manufactured products,[12] fuels and mining

[8] Agreement on Textile and Clothing (ATC) brings T&C within the GATT 1994 from 2005 after the phasing out of quota that year: ATC Agreement is reproduced in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 73.

[9] The first arrangement of this kind was the Short-Term Arrangement Regarding International Trade in Textiles (STA), which was effective from October 1961 to September 1962. This was followed by the Long-Term Arrangement Regarding Cotton Textiles (LTA), which was concluded in 1962 among 22 countries initially for five years. Then, in 1973, the Multi-fibre Agreement (MFA) came into force for a temporary period but managed to stay until 1994, being renewed five times. Finally, the *ATC Agreement* was negotiated and concluded during the Uruguay Round as a bridging instrument for ATC to conduct the transformation of trade in T&C from the MFA into GATT 1994 disciplines over a transitional period from 1995 to 2004: M Rafiqul Islam, *International Trade Law of the WTO* (2006) 133–5; Umair Hafeez Ghori, 'Rising to the Challenge: Asian Survivors of the Quota Expiry in Global Textiles and Clothing Trade' (2009) 6(2) *Manchester Journal of International Economic Law* 95, 98.

[10] Umair Hafeez Ghori, 'WTO Non-Agricultural Market Access (NAMA) Negotiations & the Global Textiles & Clothing (T&C) Trade: Reconciling the Irreconcilable Amid the Financial Meltdown' (Paper presented at the Australian National Postgraduate Law Conference 2009, Australian National University [ANU], Canberra, 11–12 June, 2009).

[11] WTO, *Market Access: Negotiations: A Simple Guide—NAMA Negotiations* <http://www.wto.org/english/tratop_e/markacc_e/nama_negotiations_e.htm> at 2 February 2010.

[12] Major manufactured products in terms of their share in world trade are: iron and steel, pharmaceuticals, personal and household goods, T&C, office and telecommunication equipment, automotive products integrated circuits and non-ferrous metals: WTO, *International Trade Statistics 2009* (2009) 33 (Chart II: 2 World Merchandise Exports by Product Group, 2008)

products, fish and fish products, and forestry products.[13] LDCs can be divided into two broad categories according to their exportable non-agricultural products. One is fuel and mining exporter LDCs, which includes Angola, Equatorial Guinea, Mozambique, Sudan, Yemen, Chad, Myanmar, Guinea and the Democratic Republic of the Congo.[14] The other group is manufacture exporter LDCs, such as Bangladesh, Cambodia, Haiti, Madagascar, Nepal, Myanmar, Vanuatu, Lesotho, and the Democratic Republic of the Congo.[15]

NAMA holds immense significance for LDCs in relation to their export share. The total value of LDC exports was recorded in 2009 as US$126,354 million of which oil export accounted for US$72,604 million, manufactured products US$22,563 million and commodities US$31,176 million.[16] This is a substantial decrease from 2008 when the total value of merchandised export from LDCs was US$173,514 million.[17] This decrease of LDC export values is also evident in Table 5.1, which shows LDC exports of merchandised products by value in three large markets: North American, Asia and EU. The table also shows that LDCs' export share in non-agricultural products is far greater than agricultural products.

<http://www.wto.org/english/res_e/statis_e/its2009_e/its2009_e.pdf> at 5 February 2010 (hereinafter *International Trade Statistics 2009*).

[13] WTO, *Market Access: Negotiations: A Simple Guide—NAMA Negotiations*, above n 11.

[14] Though other LDCs also export fuel and mining, in 2009 these countries came more or less within top five oil and mining exporter LDCs in one or two of the major markets: European Union, North America and Asia. Among these, Angola was the top fuel and mining exporter in all three markets in 2009: WTO, *International Trade Statistics 2010* (2010) 31 (Table 1.23 Imports of Agricultural Products, Fuels and Manufactures of the European Union, Asia and North America from Least Developed Countries, 2009) (hereinafter *International Trade Statistics 2010*).

[15] They came within top five LDC exporters in the EU, Asian and North American markets in 2009. Among them, Bangladesh was top manufacture exporter LDC in all three markets in 2009: Ibid.

[16] Ibid 28 (Table 1.22 Merchandise Exports and Imports of Least Developed Countries by Selected Country Grouping, 2009).

[17] *International Trade Statistics 2009* 28 (Table 1.22 Merchandise Exports and Imports of Least Developed Countries by Selected Country Grouping, 2008).

Table 1: Exports by Total LDCs in the EU, North America and Asia (million US dollars)

Product Type	EU		North America		Asia[18]	
	2008	2009	2008	2009	2008	2009
Agricultural products	4616	4197	806	681	6192	6003
Fuel and mining products	20557	10764	29594	16431	59777	42074
Manufactures	11359	11657	9224	8350	2991	2849

Source: Extracted from WTO, *International Trade Statistics 2009*[19] and *2010*.[20]

Among non-agricultural products, fuels and minerals represent more than 60 per cent of all LDC exports in 2009.[21] Clothing is the second category of exports representing 15 per cent of all LDCs' export revenues.[22] This increasing export earning from non-agricultural products leads to economic development and contributes to the GDP of LDCs at an accelerated rate. In 2008, export of goods stood at 31 per cent of the total GDP of LDCs, which was 21 per cent in 2000.[23]

One of the structural characteristics of LDC economies, export concentration,[24] has also been found for non-agricultural products.[25] Chapter 27 of the Harmonised System (HS) nomenclature (mineral fuels, mineral oils and derivatives) makes up 77 per cent of total

[18] Asia includes here Australia, China, Hong Kong, China, India, Indonesia, Japan, Malaysia, New Zealand, Pakistan, the Philippines, Singapore, Taipei Chinese and Thailand.

[19] *International Trade Statistics 2009* 29 (Table 1.23 Imports of Agricultural Products, Fuels and Manufactures of the European Union, Asia and North America from Least Developed Countries, 2008).

[20] *International Trade Statistics 2010* 31 (Table 1.23 Imports of Agricultural Products, Fuels and Manufactures of the European Union, Asia and North America from Least Developed Countries, 2009).

[21] WTO Subcommittee on Least Developed Countries, *Market Access for Products and Services of Export Interest to Least-Developed Countries*, WTO Doc WT/COMTD/LDC/W/48/Rev.1 (9 March 2011) (Note by the Secretariat) 15 (hereinafter *2011 Note by the Secretariat on Market Access for Products and Services of Export Interest to Least-Developed Countries).*

[22] Ibid.

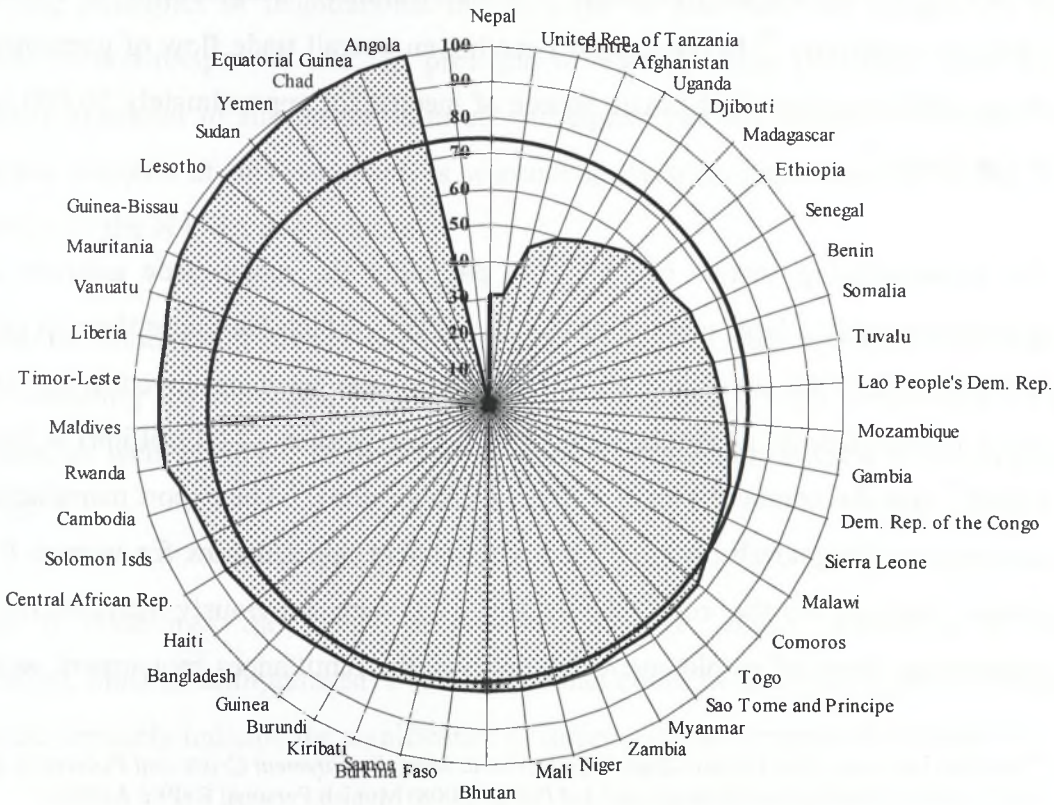
[23] *International Trade Statistics, 2010*, 29 (Table 1.21 Ratio of Exports of Goods and Commercial Services to GDP of the Least-Developed Countries, 2008).

[24] Export concentration means dependence on a few commodities for export revenue.

[25] *2011 Note by the Secretariat on Market Access for Products and Services of Export Interest to Least-Developed Countries* 16.

exports, while the second HS chapter, HS61 (articles of apparel and clothing, knitted or crocheted) along with HS62 (apparel and clothing, not knitted) constitute 11 per cent of total exports.[26] On average, almost three-quarters of total merchandise exports depend upon three main products.[27] This dependence illustrates the vulnerability of these economies to fluctuations in international trade. It also signifies that even the exclusion of a small number of products from DFQF treatment could be vital for LDCs as the loss could not be made up by DFQF in rest of the products.[28]

Chart 1: Share of Top Three LDC Products in Their Total Merchandise Exports 2008



Source: 2011 Note by the Secretariat on Market Access for Products and Services of Export Interest to Least-Developed Countries 7.

[26] Ibid.

[27] Ibid.

[28] Antonie Bouet, David Laborde and Simon Mevel, 'What Can Least Developed Countries Really Expect from the Doha Development Agenda?' (International Food Policy Research Institute, Washington DC, 2008).

Market access in non-agricultural products is enormously important for LDCs in maintaining the existing workforce engaged with exports and backward linking activities relating to non-agricultural products as well as in creating new employment opportunities. Even though the largest share of LDCs' population lives in rural areas and derives their livelihoods from agriculture, a rapidly increasing share of the population migrates to urban centres in search for employment opportunities in industrial enterprises or the services sector.[29] According to a World Bank report, the ready-made garment industry has become the lifeline of the economy of Bangladesh. With the two million workforce it employs directly, and another one million in linkage industries, it supports the livelihood of some 10 million Bangladeshis who have been lifted out of poverty.[30] In the case of Lesotho, an overall trade flow of garments worth about US$200 million is the main source of income for approximately 50,000 workers in that sector.[31]

The manufacturing sectors of LDCs, in particular the ready-made garment (RMG) industries employ a large number of female workers, which facilitates them to gain self-sufficiency. In 2006–2007, around 2.40 million people were employed in the garments sector in Bangladesh, where the number of female workers (2.04 million) is five times higher[32] than the number of male workers (0.36 million).[33] The export manufacturing of garments in Bangladesh has generated employment opportunities for women from the poorer sections of the rural population who were previously marginalised from mainstream forms of employment.[34] Moreover, the remittances by garment workers to

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[29] Michael Herrmann and Haider Khan, *Rapid Urbanization, Employment Crisis and Poverty in African LDCs: A New Development Strategy and Aid Policy* (2008) Munich Personal RePEc Archive <http://mpra.ub.uni-muenchen.de/9499/1/MPRA_paper_9499.pdf> at 26 March 2010.

[30] World Bank, *End of MFA Quotas: Key Issues and Strategis Options for Bangladesh Readymade Garment Industry* (December 2005) [1] <http://siteresources. worldbank.org/BANGLADE SHEXTN/Resources/MF A_Final_Report-print_version.pdf> at 29 June 2011.

[31] UNCTAD, *Erosion of Trade Preferences in the Post-Hong Kong Framework: From "Trade is Better than Aid" to "Aid for Trade"*, UNCTAD/LDC/2005/6 (2007) [5] <http://www. unctad.org/en/doc s/ldc20056_en.pdf> at 26 August 2011.

[32] Bangladesh Bureau of Statistics, *Gender Statistics of Bangladesh 2008* (2009) 96.

[33] Ibid.

[34] Naila Kabeer and Simeen Mahmud, 'Globalization, Gender and Poverty: Bangladeshi Women Workers in Export and Local Markets' (2004) 16 *Journal of International Development* 93, 107.

their families in the countryside also provide a mechanism for the redistribution of income from unban to rural areas.[35] Hence, any obstruction to LDCs' market access in these products creates wide-scale unemployment, gender-inequality and ultimately wide-scale poverty. This creates obstacles for LDCs in achieving sustainable development.

3 Core Principles of Non-Agricultural Market Access Negotiations

The NAMA negotiations within the WTO began in early 2002 with the mandate of Paragraph 16 of the *2001 Doha Ministerial Declaration*. The paragraph enumerates the underlying principles of negotiations: the principle of less than full reciprocity, the principle of non-reciprocity and the principle of S&DT. These principles have then constantly appeared in similar terms in all subsequent NAMA official documents. A systematic analysis of this paragraph is warranted, given its importance in laying the foundation of the NAMA negotiations

First, the paramount objective of negotiations is 'to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as NTBs, in particular on products of export interest to developing countries'.[36]

Second, it underlines the extent of product coverage, which, according to the Declaration, must be comprehensive and no product could be excluded *a priori*. These two points certainly indicate the significance of improved market access for LDCs.[37]

Third, it reaffirms its pro-developing country approach by saying that 'the negotiations shall take fully into account the special needs and interests of developing and least developed country participants'.[38] This provision reiterates the commitments made by

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[35] Ibid 108.

[36] *Doha Ministerial Declaration* para 16.

[37] Ibid.

[38] Ibid.

the Members in Paragraph 2 of the *Doha Declaration*, which seeks to place the needs and interests of developing countries, the majority of the WTO Members, at the heart of the *Doha Work Programme*. This provision is regarded as a persuading principle governing both agricultural and non-agricultural negotiation.[39]

Fourth, the paragraph categorically mentions that developing countries' needs and interests are to be taken into account through 'less than full reciprocity', thus establishing this as the central principle of NAMA negotiation.[40] However, the words '*including* through less than full reciprocity in reduction commitments' indicate that 'less than full reciprocity' is not the only one, rather one of the principles to uphold the interest of developing countries.[41] Evidently, the paragraph refers to two other provisions in accordance with which developing countries' need to be taken into account. These are the relevant provisions of Article XXVIII *bis* of the GATT 1994 and the provisions cited in Paragraph 50 of the *Doha Declaration*. These provisions incorporate the principle of S&DT and non-reciprocity. They are discussed below.

Fifth, Paragraph 16 of the *Doha Declaration* also mandates that Members will agree on modalities that would include appropriate studies and capacity-building measures to assist LDCs to participate effectively in the negotiations.[42] This provision is a response to the request made by several developing countries during the preparations for the Doha Ministerial Conference.[43] However, the response was far from what was expected in the proposal. These countries proposed to halt negotiation on developing countries' trade liberalisation of industrial goods until a study is conducted on the impact of liberalisation on those economies with due regard to their special needs and interests. If it is found in the study that liberalisation would adversely affect LDCs and developing

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[39] Martin Khor and Goh Chien Yen, *The WTO Negotiations on Non-Agricultural Market Access: A Development Perspective* (2006) [20] <http://www.twnside.org.sg/title2/t&d/tnd32.pdf> at 27 July 2011.
[40] Ibid.

[41] Ibid 21.

[42] *Doha Ministerial Declaration* para 16.

[43] WTO General Council, *Preparations for the Fourth Session of the Ministerial Conference, Proposal on Market Access for Non-Agricultural Products*, WTO Doc WT/GC/W/453 (2 November 2001) (Communication from Kenya, Mozambique, Nigeria, Tanzania, Uganda and Zimbabwe) <http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_proposals_e.htm> at 15 February 2010.

countries, they would be exempt from liberalisation commitments.[44] No such study has yet been carried out.

Returning to the earlier point, both Article XXVIII *bis* of the GATT 1994 and Paragraph 50 of the *Doha Declaration* bring into play several other GATT/WTO provisions to inspire NAMA negotiations. Paragraph 3 of Article XXVIII *bis* specifically acknowledges the importance of market protection for LDCs:

> Negotiations shall be conducted on a basis which affords adequate opportunities to take into account: (a) needs of individual contracting parties and individual industries; (b) the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and (c) all other relevant circumstances, including the fiscal, developmental, strategic and other needs of the contracting parties concerned.[45]

Paragraph 50 of the *Doha Ministerial Declaration*[46] urges full consideration in negotiations to the principle of non-reciprocity for developing countries and LDCs embodied in Part IV of the GATT 1994,[47] the 1979 *Enabling Clause*,[48] the Uruguay Round *Decision on Measures in Favour of Least-Developed Countries*[49] and other relevant WTO provisions.[50] Regarding non-agricultural products Article XXXVI of Part IV states that '[t]here is ... need for increased access in the largest possible measures to

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[44] Ibid 2.

[45] *GATT 1994*, art XXVIII bis, para 8.

[46] Paragraph 50 of the *Doha Ministerial Declaration* states:

> The negotiations and the other aspects of the Work Programme shall take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in: Part IV of the GATT 1994; the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; the Uruguay Round Decision on Measures in Favour of Least-Developed Countries; and all other relevant WTO provisions.

[47] *Part IV*, GATT BISD, 13th Supp, 1–12 (1965).

[48] *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of 28 November 1979, (L/4903), GATT BISD, 26th Supp, 203–18 (1980).

[49] Ibid.

[50] See Chapter One, s 3.2.

markets under favourable conditions for processed and manufactured products ... of particular export interest to less-developed contracting parties'.[51]

It should be mentioned that even if this reference to Paragraph 50 were not made in Paragraph 16, Paragraph 50 would have applied to NAMA negotiations as underpinning the principles for overall negotiations in the Doha Round. However, the explicit reference to Paragraph 50 strengthens its application to NAMA negotiations. These paramount objective, scope and principles of the NAMA negotiations thrashed out above were reiterated in the *2004 July Framework (NAMA)*,[52] the *2005 Hong Kong Ministerial Declaration*,[53] and in several draft NAMA Modalities.[54] Paragraph 15 of the *Hong Kong Ministerial Declaration* speaks of the principles of S&DT and 'less than full reciprocity' in reduction commitments. It is pertinent to mention here that the absence of more elaboration on the principle 'less than full reciprocity' created confusion among the negotiators as to whether this principle has been achieved in setting up the negotiating formula, particularly with regard to the contour of this principle for its application to tariff reduction commitments.[55]

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[51] *GATT 1994*, art XXXVI, 3. Also Article XXXVII of the GATT 1994 provides: 'The developed contracting parties shall to the fullest extent possible ... (a) accord high priority to the reduction and elimination of barriers to products ... of particular export interest to less-developed contracting parties ... (b) refrain from introducing, or increasing ... customs duties or non-tariff import barriers on products ... of particular export interest to less-developed contracting parties'.

[52] WTO, *Doha Work Programme*, Decision adopted by the General Council on 1 August 2004, WTO Doc WT/L/579 (2 August 2004), Annex B: Framework for Establishing Modalities in Market Access for Non-Agricultural Products, paras 2, 3 and 4 (hereinafter *2004 July Framework (NAMA)*). Paragraph 4 of the *2004 July Framework (NAMA)* provides that special needs and interests of developing countries and LDC participants should be taken into account while applying the non-linear formula on a line-by-line basis. This will be done, among others, through less than full reciprocity principle.

[53] Paragraph 13 of the *Hong Kong Ministerial Declaration* reaffirms Members' commitment to the mandate for NAMA Negotiations as set out in Paragraph 16 of the *Doha Ministerial Declaration*: *Doha Work Programme, Ministerial Declaration*, WTO Ministerial Conference, 6th sess, Hong Kong, WTO Doc WT/MIN(05)/DEC (22 December 2005) (adopted on 18 December 2005) (hereinafter *Hong Kong Ministerial Declaration*).

[54] WTO NGMA, *Chairman's Introduction to the Draft NAMA Modalities*, WTO Doc JOB(07)/126 (17 July 2007) Preamble (hereinafter *2007 Chairman's Introduction to the Draft NAMA Modalities 2007*); WTO NGMA, *Draft Modalities for Non-Agricultural Market Access*, WTO Doc TN/MA/W/103 (8 February 2008), Preamble (hereinafter *February 2008 NAMA Modalities*); WTO NGMA, *Draft Modalities for Non-Agricultural Market Access: Third Revision*, WTO Doc TN/MA/W/103/Rev.2 (10 July 2008) para 1 (hereinafter *July 2008 NAMA Modalities*); *December2008 NAMA Modalities* para 1.

[55] *Chairman's Introduction to the Draft NAMA Modalities 2007* para 7.

4 An Assessment of the Doha Round Provisions on LDCs' Market Access

4.1 Market Access for LDCs

4.1.1 DFQF Market Access

One of the objectives of LDCs' participation in the NAMA negotiations are to ensure preferential DFQF access for all of their products as asserted in the proposal submitted by Bangladesh on behalf of all LDCs.[56] This objectives of LDCs' participation was spontaneously endorsed by the *2004 July Framework (NAMA)* by calling upon 'developed-country participants and other participants who so decide, to grant on an autonomous basis duty-free and quota-free market access for non-agricultural products originating from least developed countries'.[57]

In 2005, the *Hong Kong Ministerial Declaration* took the LDC provisions further. Annex B to the Declaration makes a note that the issue of DFQF market access for non-agricultural products is being dealt with by the CTD in Special Session (CTDSS) and the decisions in that group will be factored in the NAMA framework in appropriate time.[58] As discussed in Chapter Three, Annex F to the *Hong Kong Ministerial Declaration* provides for DFQF market access for at least 97 per cent of products from LDCs.[59] All the subsequent draft NAMA texts, including the *December 2008 NAMA Modalities* reiterate the same provision for providing DFQF market access for non-agricultural products from LDCs.[60] However, LDCs raised concerns over the issue that the three per cent product exclusion could become vital for them given their export concentration in a very few products (see Chapter Three). For instance, Zambia on

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[56] WTO NGMA, *Market Access for Non-Agricultural Products: Modalities that could be Adopted for the Participation of the Least Developed Countries in the Ongoing Negotiations for the Improvement of Market Access for Non-agricultural Products*, WTO Doc TN/MA/W/22 (8 January 2003) (Negotiating Proposal Submitted by Bangladesh on behalf of the LDCs) para 13 (hereinafter *Negotiating Proposal Submitted by Bangladesh 2003*).

[57] *2004 July Framework (NAMA)* para 10.

[58] *Hong Kong Ministerial Declaration* Annex B: Market Access for Non-Agricultural Products, para 24.

[59] Ibid para 47.

[60] *2008 February NAMA Modalities* para 15; *2008 July NAMA Modalities* para 15; *2008 December NAMA Modalities* para 15.

behalf of LDCs proposed that in order to meet the 97 per cent benchmark, DFQF market access should be provided in tariff lines in which positive duties are still applied to LDC existing exports.[61]

4.1.2 Current Levels of Protection in Non-Agricultural Products

It has been widely claimed that though developed countries often have relatively very low average tariffs, they often retain very high tariffs in the form of tariff peaks[62] and tariff escalation[63] on certain products that are of key export interest to LDCs.[64] In several studies, those products have been identified as fish and fish products; leather, rubber, footwear and travel goods; T&C and transport equipment.[65] Developing countries often express this concern in their submissions to the NGMA. For instance, a group of seven African countries expressed in their submission[66] that 'reducing and eliminating tariff peaks and tariff escalation on products of export interest to developing countries need to be given maximum attention'.[67]

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[61] WTO CTDSS, WTO NGMA, WTO Committee on Agriculture Special Session, *Duty-free and Quota-free Market Access Implementation of the Decision on Measures in Favour of Least-Developed Countries of Annex F of the Hong Kong Ministerial Declaration of December 2005*, WTO Docs TN/CTD/W/31, TN/MA/W/78, TN/AG/GEN/23 (30 June 2006) (Communication from Zambia on behalf of the LDC Group) para 2 (hereinafter *Communication from Zambia 2006*).

[62] There is no unique definition of a high tariff or tariff peak, but it is now widely accepted among negotiators that a domestic or national tariff peak is an individual tariff rate that is at least three times higher than the national average: Santiago Fernandez de Cordoba, Sam Laird and David Vanzetti, 'Blend it Like Beckham—Trying to Read the Ball in the World Trade Organization Negotiations on Industrial Tariffs' (2004) 38(5) *Journal of World Trade* 773, 776. UNCTAD and the WTO generally define tariff peaks as duty rates that exceed 15 per cent: Marcelo Olarrega and Francis NG, 'Tariff Peaks and Preferences' in Bernard Hoekman, Aaditya Mattoo and Philip English (eds), *Development, Trade, and the WTO: A Handbook* (2002) 105, 105.

[63] Tariff escalation means the more processed the product, the higher the tariff: Patrick Messerlin, Ernesto Zedillo and Julia Nielson, *Trade for Development* (2005) 127.

[64] Ibid 125; Bernard Hoekman, Francis Ng and Marcelo Olarreaga, 'Tariff Peaks in the Quad and Least Developed Country Exports' (Discussion Paper 2747, Centre for Economic Policy Research, 2001); Bacchetta and Bora, above n 1, 161; Olarrega and NG, above n 63, 105.

[65] Bacchetta and Bora, above n 1.

[66] WTO NGMA, *Market Access for Non-Agricultural Products*, WTO Doc TN/MA/W/27 (18 February 2003) (Communication from Ghana, Kenya, Nigeria, Tanzania, Uganda, Zambia and Zimbabwe) para 8 (hereinafter *Communication from Ghana, Kenya, Nigeria, Tanzania, Uganda, Zambia and Zimbabwe 2003*).

[67] In discussing the mandates of the NAMA negotiations, Section 3 of this chapter mentions the commitment of Members for the reduction or elimination of tariff peaks, high tariffs and tariff escalation, in particular on products of export interest to developing countries: *Doha Ministerial Declaration* para 16.

Using data from the WTO Tariff Profiles of 2010, the following table shows the difference between simple average duty and the maximum duty imposed on non-agricultural products by some developed countries. It reflects that simple average duty is on average very low (3.8 per cent for Australia, 3.5 per cent for Canada, four per cent for the EU, 2.5 per cent for Japan and 3.3 per cent for the US) when compared to the maximum duty imposed (249 per cent for Australia, 25 per cent for Canada, 26 per cent for the EU, 384 per cent for Japan, and 60 per cent for the US). It also indicates the percentages of tariff lines that attract higher tariffs in the third and fourth column. The third, fourth and fifth columns indicate tariff peaks and high tariffs.

Table 2: Simple Average Duty and Percentage of Non-agricultural Products Attracting Tariff Peaks in 2010[68]

Country/ Territory	Simple average		Duties>15%		Duties>3* AVG		Maximum duty	
	Bound	MFN applied	Bound	MFN applied	Bound	MFN applied	Bound	MFN applied
			Share of HS 6 digit subheadings in per cent		Share of HS 6 digit subheadings in per cent			
Australia	11.0	3.8	15.2	4.7	6.8	4.7	55	249
Canada	5.3	3.5	7.1	6.7	6.6	11.3	20	25
European Union	3.9	4.0	0.9	1.1	7.4	1.9	26	26
Japan	2.5	2.5	0.7	0.7	9.2	8.6	384	384
US	3.3	3.3	2.4	2.6	8.6	7.6	60	60

Year of MFN-applied tariff: 2009

Source: WTO, UNCTAD and ITC, *World Tariff Profiles 2010* (2010) 14–19.

Regarding products on which these high tariffs are imposed, the data from the *World Tariff Profiles 2010* shows that Australia's maximum MFN-applied duties for textiles, clothing, leather and footwear in 2009 were 18 per cent and transport equipment was 249 per cent.[69] In 2009, Canada applied a maximum 18 per cent MFN-applied duty on T&C; 20 per cent on leather, footwear etc. and 25 per cent for transport equipment.[70] The maximum MFN-applied duty applied by European Communities in 2009 was 17 per cent for leather and footwear, 12 per cent for T&C; 22 per cent for transport

[68] Description of column headings: Year of MFN-applied tariff means the calendar year or method of fiscal year; Simple average means simple average of the *ad valorem* or AVE HS six-digit duty averages; Duties > 15 per cent means share of HS six-digit subheadings subject to AVEs greater than 15 per cent; Duties > 3 * AVG means share of HS six-digit subheadings subject to AVEs greater than three times the national average; and maximum duty means maximum tariff line *ad valorem* duty or AVE: WTO, UNCTAD and ITC, *World Tariff Profiles 2010* (2010), 1.

[69] Ibid 34.

[70] Ibid 54.

equipment, and 26 per cent for fish and fish products.[71] The same year, Japan applied maximum MFN-applied duty of 25 per cent on textiles and 384 per cent on leather, footwear etc. and 15 per cent on fish products.[72] Finally, the US applied a maximum MFN-applied duty of 25 per cent on transport equipment, 32 per cent on clothing, 38 per cent on textiles, 35 per cent on fish and fish products, 38 per cent on minerals and metals and 60 per cent on leather, footwear etc.[73] Hence, the data shows that the selected developed countries indeed keep high tariffs and tariff peaks on non-agricultural products of export interest of LDCs.[74]

LDCs are also worried about tariff escalation that impedes their diversification efforts in situation in which they need it most to move away from extreme dependency on commodity exports.[75] Like tariff peak, tariff escalation is also claimed to be rampant for products in which developing countries have comparative advantage, such as T&C, leather and leather products, wood, pulp, paper, furniture and metals.[76] For instance, live fish in most cases enter into the US market duty-free.[77] Even fish fillets attract a very minimal of 5.5 per cent per kg tariffs while processed or canned fish draws as much as a 25 per cent tariff.[78] Tariff escalation results in more restricted market access for more processed products embodying greater value added. Hence, such tariffs discourage developing countries and LDCs from moving up the value chain[79] and specialising in more processed product attracting greater value.

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[71] Ibid 75.

[72] Ibid 96.

[73] Ibid 166.

[74] For instance, it has been highlighted that South Asian LDCs, such as Bangladesh and Nepal, have comparative advantage in T&C, footwear, leather products, fish and fisheries products, travel goods etc.: Posh Raj Pandey, 'Hong Kong Duty-Free Quota-Free Market Access Decision: Implications for South Asian LDCs' in CUTS International (ed), *South Asian Positions in the WTO Doha Round: In Search of A True Development Agenda* (2007) vol 2, 201, 208–12.

[75] *Communication from Ghana, Kenya, Nigeria, Tanzania, Uganda, Zambia and Zimbabwe 2003* para 3.

[76] Messerlin, Zedillo and Nielson, above n 63, 128.

[77] *Harmonized Tariff Schedule of the United States (2010): Annotated for Statistical Reporting Purposes*, chap 3: Fish and Crustaceans, Molluscs and other Aquatic Invertebrates <http://www.usitc.gov/publications/docs/tata/hts/bychapter/1000C03.pdf> at 27 March 2010.

[78] Ibid.

[79] Messerlin, Zedillo and Nielson, above n 63, 128.

It can be concluded from the examination of the tariff treatment of selected developed countries in selected products that tariff peaks and tariff escalation still matters for LDCs when they apply to LDC exports and when these exports are not receiving DFQF treatment. This chapter explains that LDC exports often cannot satisfy the rules of origin condition attached in the DFQF schemes. In such cases, MFN duty with its tariff peaks and high tariffs apply to their exports. This problem is more prevalent in the US market where all LDC products are still not receiving DFQF market access. In 2008, the share of duty-free imports was very low for non-agricultural products because 540 traded tariff lines remained dutiable under the general GSP-LDC scheme.[80] Preferential rates for LDCs' garments entering the US market average more than 11 per cent and the rates for textiles are about six per cent.[81] Conversely, even when LDC exports are not affected by tariff peaks and high tariffs, this poses another type of challenge for them. All of these tariff peaks and high tariffs will be dismantled as an outcome of NAMA negotiations. This means even more preference erosion for LDCs who currently export duty-free where other developed and developing countries have to pay high tariffs. Preference erosion is analysed in Section 5.6.

4.2 Waiver for LDCs

In the initial years of NAMA negotiations, LDCs became sceptic about their responsibilities to become a part of negotiations. They were anxious over whether they would have to make any tariff reductions. This is very much evident in their submissions to the Negotiating Group on NAMA. In its submission on behalf of LDCs, Bangladesh stated that another objective of LDCs' participation in the negotiations is to ensure their markets remain protected.[82] They were adamant not to reduce their tariffs and to maintain their existing levels of protection with the aim of:

- Ensuring continuing viability of their existing domestic industries

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[80] *2011 Note by the Secretariat on Market Access for Products and Services of Export Interest to Least-Developed Countries* 39.

[81] UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs* (2010) 62.

[82] *Negotiating Proposal Submitted by Bangladesh 2003* para 13.

- Promoting further industrial development that is export-oriented and is able to take advantage of the new export opportunities that would be created by the improvements in preferential access
- Maintaining and increasing industrial employment and
- Ensuring that revenue required by the government for developmental purposes continues to be available to them.[83]

Their claims in fact correspond to the provision of Paragraph 3 of Article XXVIII *bis* of the GATT 1994 regarding the need of tariff protection for protecting domestic industries and maintaining tariff revenue for development purpose. Similarly, a group of African countries strongly rejected the possibility of any binding commitments for tariff reduction, rather they wanted this matter to be left to their discretion.[84]

NAMA negotiations respond to these submissions of LDCs in giving them waiver from all tariff reduction commitments. They are also exempt from participating in the sectoral approach. Annex B to the *Hong Kong Ministerial Declaration* notes the consensus among Members on the issue of LDCs' discretion in determining the extent and level of tariff bindings for each of them.[85] All the draft NAMA Modalities of 2008[86] reaffirm the exemptions for LDCs and expectations from them for 'substantial increase' in their tariff binding commitments.[87] The texts leave the extent and level of tariff binding on the judgement of particular LDCs:

> Individual LDCs shall determine the extent and level of tariff binding commitments in accordance with their individual development objectives.[88]

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[83] Ibid.

[84] *Communication from Ghana, Kenya, Nigeria, Tanzania, Uganda, Zambia and Zimbabwe 2003* para 7.

[85] *Hong Kong Ministerial Declaration* Annex B: Market Access for Non-Agricultural Products para 18.

[86] *February 2008 NAMA Modalities* para 14; *July 2008 NAMA Modalities* para 14; *December2008 NAMA Modalities* para 14.

[87] *December 2008 NAMA Modalities* para 14.

[88] *February 2008 NAMA Modalities* para 14; *July 2008 NAMA Modalities* para 14; *December2008 NAMA Modalities* para 14.

Though no figures have been proposed to hint what this 'substantial increase' might mean, and the matter has been left to the discretion of individual LDCs, this could entail a significant concession for many LDCs.[89] This is because, as Article XXVIII *bis* of the GATT 1994 stipulates, 'the binding against increase of low duties ... shall, in principle, be recognised as a concession equivalent in value to the reduction of high duties'.[90] Currently, LDCs are very divergent in binding tariffs on non-agricultural products, as Table 5.3 reveals. Some LDCs, such as Bangladesh, Gambia, Mozambique, Tanzania, Uganda, Togo and Zambia have very low level of binding coverage. Therefore, a 'substantial increase' of binding coverage implies a substantial concession from them in the Doha Round. This is because it takes away from them the policy space that they reserve by keeping tariff lines unbound. The binding of tariffs constraints their flexibility to respond to import surges, threatening the existence of domestic producers.[91] It also affects an LDC's ability to diversify into industrial and manufacturing sectors in which they currently do not enjoy any production capacity.[92]

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[89] John Hilary, *The Doha Deindustrialisation Agenda: Non-Agricultural Market Access Negotiations at the WTO* (April 2005) War on Want [18] <http://www.wto.org/english/forums_e/ngo_e/posp47_nama_e.pdf> at 29 March 2011.

[90] *GATT 1994* art XXVIII *bis*.

[91] Hilary, above n 89, 18.

[92] Ibid.

Table 3: Binding Coverage of Non-Agricultural Tariffs in LDC Members in 2010[93]

Country	Binding Coverage (%)	Country	Binding Coverage (%)
Angola	100	Malawi	21.2
Bangladesh	2.6	Maldives	96.6
Benin	29.7	Mali	31.0
Burkina Faso	29.5	Mauritania	29.9
Burundi	10.1	Mozambique	0.5
Central African Republic	56.3	Myanmar	5.0
Chad	0.3	Nepal	99.3
Democratic Republic of the Congo	100	Niger	96.2
Djibouti	100	Rwanda	100
Gambia	0.6	Senegal	100
Guinea	29.6	Sierra Leone	100
Guinea-Bissau	97.4	Solomon Islands	100
Haiti	87.7	Tanzania	0.2
Lesotho	100	Togo	0.8
Madagascar	19.0	Uganda	2.9
		Zambia	4.1

4.3 Technical and Financial Assistance and Capacity Building for LDCs

Annex F to the *Hong Kong Ministerial Declaration* urges all donors and relevant international institutions to increase financial and technical support aimed at the diversification of LDC economies, while providing additional financial and technical assistance through appropriate delivery mechanisms to meet their implementation obligations, including fulfilling SPS and TBT requirements, and to assist them in

[93] WTO, UNCTAD and ITC, *World Tariff Profiles 2010* (2010) 14, 16, 18.

managing their adjustment processes, including those necessary to face the results of MFN multilateral trade liberalisation.[94]

A more comprehensive provision was adopted in the *February 2008 NAMA Modalities*,[95] which was retained verbatim in all subsequent NAMA modalities:[96]

> Members are committed to enhancing trade capacity-building measures to assist Members in the early stages of development, and in particular Least Developed Country Members, to address their inherent supply-side capacity constraints and the challenges that may arise from increased competition as a result of MFN tariff reductions. These measures, including the Enhanced Integrated Framework for Least Developed Countries and other Aid-for-Trade Initiatives, shall be designed to enable such Members to take advantage of increased market access opportunities, including through diversification of export products and markets, and to meet technical standards/requirements and address other non-tariff measures.

Though drafted in an inclusive manner incorporating different aspects in which LDCs need trade-related technical assistance and capacity building, this provision is at most a 'best endeavour'. It has not indicated how WTO Members will implement their commitments to enhance trade capacity building for LDCs and whether they are bound to provide such assistance.

5 Non-Tariff Barriers Inhibiting Market Access in Non-Agricultural Products

With successive rounds of the GATT and the WTO negotiations and unilateral trade liberalisation, there has been a large drop in the average tariff on manufactured goods. During the past three decades, industrial tariffs have undergone incessant reduction while at the same time countries profoundly resorted to various NTBs to retain some of

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[94] *Hong Kong Ministerial Declaration* Annex F, para 36.

[95] *February 2008 NAMA Modalities* para 26.

[96] For instance, *July 2008 NAMA Modalities* para 27 and *December 2008 NAMA Modalities* para 27.

the advantages they used to enjoy from tariff protection.[97] Consequently, the NTBs ballooned to such a point that they have become greater barriers to market access than tariffs.

It was at the insistence of developing countries in Doha that NTBs were included in the NAMA text.[98] The reductions or eliminations of NTBs have been unequivocally recognised to be an integral and equally important part of the objectives of Paragraph 16 of the *Doha Declaration.*[99] In the mandate of negotiations on NTBs within NAMA, special emphasis has been given on the interests of developing countries and LDCs. Negotiations on NTBs

> shall aim to reduce or eliminate, as appropriate, NTBs, in particular on products of export interest to developing members and to enhance market access opportunities achieved through these modalities.[100]

All negotiations on NTBs within NAMA are also mandated to 'take fully into account the principle of special and differential treatment for developing and least developed Members.[101] In reality, in the NTB negotiations within the NAMA the voice of LDCs are very feeble, the predominant role being played by developed and advanced developing countries in shaping the modalities for negotiation.

5.1 NTBs Causing Market Access Impediments for LDCs

LDCs' market access is hurt most by NTBs but it is difficult to quantify exactly how LDCs are affected. This is because to date only two LDCs—Bangladesh and Senegal—

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[97] Chandan Mukherjee, Pranav Kumar and Simi T B, 'Negotiations on Non-Tariff Barriers under NAMA: The Major South Asian Concerns' in CUTS International (ed), *South Asian Positions in the WTO Doha Round: In Search of A True Development Agenda* (2007) vol 2, 123, 123.

[98] Ibid 136.

[99] *July 2008 NAMA Modalities* para 23 and *December 2008 NAMA Modalities* para 23.

[100] Ibid.

[101] *February 2008 NAMA Modalities* para 26; *July 2008 NAMA Modalities* para 26 and *December 2008 NAMA Modalities* para 26. This language has transformed from a 'should' imperative in the *July 2004 Framework Agreement (NAMA)* to stronger 'shall' in the *February 2008 NAMA Modalities.*

notified the NGMA about the NTBs that are affecting their market access.[102] This reflects the lack of capacity of these poorest countries to identify the NTBs that are inhibiting their effective market access.

In its notification, Senegal identified its fisheries products as being affected by stringent sanitary regulations and quality standards in developed countries, particularly EU markets.[103] Bangladesh identified both its agricultural and non-agricultural products as affected by barriers. Cosmetics,[104] home care and fabric care products[105] and all toiletry products[106] were noted to face barriers due to several labelling and attestation requirements leading to a price increase and discouragement for the buyers due to unnecessary hassles, time lagging and export costs. Pharmaceutical products were identified to confront a number of obstacles including requirement of registration, proper documentations, consular information, lengthy procedures for establishing Letter of Credit and even import bans on locally manufactured products. Processed foods[107] had to fulfil the requirement of lab testing upon arrival of the consignments and in some markets they met with total ban on imports.[108] NTBs in the form of environmental and health-related requirements create burden on small and medium size enterprises. Studies of the UNCTAD and the OECD on the leather industry in several Asian countries suggest that these requirements can in fact reduce the number of small family-owned

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[102] The Chairman of the Negotiating Group sent two letters dated 10 October and 27 November 2002 requesting Members to notify of NTBs that their exporters were facing in various markets. *2004 July Framework Agreement (NAMA)* encouraged Members to make notifications on NTBs by 31 October 2004 and to proceed with identification, examination, categorisation and ultimately, negotiations on NTBs: WTO NGMA, *Non-Tariff Barriers Notification*, WTO Doc TN/MA/W/25 (28 March 2003) (hereinafter *Non-Tariff Barriers Notification 2003)*. A remarkable number of notifications have been submitted on NTBs by both developed and developing Members. The Negotiating Committee, from time to time, compiled the notifications. Among the compilations made between December 2002 and May 2006, only two LDCs (Bangladesh and Senegal) submitted notifications on the NTBs. The Negotiating Group compiled these notifications in *Non-Tariff Barriers Notification 2003*. Notification of Bangladesh is at 24 and Senegal at 199.

[103] Ibid 199.

[104] Soap (HS 3401 and 3402), shampoo (HS 3305.10), dental care (HS 3306), shaving line (HS 3307), skin care (HS 3304), hair care (HS 3301 and HS 3305): Ibid 24.

[105] Ibid 24, HS Chapter 33 and 34.

[106] Ibid 24.

[107] Juices and drinks: 2009.80.00, jam/jelly: 2007.90.09, pickles: 2001.90.03, spices: 0910.30.20 and snacks: 2008.99.90: Ibid 24.

[108] Ibid 24.

enterprises.[109] The case study on fisheries sector shows how expensive the NTBs are for an LDC.

5.1.1 Fisheries Sector in Bangladesh: Cost of Compliance with SPS Standards

The marine fisheries sector in Bangladesh has been the worst affected sector by the SPS requirements in major export destinations like the EU and to a lesser extent the US. In the late 1970s, the automatic detention placed by the US Food and Drug Administration (USFDA) affected the shrimp industry of Bangladesh.[110] The second setback came in July 1997 when the EU banned imports of fishery products from Bangladesh on the grounds of serious deficiencies in the infrastructure and hygiene in processing establishments and insufficient guarantees of quality control by Bangladeshi government inspectors.[111] During that time, frozen shrimp and fish was the fourth leading export item in Bangladesh, with a 7.3 per cent share of the total export market. The major importers at the time were the EU, accounting for 34–50 per cent of Bangladesh's exports, the US at 23–38 per cent, and Japan at 15–26 per cent.[112] The ban resulted in an estimated costs of US$15 million in lost revenues in the shrimp-processing sector,[113] and also in loss of employment. However, the positive aspect was that with the concerted effort of Bangladesh government, shrimp-processing industry and the Food and Agriculture Organization (FAO), Bangladesh succeeded in resuming its exports of fishery products to the EU within a short span of five months by meeting

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[109] OECD, *The Development Dimension of Trade and Environment: Case Studies on Environmental Requirements and Market Access*, OECD Doc COM/ENV/TD(2002)86/FINAL (19 November 2002) 31–8 <http://www.oecd.org/dataoecd/23/15/25497999.pdf> at 29 July 2011; Country Case Studies Presented at the UNCTAD Subregional Workshop on Environmental Requirements: *Market Access and Export Competitiveness for Leather and Footwear Goods*, Bangkok, Thailand 30 July to 1August 2003. Case studies can be retrieved from the UNCTAD website <http://www.unctad.org/trade_env/test1/meetings/bangkok4.htm> at 29 July 2011.

[110] James C Cato and S Subasinge, 'Food Safety in Food Security and Food Trade, Case Study: The Shrimp Export Industry in Bangladesh' (Focus 10, Brief 9 of 17, International Food Policy Research Institute (IFPRI), 2003) 1.

[111] Ibid.

[112] Ibid.

[113] James C Cato and Carlos A Lima dos Santos, 'European Union 1997 Seafood-Safety Ban: The Economic Impact on Bangladesh Shrimp Processing' (1998) 13(3) *Marine Resource Economics* 215, 226.

the stringent Hazard Analysis Critical Control Point (HACCP) requirements of the EU.[114]

5.2 Current State of Negotiations on NTBs

Despite the concerns raised by some environmental NGOs as to the adverse social and environmental effect of negotiating NTBs within NAMA,[115] NTBs have been the focus of the Negotiating Group's activities since the beginning of 2009.[116] Swiss Ambassador Luzius Wasescha, the Chair of the NAMA Negotiations, in his April 2011 report observed:

> There is a significant potential NTB-package within reach which would inter alia constitute a series of improvements to the functioning of the TBT agreement, create stimuli for legislators to privilege the reference to international standards and to diminish the tendency to deviate from international standards.[117]

First, the report includes a draft Ministerial Decision on 'horizontal mechanism' for swift mediation of NTMs.[118] In the absence of any language on S&DT and technical assistance, it is not clear to what extent the swift mediation will take LDCs' interest into account. Second, it includes a draft 'understanding' setting out guidelines for Members to ensure that labelling requirements in relation to textiles, clothing, footwear, and travel goods do not serve as an undue trade barrier.[119] Third, the report incorporates provisions

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[114] Cato and Subasinge, above n 110.

[115] Friends of the Earth International, *Summary of Analysis of Notifications of Non-Tariff Measures (NTMs) in NAMA Negotiations of the World Trade Organization* (2005) <http://www.foe.co.uk/resource/media_briefing/ntbsanalysis.pdf> at 27 July 2011. Daniel Mittler, Jurgen Knirsch, 'Improved Market Access at the Expense of the Environment? The Environmental Risks of the NAMA Negotiations at the WTO' (2007) 16(1) *Environmental Politics* 113.

[116] WTO NGMA, *Textual Report by the Chairman, Ambassador Luzius Wasescha, on the State of Play of the NAMA Negotiations*, WTO Doc TN/MA/W/103/Rev.3/Add.1 (21 April 2011) (hereinafter *Report by the Chairman, Ambassador Luzius Wasescha 2011).*

[117] Ibid 3.

[118] *Report by the Chairman, Ambassador Luzius Wasescha 2011*, Annex A: Ministerial Decision on Procedures for the Facilitation of Solutions to Non-Tariff Barriers in WTO, 5–9.

[119] *Report by the Chairman, Ambassador Luzius Wasescha 2011*, Annex B: Understanding on the Interpretation of the Agreement on Technical Barriers to Trade with respect to the Labelling of Textiles, Clothing, Footwear, and Travel Goods, 10–15.

on 'transparency' that require Members to publish new technical regulation or conformity assessment procedure that may affect trade of other Members.[120] If adopted, these provisions would amend the TBT Agreement in a number of ways. For instance, unlike the provisions of the TBT Agreement,[121] it requires Members to publish technical regulation even if it is based on international standard. The transparency provision requires WTO Members to consider the compliance cost of proposed technical regulation, 'taking into account the special development, financial and trade needs of developing country Members'.[122] However, it is still too early to appreciate the implications of these provisions for the sustainable development of LDCs.

6 Preference Erosion for LDCs

6.1 Severity of Preference Erosion

NAMA negotiations, with the ambitious objectives of MFN tariff reduction and altogether tariff elimination under sectoral negotiations, raised alarming concern for the present preference-receiving countries in the form of preference erosion, which is likely to bring adverse implications for their economic growth, foreign exchange reserves, livelihood and poverty alleviation.[123] In other words, preference erosion poses a threat for LDCs' sustainable development by shrinking their existing market access. LDCs are anxious about preference erosion not only in developed countries' markets, but also in the markets of developing countries where they enjoy preferential treatment since developing countries will also have to undergo a substantial tariff cut as an outcome of the NAMA negotiations.[124]

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[120] *Report by the Chairman, Ambassador Luzius Wasescha 2011,* Annex C: Transparency, 16–21.

[121] *TBT Agreement* art 2.9.

[122] *Report by the Chairman, Ambassador Luzius Wasescha 2011,* Annex C: Transparency, Article 10: Good Regulatory Practice.

[123] Mustafizur Rahman and Wasel Bin Shadat, 'NAMA Negotiations in the WTO and Preference Erosion: Concerns of Bangladesh and Other Regional LDCs' (Paper 51, Centre for Policy Dialogue, 2005) 3.

[124] Ibid 3. For instance, the South Asian LDCs (Bangladesh, Nepal and Bhutan), which enjoy preferential treatment from the three developing countries in the region (India, Pakistan and Sri Lanka) as part of the South-Asia Preferential Trading Arrangement (SAPTA) will suffer from preference erosion if these developing countries have to reduce their MFN tariffs: Ibid 3.

In a simplified way, preference erosion is defined as the decrease in the margin between a preferential tariff rate and the MFN rate originating from multilateral tariff liberalisation.[125] This definition is based on the simple equation of the value of preferences for preference-receiving countries. At the tariff line, this is simply the difference in percentage points between the MFN tariff rate and the preferential tariff rate. These traditional measures of the value of preference do not take into account the actual utilisation of preferences, reciprocal tariff preferences under various RTAs, other countries competing in the same markets. Preference erosion is also calculated as the difference in the value of the preference before and after MFN liberalisation.[126] These estimates of the value of preferences are highly sensitive to the specific measure used for the calculations.

Low, Piermartini and Richtering estimated the degree of preference erosion affecting all developing countries as a result of an MFN tariff cut on non-agricultural products in the Quad (Canada, the EU, Japan, and the US) and Australia. They found that developing countries would enjoy a net gain of US$2 billion after the MFN tariff cut. The gains are concentrated in only a third of the countries while the losses are more widespread.[127] LDCs would suffer a net loss of US$170 million under the same liberalisation scenario, with the exception of only two LDCs (Maldives[128] and Nepal), which gain significantly.[129] The major losers from preference erosion are Bangladesh, Cambodia, Haiti, Lesotho and Madagascar. A significant number of LDCs would not incur any losses from preference erosion, partly because these countries do not rely on preferences and partly because the bulk of their exports into the Quad countries is MFN duty-free. Countries belonging to this group include Benin, Burkina Faso, Burundi, Central African Republic, Chad, the Democratic Republic of Congo, Djibouti, Guinea, Mali,

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[125] Ibid.

[126] Patrick Low, Roberta Piermartini and Jurgen Richtering, *Multilateral Solutions to the Erosion of Non-Reciprocal Preferences in NAMA* (2008) 11, <http://ctrc.sice.oas.org/TRC/Articles/TradePreferenceErosion/Chapter07.pdf> at 28 February 2010.

[127] Ibid 18.

[128] Maldives have graduated from LDCs in January 2011.

[129] Low, Piermartini and Richtering, *Multilateral Solutions to the Erosion of Non-Reciprocal Preferences in NAMA*, above n 126, 18, 26.

Niger, Rwanda, Sierra Leone, Solomon Islands, Togo and Zambia.[130] They also found that preference erosion will occur mostly in clothing, followed by other sectors such as textiles, fish and fish products (especially Namibia, but also Madagascar and Mauritius), leather and leather products (especially Cambodia but also Bangladesh), electrical machinery, wood and wood products.[131] This observation is similar to that of Hoekman and Prowse,[132] who hold that LDCs with a high concentration of exports in heavily protected commodities are likely to suffer most from preference erosion.[133]

In another study Low, Piermartini and Richtering found that risk of preference erosion in agriculture in far more concentrated in terms of particular products and countries. Their study concluded that the most affected products include bananas (Belize, Cameroon, Dominica, St. Lucia, St. Vincent and the Grenadines, and Switzerland; sugar (Barbados, Belize, Fiji, Guyana, Jamaica, Mauritius, St. Kitts and Nevis, Swaziland; and beverages and spirits (Barbados, Belize, Jamaica).[134]

Arvind Subramanian found that on account of preference erosion resulting from MFN tariff reductions, Bangladesh would incur an approximate export loss of US$222.4 million, Cambodia US$53.6 million, and Nepal US$17.8 million.[135] The estimate also indicated that for other Asia-Pacific LDCs the impact is not likely to be of significant magnitude due to low utilisation of preferences for limited supply-side capacities and stringent rules of origin.[136]

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[130] Ibid 19, 26.

[131] Ibid.

[132] Bernard Hoekman and Susan Prowse, 'Economic Policy Responses to Preference Erosion: From Trade as Aid to Aid for Trade' in Bernard Hoekman, Will Martin and Carlos A Primo Braga (eds), *Trade Preference Erosion: Measurement and Policy Responses* (2009) 425.

[133] Ibid 430.

[134] Patrick Low, Roberta Piermartini and Jurgen Richtering, 'Nonreciprocal Preference Erosion Arising from Most-Favoured-Nation Liberalization in Agriculture: What are the Risks?' in Bernard Hoekman, Will Martin and Carlos A. Primo Braga (eds), *Trade Preference Erosion Measurement and Policy Response* (2009) 277, 300.

[135] This finding on Nepal is contradictory to the findinds of Low, Piermartini and Richtering who found that Nepal is likely to gain significantly: Low, Piermartini and Richtering, *Multilateral Solutions to the Erosion of Non-Reciprocal Preferences in NAMA*, above n 126, 18, 26.

[136] Arvind Subramanian, 'Financing of Losses from Preference Erosion' (Paper prepared for the World Trade Organization, 2003) WTO Doc WT/TF/COH/14 (Geneva).

A study by Iancovicina, Mattoo and Olarreaga estimated that if 37 sub-Saharan countries were to receive unrestricted preferential access to the markets of the Quad countries (EU, US, Japan, Canada), their welfare would increase by about $1.7 billion; and a 25 per cent MFN tariff liberalisation by the Quad countries will erode the preference margin received by these countries and reduce their welfare by about US$0.5 billion or about 30 per cent.[137]

It is clear from these various studies that the precise absolute potential magnitude of erosion remains open to debate. But the studies undoubtedly highlight one key point: 'it is small relative to the total potential gains from deep, global MFN liberalisation, but likely to be significant for a limited number of preference dependent countries'.[138]

6.2 Ways to Resolve the Preference-Erosion Problem

Paragraph 16 of the *2004 July Framework Agreement (NAMA)* recognised that as a result of the NAMA negotiations, the non-reciprocal preference-beneficiary Members may embrace challenges. The same concern was also expressed in the *2005 Hong Kong Ministerial Declaration*, which instructs the Negotiating Group 'to intensify work on the assessment of the scope of the problem with a view to finding a possible solutions'.[139] In the meantime, various proposals have been made to the NAMA Negotiating Group, mostly by the ACP countries and LDCs.[140] This sub-section examines whether and how Doha negotiations have taken these proposals into account and the potential impact of the various solutions building upon existing literature.

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[137] Elena Iancovicina, Additya Mattoo and Marcelo Olarreaga, 'Unrestricted Market Access for Sub-Saharan Africa; How Much Is It Worth and Who Pays?' (2002) 10(4) *Journal of African Economies* 410.

[138] Bernard Hoekman, William J Martin and Carlos A Primo Braga, 'Preference Erosion: The Terms of the Debate' (World Bank, 2006) [17] <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Preferences_Intro_Terms_of_the_Debate.pdf> at 1 March 2010.

[139] *Hong Kong Ministerial Declaration* para 20.

[140] WTO Docs TN/MA/W/21, TN/MA/W/22, TN/MA/W/27, TN/MA/W/30, TN/MA/W/31, TN/MA/W/34, TN/MA/W/38, TN/MA/W/39, TN/MA/W/47 and TN/MA/W/53: *Market Access: Work in the WTO: Non-agricultural Market Access Negotiations* <http://www.wto.org/english/tratop_e/markacc_e/markacc_negoti_e.htm>.

The solutions proposed for addressing preference erosion can broadly be divided into two groups: trade-based solutions and non-trade solutions.

6.2.1 Trade-Based Solutions

6.2.1.1 Extension of Existing Preference Schemes Including Compensatory Preferences in other Markets

An obvious trade solution to non-reciprocal preference erosion arising from MFN liberalisation would be to extend preferential arrangements to other product areas as well as in other potential markets. This approach is based on the submission by Bangladesh on behalf of LDCs.[141] This submission, emphasising the importance of LDCs' duty-free market access in the EU and the US markets, called for improvements in existing preference schemes to ensure DFQF access for all LDC exports. It also proposed that other developing countries develop non-preferential preference schemes with a wide product coverage.[142]

Of the 15 countries most affected by preference erosion (Bangladesh, Cambodia, the Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Kenya, Lesotho, Madagascar, Mauritius, Namibia, Nicaragua, Saint Lucia and Swaziland) , only two (Bangladesh and Cambodia) have scope for additional preferences in excess of the value of preference erosion incurred as a result of MFN liberalisation. The other 13 countries lack sufficient scope for additional preferences to cover the value of estimated losses from preference erosion.[143]

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[141] *Negotiating Proposal Submitted by Bangladesh 2003.*

[142] Ibid para 13.

[143] Low, Piermartini and Richtering, *Multilateral Solutions to the Erosion of Non-Reciprocal Preferences in NAMA*, above n 126, 24.

6.2.1.2 Improvement of the Scope for Utilising Existing Preferences

A number of studies have calculated preference utilisation rates to assess the actual coverage of eligible products, the *de facto* exclusion of some potential beneficiary countries, and the access conditions in the markets of preference-giving countries. Some studies suggest that non-reciprocal preference utilisation rates are frequently low.[144] However, the Chairperson's proposal based on submissions of some preference-receiving countries for deepening and accelerating market access on other products of interest to preference beneficiaries has met little support from Members.[145] It could not make its way through the draft NAMA Modalities. Countries ask for improving rules of origin and eliminating other NTBs, which impedes full utilisation of preferences.[146]

6.2.1.3 Mitigating the product coverage or pace of MFN liberalisation

The submission made by Bangladesh proposed a request-offer approach whereby LDCs may request preference-giving countries to postpone the MFN tariff reduction for a temporary period (for example, five years) or to spread the staging of reductions over a period of 10 years instead of the normal five years. The preference-giving countries should sympathetically agree to consider such a request.[147] As the submission continued, since the proposal is made to halt the reduction only for a limited period or to spread the reduction period over a longer span of time, it is not inconsistent with the provisions of the *Enabling Clause*, which provide that the extension of the preferential

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[144] Focusing on the EU's Everything but Arms (EBA) initiative, Brenton found very low utilisation rates for LDC exports to the European Union in 2001: Paul Brenton, 'Integrating the Least Developed Countries into the World Trading System: the Current Impact of EU Preferences Under Everything but Arms' (World Bank Policy Research Working Paper 3018, 2003). Inama estimated that less than 40 per cent of Quad imports from all beneficiary countries eligible for GSP preferences entered under the preferential scheme: Stefano Inama, 'Trade Preferences and the World Trade Organization Negotiations on Market Access: Battling for Compensation on Erosion of GSP, ACP and other Trade Preferences or Assessing and Improving their Utilization and Value by Addressing Rules or Origin and Graduation? (2003) 37(5) *Journal of World Trade* 959, 962. However, the 2011 Secretariat Note to the Sub-Committee on LDC noted that the average utilisation of the preferential schemes is 87 per cent: *2011 Note by the Secretariat on Market Access for Products and Services of Export Interest to Least-Developed Countries* 38.

[145] *2007 Chairman's Introduction to the Draft NAMA Modalities* 52.

[146] WTO NGMA, *Market Access for Non-Agricultural Products: Treatment of Non-reciprocal Preferences for Africa*, WTO Doc TN/MA/W/49 (21 February 2005).

[147] *Negotiating Proposal Submitted by Bangladesh 2003* para 17.

treatment under the GSP 'shall not prevent' reductions being made on an MFN basis.[148] Papua New Guinea proposed the implementation of MFN reduction for a lengthy period or the first instalment to be deferred to the third year of implementation period to address preference erosion.[149]

A submission made on behalf of the African Group[150] proposed the application of a correction co-efficient to be agreed by Members to improve the preference margins for the products of export interest of African countries.[151] It also asked for a longer staging periods to adjust themselves and rectify their structural imbalances.[152] The submission of Benin on behalf of the ACP Group[153] proposed an approach to 'smooth' the process of liberalisation for some products from certain countries so as not to jeopardise the liberalisation of world trade. It referred to the submissions by Mauritius[154] and other countries, which indicated that preferences are linked to a narrow range of products on very few export markets. With a view to identify the products concerned with the erosion of preferences, Benin proposed an Index of Vulnerability:

> For a country to be vulnerable to preference erosion, it must have some characteristics. Firstly, it must already enjoy significant preferences (for the 'erosion of preferences' to take place). Secondly, a country is considered as vulnerable when it depends on few export products and export markets, and it is a small exporter, relative to the world.
>
> In concrete terms, this can be calculated using three relationships:
>
> The share of the particular product of the importing country on the total exports of the exporting country (1);

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[148] Ibid para 18.

[149] WTO NGMA, *Market Access for Non-Agricultural Products*, WTO Doc TN/MA/W/39 (2 July 2003) (Communication from Papua New Guinea) para 26.

[150] WTO NGMA, *Market Access for Non-Agricultural Products: Treatment of Non-reciprocal Preferences for Africa*, WTO Doc TN/MA/W/49 (21 February 2005).

[151] Ibid para 21.

[152] Ibid.

[153] WTO NGMA, *Market Access for Non-Agricultural Products*, WTO Doc TN/MA/W/53 (11 March 2005) (Communication from Benin on behalf of the ACP Group of States).

[154] WTO NGMA, *Market Access for Non-Agricultural Products*, WTO Doc TN/MA/W/21/Add.1 (15 July 2003) (Communication from Mauritius, Addendum) para 5.

> The share of the particular product of the exporting country in the importing country (2);
>
> The world market share of the exporting country, for the particular product (3).
>
> ...
>
> In other words, the product and market concentration is fundamental: the country will be more vulnerable the less diversified its export markets and export products are, and the smaller its world share is.[155]

This proposal of the ACP group and the follow-up indicative list of products (170 HS 6-digit tariff lines) vulnerable to preference erosion in the EC and US markets brought other developing countries in direct conflict with them. As notified by the Chairperson of the NGMA, some developing countries expressed concern that the tariff lines listed covered the majority of their exports on which they sought MFN cuts.[156]

However, pursuant to the instructions at Hong Kong, the Negotiating Group initiated an assessment of the scope of the preference-erosion problem with the support of a Secretariat analysis of the key products, key countries and key markets concerned.[157] The Chairperson of the NGMA acknowledged in his notification that exports of these poorest countries are highly concentrated in a few tariff lines, which make it possible to capture the bulk of the problem with a short list of lines.[158] He noted wide acceptance among Members over this approach to defining the scope of the problem. The most sensitive exports of beneficiaries were grasped in the list in Annex 2 and 3 of the NGMA Chairperson's Proposal, which were prepared focusing on a very limited number of tariff lines and the two principle preference-granting markets (the EC and US). However, preference beneficiaries argued for the inclusion of additional tariff lines in the list.[159]

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[155] *Communication from Benin on behalf of the ACP Group of States* para 3 (italics in the original).

[156] *Hong Kong Ministerial Declaration*, Annex B: Market Access for Non-Agricultural Products, para 29.

[157] *2007 Chairman's Introduction to the Draft NAMA Modalities*.

[158] Ibid para 49.

[159] Ibid.

Finally, *December 2008 Revised NAMA Draft Modalities* incorporated concrete proposals for dealing with the preference-erosion problem. It acknowledged with definite terms that MFN liberalisation resulting from the Doha Round will erode non-reciprocal preferences in relation to a limited number of tariff lines that are of vital export importance for developing Members who are beneficiaries of such preferences. As a result, and in order to provide these Members with additional time for adjustment, the reduction of MFN tariffs on those tariff lines shall be implemented in nine equal rate reductions by the preference-granting developed Members concerned. The first reduction shall be implemented two years after the first reduction is required and each successive reduction shall be made effective on 1 January of each of the following years.[160] The relevant tariff lines shall be those contained in Annex 2 for the European Communities and in Annex 3 for the US.[161]

6.2.2 Non-Trade Solutions

Hoekman and Prowse were critical of trade-based solutions for their inconsistency with the MFN principles.[162] These trade-based solutions, which they regard as 'distorting trade policy instrument', accentuate discrimination.[163] Conversely, it is doubtful whether they appropriately target those countries that are most affected by erosion of preferences.[164] They argued in favour of Aid for Trade to assist countries to deal with both the adjustment costs associated with global trade reforms and to improve their capacity to exploit trade opportunities, diversify their economies and to address their supply-side constraints.[165] They suggest binding commitments as part of a Doha Round agreement for financial assistance to the affected countries in a multilateral basis and through the existing aid channel.[166]

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[160] *December 2008 NAMA Modalities* para 28.

[161] Ibid.

[162] Hoekman and Prowse, above n 132, 434.

[163] Ibid 444.

[164] Ibid 434.

[165] Ibid 439–46.

[166] Ibid 446.

Accordingly, the *December 2008 NAMA Modalities* urges preference-granting Members, and other Members in a position to do so, to increase their assistance to the affected Members through mechanisms including the Enhanced IF for LDCs and other Aid for Trade initiatives.[167] Progress in the implementation of such assistance and its effectiveness in assisting the Members affected by preference erosion shall be reviewed periodically in the CTD.[168] It can be argued that all the policies should be put in place to address preference-erosion problems and Aid for Trade and other technical and financial assistance should be complementary to preferential market access instead of replacing them. A concerted effort will assist LDCs to confront the challenges of preference erosion that inhibit their sustainable development.

7 LDCs' Market Access in Textiles and Clothing

7.1 Importance of the T&C Sector

According to the *International Trade Statistics 2010 and 2009*, combined T&C exports was US$527 billion in 2009[169] and US$612 billion in 2008.[170] Separately, in 2009, textiles accounted for 1.7 per cent of the total merchandised exports and clothing accounted for 2.6 per cent.[171] Despite T&C's small share in world merchandised exports, the sector carries immense significance in the economies of LDCs in contributing to their GDP as well as providing livelihoods to millions of people.[172] The importance of this very dynamic sector for the sustainable development of LDCs lies in creating direct and indirect employment and generating foreign exchange earnings, which in turn helps finance a growing share of imports of vitally important capital

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[167] *December 2008 NAMA Modalities* para 29.

[168] Ibid.

[169] Of this textile export was of US$211 billion and clothing export US$362 billion: *International Trade Statistics 2010*, 43 (Table II.1: World Merchandise Exports by Major Product Group, 2009).

[170] Of this textile export was of US$250 billion and clothing export US$362 billion: *International Trade Statistics 2009*, 41 (Table II.1: World Merchandise Exports by Major Product Group, 2008).

[171] *International Trade Statistics 2010*, 43 (Table II.1: World Merchandise Exports by Major Product Group, 2009).

[172] Ghori, above n 10.

goods and essential inputs. It creates significant additional positive externalities, including by being an important training ground for a growing number of new entrepreneurs.[173]

Between 2000 and 2008, LDCs benefiting from preferential market access increased their share in the EU clothing market from 8.3 per cent to 9.1 per cent. Ninety-nine per cent of EU imports from the LDCs originated from five countries: Bangladesh (81.5 per cent), Cambodia (9.5 per cent), Madagascar (3.7 per cent), Myanmar (2.5 per cent) and Laos (1.9 per cent).[174] A similar pattern is observed in the US market. Here, 99 per cent of imports are from LDCs concentrated in five countries: Bangladesh, Cambodia, Haiti, Lesotho and Madagascar.[175] In the US, market imports from Vietnam (not an LDC) and Bangladesh increased by 19.8 per cent and 11 per cent respectively.[176] Overall, imports from LDCs increased by three per cent, with LDCs increasing their share in the clothing market of the US from 6.4 per cent in 2000 to 8.8 per cent in 2008.[177]

Despite being an LDC, Bangladesh is among the top six leading clothing exporters with its US$11 billion of exports, which represents a 3.4 per cent share of world exports in 2009.[178] Clothing accounted for a 71.1 per cent share in the total merchandise exports for Bangladesh in 2009, which was 70.8 for Cambodia, 86.0 per cent for Haiti, 64.5 per cent for Lesotho, 37.8 per cent for Madagascar and 7.5 per cent for Mayanmar (this is a drastic fall from 48.6 per cent in 2000).[179] Textile's share in total merchandised exports

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[173] World Bank, 'End of MFA Quotas: Key Issues and Strategis Options for Bangladesh Readymade Garment Industry' (World Bank Office, Dhaka, December 2005) 1 <http://siteresources.worldbank.org/BANGLADESHEXTN/Resources/MFA_Final_Report-print_version.pdf> at 29 June 2011.

[174] *International Trade Statistics 2009*, 39.

[175] Ibid.

[176] Ibid.

[177] Ibid.

[178] *International Trade Statistics 2010*, 114 (Table II.69: Leading Exporters and Importers of Clothing, 2009).

[179] Ibid 115 (Table II.70: Clothing Exports of Selected Economies, 1990–2009).

from Bangladesh was 7.1 per cent in 2009 and from Nepal 29.9 per cent in 2009, from Tanzania 3.9 per cent.[180]

7.2 Challenges in the Post-Quota World

Even after the expiry of the prolonged institutional protectionism, trade in T&C still faces a number of challenges. In some cases, expiry of quota has introduced new challenges for the countries whose export industries were built on quotas. Some of these challenges are general to other industrial products covered within the NAMA negotiations and some problems are exclusive to T&C.

7.2.1 Demand Side Problems

7.2.1.1 Trade Remedy Measures

Developed countries are the most frequent users of anti-dumping measures and the T&C sector has been the subject of anti-dumping investigations on several occasions. In a survey of anti-dumping actions initiated between 1994 and 2001, the EU initiated 64 anti-dumping actions in the T&C sector, 57 of which were targeted against textiles and apparel exports of the developing countries.[181] More competitive T&C from developing countries such as China, India, Pakistan and Turkey have been traditionally a major target of anti-dumping investigations,[182] and they still continue to be the target, given their large share in the import market of developed countries. Since LDCs' share in the import market is still not threatening, they have not yet been subject to such measures.

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[180] Ibid 109 (Table II.65: Textile Exports of Selected Economies, 1990–2009).

[181] WTO General Council, *Anti-dumping Actions in the Areas of Textiles and Clothing, Proposal for a Specific Short-term Dispensation in Favour of Developing Countries Following Full Integration of the Sector into GATT 1994 From January 2005*, WTO Doc WT/GC/W/502 (14 July 2003) (Communication from Costa Rica, Guatemala, Hong Kong China, India, Indonesia, Macao, China, Maldives, Pakistan, People's Republic of China, Thailand and Vietnam); see ITCB, 'Anti-Dumping Actions in the Area of Textiles and Clothing: Developing Members' Experiences and Concerns', ICTB Submission to the WTO Negotiating Group on Rules (February 2003); See WTO Negotiating Group on Rules, *Anti-Dumping Actions in the Area of Textiles and Clothing: Developing Members' Experiences and Concerns*, WTO Doc TN/RL/W/48/Rev.1 (February 2003) (Submission by the International Textile and Clothing Bureau (ITCB)).

[182] Ratnakar Adhikari and Chatrini Weeratunge, 'Textiles & Clothing Sector in South Asia: Coping with Post-quota Challenges' in B S Chimni et al (eds), *Multilateralism at Cross-roads: Reaffirming Development Priorities, South Asian Yearbook of Trade and Development 2006* (2007) 109.

However, caution has been raised by LDCs such as Bangladesh as its share is gradually increasing.[183] The apprehension is more real since in 2008 Bangladesh holds the second position (with a 6.4 per cent share) in clothing imports in Canada and the fourth position both in the US (with a 4.4 per cent share) and the EU (with a 3.9 per cent share).[184]

7.2.1.2 Safeguard Measures

LDCs' T&C exports have not yet faced any safeguard measures in developed countries' markets. But safeguard measures imposed by both the US and the EU in 2005 on several items of Chinese T&C under the mandate of 'textile specific safeguard clause',[185] included in China's terms of accession to the WTO, worked as a blessings for these small T&C exporting countries. While imposing this safeguard, the EU specifically mentioned concern for textile exporting LDCs such as Bangladesh and developing countries such as Morocco, Tunisia and Turkey, which might suffer severe loss in the EU market due to the surge in Chinese exports.[186] However, since the beginning of 2009, there are no longer any safeguard provisions in the EU and the US on T&C imports originating in China. As a result of this liberalisation, China has become the largest provider of T&C in the EU and the US, and continues to capture the market share in Europe from other traditional providers in Asia.[187]

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[183] Ratnakar Adhikari, 'Textiles and Clothing in South Asia: Current States and Future Potential' (2007) 8(2) *South Asian Economic Journal* 171, 183.

[184] *International Trade Statistics 2009* 110–11 (Table 2.68: Clothing Imports of Selected Economies by Origin).

[185] This clause allows WTO Members to impose quantitative restrictions on imports of Chinese textiles and clothing if they are found to disrupt markets. It permits countries to restrain the annual growth of T&C imports from China to 7.5 per cent above the preceding year's import levels.

[186] ICTSD, 'EU Launches Textile Safeguard Investigation' (2005) 9(14) *Bridges Weekly Trade News Digest* 2, 2.

[187] See the official website for European Commission <http://ec.europa.eu/trade/creating-opportunities/economic-sectors/industrial-goods/textiles-and-footwear/> at 19 March 2010; also see the website of International Trade Administration, Office of Textiles and Apparel <http://web.ita.doc.gov/tacgi/eamain.nsf/d511529a12d016de852573930057380b/5895f5d4f2548742852573940056c015?OpenDocument> at 19 March 2010.

7.2.1.3 Regulatory/Standards-Related Barriers

T&C exports from developing countries and LDCs often face regulatory and standards-related barriers in developed countries' markets. TBTs are the primary reported barrier for T&C sector.[188] The restrictions are mainly in the form of shipments being subjected to rigorous labelling and marketing requirements, security parameters and document verification at the ports of importing countries and the issues relating to compliance with labour and environmental norms.[189] For instance, the Indian T&C sector was reported to face the following regulatory barriers: recalling of Indian-made skirts on the grounds of non-conformity to flammability standards; targeting of Indian rayon scarves on the grounds of non-conformity to flammability standards; and ban on imports of textile and leather goods treated with azo-dyes and pentachlorophenol.[190] On similar grounds, Nepalese woollen carpets were banned by Germany in the first half of 1990s.[191] Again, the RMG sector of Bangladesh suffered from the US import ban for engaging child labour in factories. This ban was removed after satisfying the US authority that garment factories no longer employed child labour.[192]

7.2.1.4 Rules of Origin

Market access in T&C is obstructed by stringent rules of origin, each importing countries employing distinctive rules of origin, which is again different for preferential and non-preferential trade, and further different in relation to various preferential regimes. Since LDCs' T&C exports to the EU are covered by the EBA system, they have to follow the rules of origin of EBA. While African and Caribbean countries' T&C

[188] Mukherjee, Kumar and TB, above n 97, 169.

[189] Ibid 163.

[190] R K Gupta, 'Non-tariff Barriers or Disguised Protectionism' (Briefing Paper No 2/1997, CUTS, 1997). In India, T&C products are subject to maximum types (14) of NTMs and nearly 16.5 per cent of the total NTM cases are reported in this sector. There have been increasing incidences in which different segments of India's T&C exports are facing various NTMs in the major markets. For more information, see Gordhan K Saini, *Non-Tariff Measures Affecting India's Textiles and Clothing Exports: Findings from the Survey of Exporters* (2009) Indira Gandhi Institute of Development Research <http://www.igidr.ac.in/pdf/publication/WP-2009-008.pdf> at 27 July 2011.

[191] Adhikari and Weeratunge, above n 182, 127.

[192] Michael E Nielsen, 'The Politics of Corporate Responsibility and Child Labour in the Bangladeshi Garment Industry' (2005) 81(3) *International Affairs* 559.

exports to the US are covered by AGOA and Caribbean Basin Initiative (CBI),[193] Asian LDCs export under non-preferential rules of origin, since the T&C sector of the US is not covered by GSP.

Previously, EU rules of origin required a 'double transformation' to take place in the preference-receiving countries to take advantage of duty-free treatment. To benefit from duty concession, the exported product should be wholly produced in the exporting country. If it is manufactured from inputs from other countries, it should have undergone sufficient working or processing in the exporting country. Thus, for woven apparel, the production of fabric as well as the making up of fabric into apparel should have taken place in the preference-receiving country. For knit apparel, the yarn used should also have been produced in the country claiming the benefit.[194] A study of the European Commission itself found that most LDCs lack their domestic fabric production to satisfy the 'double transformation' rule of EU.[195] Again, the cost of compliance with the rules of origin is so high that they often choose to export under the MFA tariff. In a study conducted on the EBA utilisation rate of Bangladesh, the most successful T&C exporters in the EU, Munir Ahmed found that for knit clothing (HS chapter 61), its utilisation rate was around 80 per cent from 2002 to 2005. This rate was dramatically low, only 28 per cent for woven fabrics (HS chapter 62), which constitutes 45 per cent of its total exports of clothing to the EU.[196] However, the new rules of origin in the EU, which came into effect on 1 January 2011, made the rules of origin flexible for LDCs. It replaced the double transformation rules with a single processing requirement for LDCs.[197]

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[193] Caribbean Basin Initiative (CBI) is a trade agreement between the US and the countries in Central America and in the Caribbean. It was initially launched in 1983, through the Caribbean Basin Economic Recovery Act (CBERA) and expanded in 2000 through the US-Caribbean Basin Trade Partnership Act (CBTPA): *Caribbean Basin Initiative*, Office of the USTR <http://www.ustr.gov/trade-topics/trade-development/preference-programs/caribbean-basin-initiative-cbi> at 21 August 2011.

[194] Munir Ahmad, 'Impact of Origin Rules for Textiles and Clothing on Developing Countries' (Issue Paper No 3, ICTSD, 2007) 31, 32 <http://ictsd.org/downloads/2009/02/impact-of-origin-rules-for-textiles-and-clothing-on-developing-countries1.pdf> at 27 July 2011.

[195] European Commission, *Impact Assessment on Rules of Origin for the Generalized System of Preferences (GSP)* TAXUD/GSP-RO/IA/1/07 (25 October 2007)16.

[196] Ahmad, above n 194, 32.

[197] Stefano Inama, 'The Reform of the EC GSP Rules of Origin: *Per aspera ad astra*?' (2011) 45(3) *Journal of World Trade* 577.

AGOA rules of origin for textiles have been regarded as 'too restrictive' and 'ungenerous', and are believed to have been designed to serve the domestic textile industry.[198] Eight different categories of apparel products of AGOA apply a range of process rules. For instance, the first category applies a 'sewing forward rule', which requires that all economic activity starting from the sewing has to be carried out in the preference-receiving country.[199] However, this liberal rules requires preference-receiving country to use fabric (cloth) that is wholly formed and cut in the US from yarns wholly formed in the US.[200] In contrast, the third preference category allows the preference-receiving country to assemble from fabric and yarn from other T&C beneficiary SSA country.[201] However, this category applies a TRQ, which subjects over-quota shipments to the MFN rate.[202]

The instance of Canada reveals the positive relation between relaxed rules of origin and high utilisation of preferences. In 2003, Canada not only extended duty-free treatment to T&C products from all LDCs, it substantially relaxed its rules of origin, requiring only 25 per cent of value addition on the apparel product in the LDC exporting country. As an immediate result, LDCs' T&C export to Canada boomed from 1.9 per cent from before the reform of origin rules to 4.3 per cent in 2003 and 5.9 per cent in 2004.[203]

7.2.2 Supply-Side Constraints

Besides the demand side challenges discussed above, most LDCs confront sever supply-side constraints in obtaining better market access for T&C products. The restraints that they face from the supply side are often in the form of low human capital marked by

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[198] Raj Bhala, 'Generosity and America's Trade Relations with Sub-Saharan Africa' (2006) 18 *Pace International Law Review* 133, 183–4.

[199] Ibid 186.

[200] The First Preference Category: United States Yarn-Forward with Beneficiary Assembly: *Trade Act of 1974*, 19 USC § 3721 (b)(1). Ibid 194.

[201] The Third Preference Category: Regional or Other Fabric: *Trade Act of 1974*, 19 USC § 3721(b)(3).

[202] Bhala, above n 198, 199.

[203] Ahmad, above n 194, 32.

low labour-wages, lack of safety standards and severe skills deficit due to lack of training opportunities for garments workers. An IMF report on Bangladesh economy mentions the inadequate standard of training of garments workers as a major impediment to the country's potential to diversify into higher value-added T&C products or to move up the value chain.[204] This is one of the reasons for LDCs being hooked up with the production of basic items with low value addition that are less profitable but entrenched with high competition.[205] Other supply-side constraints include substandard quality of infrastructure including roads, communication technologies, power supply, port services;[206] inefficient trade facilitation measures;[207] increased cost of inputs;[208] and finally access to flexible credits.[209] Overcoming these constraints of LDCs is extremely important to subsist in the competition from China, Vietnam and India in the post-quota era.

Many studies predicted dire consequences of LDCs in the quota-free world. Proving them utterly wrong, some LDCs, particularly Bangladesh, increased its T&C exports both in the US and the EU market. While some attribute this success to the temporary textile safeguards on Chinese imports by both the US and the EU, others give credit to their comparative advantage in this sector. However, it is still early to become too optimistic about the performance of these LDCs in the T&C sector, rather they should concentrate on facing the possible challenges discussed above by utilising the NAMA framework.

7.2.3 Preference Erosion

In most developed countries, tariff peaks have been retained for T&C. These tariff peaks will be severely reduced as an outcome of NAMA. Even it can be brought down

[204] IMF, 'Bangladesh: Selected Issues' (IMF Country Report No 7/230, IMF, 2007).

[205] Adhikari, above n 183, 185.

[206] Ibid 186.

[207] Ibid.

[208] Ibid 188.

[209] Ibid.

to a zero-tariff if T&C is brought within sectoral negotiation. This will have both a positive and negative impact on T&C-dependent LDCs. In some markets, they will suffer from preference erosion while in others, they will receive enhanced market access. This problem was identified in relation to Bangladesh, the leading T&C exporter LDC, which will encounter preference erosion in the EU market where its T&C products are enjoying DFQF market access under the EBA initiative. Bangladesh is predicted to have better market access where its T&C sector is not covered under any preferential arrangements. SSA countries that are currently exporting T&C in the US market under AGOA will face serious preference erosion.[210] The preference-erosion problem is augmented by China's entrance into international markets. China accounted for 33 per cent of world exports. With the expiry of the EU's growth caps on 10 categories of T&C imports from China, exports to the EU surged by 37 per cent.[211] This put LDCs in fierce competition with Chinese T&C.

8 Conclusion

This chapter addressed research question III of the thesis in examining the extent to which the NAMA negotiations establish a market access regime for LDCs that will enable them to face their sustainable development challenges. Paragraph 16 of the *Doha Declaration* mandates that the NAMA negotiations be conducted on the principle of 'non-reciprocity', 'less than full reciprocity' and S&DT for LDCs and also by taking into consideration their special needs and interests. Accordingly, in the NAMA negotiations, the special needs of LDCs have taken into account by providing them with DFQF market access, promises of technical and financial assistance and exempting them from tariff reduction commitments. Apparently, LDC provisions on NAMA are a very positive approach of the WTO towards LDCs in upholding the mandate of Paragraph 16 of the *Doha Declaration*. However, a complete assessment of the fairness discourse depends on how these provisions are implemented.

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[210] Rahman and Shadat, above n 123; Mustafizur Rahman, 'NAMA Negotiations in the WTO and Preference Erosion: Concerns of Bangladesh and Other Asia-Pacific LDCs' (2006) 7(2) *South Asia economic journal (Institute of Policy Studies)* 179.

[211] *International Trade Statistics 2009* 39.

DFQF access does not exempt LDCs from complying with SPS, TBT and other NTMs applicable in their full swing in relation to these products. Though LDCs are exempt from tariff reduction commitments, they are asked to substantially increase their tariff bindings. This might entail a significant concession for many LDCs by limiting their scope to diversify into industrial sectors in which they do not have any existing production capacity. Hence, the chapter observed that LDCs should be exempt from any strains for tariff bindings.

The chapter examined the post-quota performance of LDCs. It found that though some LDCs survived very well, their market access is rigged with both demand- and supply-side problems in terms of high tariffs, NTBs, in particular SPS and TBT standards and import bans on child labour grounds, rigorous rules of origin causing low utilisation of preferences, and lack of technical assistance that confine LDCs to low value-added production.

This chapter concluded that an effective market access regime for LDCs in non-agricultural products can be ensured through operational DFQF treatment for all LDC products, along with simplified and harmonised rules of origin. It is also necessary to make SPS and TBT measures in relation to LDC products conditional on providing active technical and financial assistance by developed countries. Assistance programmes are also needed to address supply-side constraints and preference erosion problem.

Chapter Six:
Market Access in Services Trade and Sustainable Development of LDCs*

1 Introduction

Trade in services became integrated into the WTO regime at the doggedness of developed countries to extend their markets of services exports throughout the world. Developing countries vehemently opposed the inclusion of services trade as a vicious device for the ingression of multinational corporations (MNCs) into their essential sectors.[1] However, they lost the battle and services emerged as an integral part of the WTO through the *General Agreement on Trade in Services* (GATS).[2] The GATS incorporates S&DT provisions for developing countries and particularly for LDCs.[3] However, the approach that the GATS has taken for achieving development goals for developing countries and LDCs is not through preferential market access, rather through services trade liberalisation by means of commitments pursuant to Parts III and IV of the GATS.[4]

Unsurprising, LDCs are in an adverse position in overall services trade. The GATS paves the way for market access in services where developed countries have comparative advantage, such as financial services and telecommunication, and closes

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[1] Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (2008) 67.

[2] *General Agreement on Trade in Services*, reproduced in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 284.

[3] Though the term 'special and differential treatment' has not been used throughout the Agreement, several provisions mandate that developing countries' and LDCs' special needs to be taken into consideration.

[4] Mary E Footer and Carol George, 'The General Agreement on Trade in Services' in Patrick F J Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (2005) vol I, 799, 832.

markets where LDCs have comparative advantage, such as market access for low-skilled labourers. Hence, the services trade remains the stronghold of developed countries, and LDCs remain the major importers. Apart from the trade deficit, LDCs often have to liberalise their essential services to find themselves losing their regulatory control over foreign transnational corporations. These factors have a significant effect on the sustainable development of LDCs, in terms of their effect on LDCs' poverty, employment, environment and overall economic development.

The failure of the GATS in appreciating the importance of services trade for ensuring sustainable development for LDCs was made up by adopting, in 2003, the *Modalities for the Special Treatment for Least-developed Country Members in the Negotiations on Trade in Services* (hereinafter *2003 LDC Modalities*).[5] Adopted by the Special Session of the Council for Trade in Services under the mandate of Article XIX:3 of the GATS, the *2003 LDC Modalities* emphasise that for LDCs, services play a key role in eradication of their poverty. This chapter examines whether the provisions of the GATS are effective for ensuring the sustainable development for LDCs through market access in services, with emphasis on the issue of temporary movement of natural persons (TMNP). It analyses the provisions of the GATS on technical assistance and capacity building to strengthen their services exports. The chapter addresses the importance of a waiver exempting LDCs from making commitments in services trade, which is one of the core LDC issues for the *December 2011 Ministerial Conference*.[6]

2 Trends in Services Trade and the Position of LDCs

The contemporary world is characterised by a growing and dynamic service sectors. According to the UNCTAD, since 1990, the share of services in GDP has increased from 65 per cent to 72 per cent in developed countries, while for developing countries it

[5] WTO, *Modalities for the Special Treatment for Least-developed Country Members in the Negotiations on Trade in Services*, WTO Doc TN/S/13 (5 September 2003) (hereinafter *2003 LDC Modalities*, WTO Doc TN/S/13).

[6] *Members to Think About 'What Next for Doha, WTO' for December Meeting*, (26 July 2011) WTO: 2011 News Items <http://www.wto.org/english/news_e/news11_e/tnc_infstat_26jul11_e.htm> at 15 August 2011.

has increased from 45 per cent to 52 per cent.[7] The same study shows that on an average, the service sectors accounts for 70 per cent of employment in developed countries and 35 per cent of total employment in developing countries.[8] However, the contribution of services to income and employment in developing countries would have been much larger had the informal services been accounted for since in developing countries, informal services occupy a large portion of service sectors.[9] Since 1990, world services trade has nearly tripled to reach US$2.4 trillion.[10] Since the 1990s, services exports from developing countries have grown at an average annual rate of eight per cent compared with six per cent for developed countries, and their share of the world services exports has increased from 19 to 24 per cent.[11] Despite these optimistic figures, the reality is, developed countries dominate in trade in services and their exports account for 78 per cent of total world exports and a similar percentage of total imports.[12] These countries with their advanced education, training and technology, remain the principal exporters and investors in the service sectors. Developing countries are also creeping up the ladder of world services exports. However, this trend is concentrated in a small number of developing countries, such as the Republic of Korea, China, Singapore, Hong Kong China, India, Egypt, Thailand, Malaysia and Brazil, which find their places among the leading exporters of some services.[13] Only this

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[7] UNCTAD, *Trade in Services and Development Implications*, UN Doc TD/B/COM.1.85 (2 February 2007) (Note by the Secretariat) 2 (hereinafter *2007 Trade in Services and Development implications*). The time span of these statistics is from 1990 to 2005. These figures are drawn from IntraStat, which is the UNCTAD intranet gateway to statistical information.

[8] Ibid.

[9] Saman Kelegama, 'Introduction: Opportunities and Risks of Liberalising Trade in Services' in Saman Kelegama (ed), *Trade in Services in South Asia: Opportunities and Risks of Liberalisation* (2009) 1, 1.

[10] *2007 Trade in Services and Development Implications* 2.

[11] Ibid.

[12] Luis Abugattas Majluf and Simonetta Zarrilli, 'Challenging Conventional Wisdom: Development Implications of Trade in Services Liberalisation' (Trade, Poverty and Cross-Cutting Development Issues Study Series No 2, UNCTAD, 2007) UN Doc UNCTAD/DITC/TAB/POV/2006/1 [17] <http://www.unctad.org/en/docs/ditctabpov20061_en.pdf> at 28 July 2011.

[13] For instance, Singapore, Republic of Korea, China, , Hong Kong China, India and Thailand are among the top 15 exporters of transportation services: WTO, *International Trade Statistics 2010* (2010) 125 (Table III.4 Leading Exporters and Importers of Transportation Services, 2009) (hereinafter *International Trade Statistics 2010)*. China, Macao China, Hong Kong China, Thailand, Malaysia, Mexico, Egypt and India are among the top 15 exporters of travel services: *International Trade Statistics 2010* 130 (Table III.7 Leading Exporters and Importers of Travel, 2009). India, China, Hong Kong China, Singapore, Republic of Korea, Chinese Taipei and Brazil are among the upper fifteen exporters of commercial

handful of developing country exporters of services account for 70 per cent of the total services exports of the group.[14]

The acute concentration of services exports in a very few advanced developing countries essentially leaves the whole section of LDCs marginalised from international flows of services. As a whole, their share in world service exports stood at about 0.8 per cent, mostly in transport and travel services.[15] Most of them have deficits in trade in services.[16] It is pertinent to mention that currently 12 sectors and 160 sub-sectors are listed by the GATS. These are business services, communication services, construction and related engineering services, distribution services, educational services, environmental services, financial services, health-related and social services, tourism and travel-related services, and other services not included elsewhere.[17] LDCs' comparative advantage lies in exports of traditional services such as transport, tourism and labour-intensive services, such as the movement of semi-skilled workers.[18] Indeed, the basic characteristics of LDCs in terms of extreme low income, human resource weakness, economic vulnerability and abundant unskilled, unemployed workforce they have strong comparative advantage in the supply of low- and semi-skilled services.[19] Given their over-reliance on a limited number of service activities, these countries remain particularly vulnerable to external shocks due to varieties of factors ranging from natural disasters to terrorist threats.[20]

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services: *International Trade Statistics 2010* 135 (Table 3.10 Leading Exporters and Importers of Commercial Services, 2009).

[14] Majluf and Zarrilli, above n 12, 18.

[15] *2007 Trade in Services and Development Implications* 3; UNCTAD, *Trade in Services and Development Implications*, UN Doc TD/B/COM.1/71 (20 January 2005) (Note by the UNCTAD Secretariat) 3 (hereinafter *2005 Trade in Services and Development Implications*).

[16] Kelegama, above n 9, 2.

[17] WTO, *Services Sectoral Classification List*, WTO Doc MTN.GNS/W/120 (10 July 1991) (Note by the Secretariat).

[18] UNCTAD, *Trade in Services and Development Implications*, UN Doc TD/B/COM.1/71 (20 January 2005) (Note by the UNCTAD Secretariat) 3 (hereinafter *2005 Trade in Services and Development Implications*); Majluf and Zarrilli, above n 12, 17.

[19] Daniel Crosby, 'Advancing Services Export Interests of Least-Developed Countries: Towards GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-skilled and Semi-skilled Services' (Issue Paper No 9, ICTSD, 2009) 1.

[20] *2005 Trade in Services and Development Implications* 3.

The main challenges that LDCs are facing in the services area are how to strengthen their domestic supply capacity, maximising the contribution of services to economic growth, while reconciling this objective with social, environmental and equity considerations.[21] Developing countries, including some LDCs, have stressed in their communication to the WTO that many of them have made substantial commitments under the GATS with respect to many services industries.[22] They have also undertaken a higher share of full bindings under the cross-border and commercial presence modes of supply.[23] In return, they have not received concessions of any meaningful economic value under the TMNP. Consequently, most of them have to bear a deficit in trade in services, except in areas of tourism, travel and transportation services.[24]

3 Linkage between Trade in Services and Sustainable Development of LDC

Very few studies directly address the issue of the interaction between trade in services and sustainable development. Gary P. Sampson[25] took such an effort. Sampson started his analysis of the GATS accepting the hypothesis that a viable services sector is a precondition for economic growth and a crucial ingredient for sustainable

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[21] Majluf and Zarrilli, above n 12, 1.

[22] WTO Council for Trade in Services Special Session, *Assessment of Trade in Services*, WTO Doc S/CSS/W/114 (9 October 2001) (Communication from Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe) (hereinafter *Assessment of Trade in Services*, WTO Doc S/CSS/W/114); WTO Council for Trade in Services Special Session, *Assessment of Trade in Services*, WTO Doc TN/S/W/3 (10 June 2002) (Communication from Cuba, Dominican Republic, Kenya, Nigeria, Pakistan, Senegal and Zambia) (hereinafter *Assessment of Trade in Services*, WTO Doc TN/S/W/3).

[23] LDCs have also undergone wide-scale privatisation of their essential services, being compelled by the Structural Adjustment Programmes of the IMF and World Bank.

[24] *Assessment of Trade in Services*, WTO Doc S/CSS/W/114; *Assessment of Trade in Services*, WTO Doc TN/S/W/3.

[25] Gary P Sampson, *The WTO and Sustainable Development* (2005) 163–91.

development.[26] However, he did not establish any linkage between trade in services and sustainable development. Sustainable development dimension of services trade is found in the argument of Jane Kelsey who pointed out the role of services as intrinsically social, as well as cultural and economic, often having an environmental dimension.[27] She also maintained that the 'quality, affordability and accessibility of services ... hold the key to social well-being, cohesion and stability—and often the sustainability of life itself'.[28]

The literature on services trade can be broadly divided into two segments. In one segment are those who conclude in favour of immense welfare-generating consequences of the GATS for developing countries. In the other segment are those who view that the GATS will bind domestic policy space, transfer essential services to the hands of profit-seeking corporations, and bar developing countries from pursuing development policies.[29]

3.1 Positive Linkage between Services Trade and Sustainable Development

The OECD, one of the protagonists for services trade, published a report titled *Trade in Services and Developing Countries*.[30] The OECD considered the potential gains to developing countries from the liberalisation of trade in services, both in terms of increased export opportunities and development gains. Export opportunities are increased since other countries' barriers are lowered. Development gains will be achieved as reductions in local protection help promote both the efficiency of domestic resource allocation and the transfer of skills from overseas. The report explored the sectors in which developing countries could have competitive advantage: travel and tourism, construction and engineering services, and information, computer and

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[26] Ibid 166.

[27] Kelsey, above n 1, 1.

[28] Ibid.

[29] Parashar Kulkarni, 'Impact of the GATS on Basic Social Services Redux' (2009) 43(2) *Journal of World Trade* 245, 245.

[30] OECD, *Trade in Services and Developing Countries* (1989). This report was based on OECD Secretariat papers prepared over a period of some two years as part of a programme of work on trade in services under the auspices of the Trade Committee.

communications (ICC) services. Except tourism, in all these services, the competitive advantage of developing countries is associated with labour-intensity.[31]

Geza Feketekuty, the then USTR and another vigorous advocate for trade in services argued that the liberalisation of barriers to international trade in services can contribute to growth in two distinct ways:

- by stimulating the removal of barriers to domestic competition within individual countries, eliminating internal constraints to the achievement of greater economic efficiency in providing services[32]
- by eradicating barriers to external competition for services, which could result in gains in domestic productivity (as domestic producers respond to the international competition), expanded markets for competitively produced services, and lower prices for consumers.[33]

Aaditya Mattoo and Robert M. Stern held that developing countries are likely to benefit significantly from further domestic liberalisation and the elimination of barriers to their exports. Indeed, income gains from a reduction in protection to services may be multiples of those from trade liberalisation in goods.[34] They also maintained that removing barriers to trade in services in a particular sector is likely to lead to lower prices, improved quality and greater variety. They also observed that since services are inputs into production, the inefficient supply of such services acts as a tax on production and prevents the realisation of significant gains in productivity.[35] They gave sector-specific accounts of services trade explaining why services trade is significant for developing countries' development in financial, telecommunication, transport, business, education and health, environmental and other services.[36]

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[31] Ibid 7, 70.

[32] Geza Feketekuty, 'Regulatory Reform and Trade Liberalization in Services' in Pierre Sauve and Robert M Stern (eds), *GATS 2000: New Directions in Services Trade Liberalisation* (2000) 225, 239.

[33] Ibid.

[34] Aaditya Mattoo and Robert M. Stern, 'Overview' in Robert M. Stern and Gianni Zanini Aaditya Mattoo (eds), *A Handbook of International Trade in Services* (2008) 3, 4.

[35] Ibid 3, 10.

[36] Ibid.

Pierre Sauve expressed a similar view about liberalisation on international trade in services as upholding potential for major gains in economic growth and efficiency.[37] He pointed out two broad benefits of the GATS. First, it provides for a structure of legally binding multilateral concepts, principles and rules to work at the progressive liberalisation of trade and investment in services. Second, it promises to raise the economic efficiency of Member's service industries by upgrading domestic resource allocation and providing access to 'lower-cost/higher-quality' service inputs. The advanced level of domestic efficiency thus achieved through this process should generate increased export opportunities. Higher-quality and/or cheaper service inputs are often a precondition for more efficient and competitive domestic production and for greater exports of goods and services.[38]

3.2 Negative Linkages between Services Trade and Sustainable Development

The arguments that throw light on the negative co-relation between services trade and sustainable development are based on the apprehension that the liberalisation of services trade may weaken the sovereignty of local and national governments by jeopardising, inter alia, control over land use, licensing and environmental health.[39] The GATS disciplines are considered unsympathetic to the nascent stage of regulatory structures in developing countries.[40] Therefore, the arguments underscore the need for regulations for protecting the environment, improving public health and maintaining a level of economic welfare.[41]

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[37] Pierre Sauve, 'Assessing the General Agreement on Trade in Services: Half-Full or Half-Empty?' (1995) 29(5) *Journal of World Trade* 125, reproduced in Pierre Sauve, 'Assessing the General Agreement on Trade in Services: Half-Full or Half-Empty?' in Pierre Sauve (ed), *Trade Rules Behind Borders: Essays on Services, Investment and the New Trade Agenda* (2003) 19, 20.

[38] Ibid 40.

[39] See Centre for International Development at Harvard University, *Services Summary*, <http://www.cid.harvard.edu/cidtrade/issues/services.html> at 21 July 2004.

[40] Parashar Kulkarni, 'Domestic Regulation in GATS and South Asia: Integrating the Domestic Reform Agenda with GATS Disciplines' in Saman Kelegama (ed), *Trade in Services in South Asia: Opportunities and Risks of Liberalisation* (2009) 259, 261.

[41] Rafael Leal-Arcas, 'The Resumption of the Doha Round and the Future of Services Trade' (2007) 29 *Loyola of Los Angeles International and Comparative Law Review* 339, 375.

Scott Sinclair accused the GATS to restricting government actions affecting services through legally enforceable constraints backed up by trade sanctions.[42] Characterising the GATS as a threat to the economy, he blamed it for being designed to facilitate international business by constraining democratic governance.[43] Sinclair depicted how MNCs engulf the service sectors of developing countries.[44] Global business interests are seeking binding, global and irreversible rules on services. Hence, MNCs, as they expand and extend their global reach, increasingly have a strong interest in reducing the cost of complying with the regulations they face in different countries. They also benefit from privatisation and commercialisation of public enterprise that allow them to expand their market share. As an instrument to achieve this goal, these MNCs are campaigning for global rules to reduce or eliminate constraints placed by governments on their international commercial activity.

Jane Kelsey argued that the essential social quintessence of services can be supplanted by the global services market governed exclusively by pro-business regulation.[45] She reproved that the GATS, with the feature of business regulation, can change the course of politics, law, culture and social relations around the world.[46] At some point, she quoted the European Commission saying that the GATS is 'not just something that exists between governments. It is, first and foremost, an instrument for the benefit of business'.[47] In fact, Feketekuty himself admitted that:

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[42] Scott Sinclair, *Sequel to Seattle: How the World Trade Organization's New "Services" Negotiations Threaten Democracy* (September 2000) [3] Canadian Centre for Policy Alternatives <http://ratical.org/co-globalize/GATSsummary.pdf> at 28 July 2011.

[43] Ibid.

[44] Sinclair stated that:

> On behalf of predominantly northern-based multinationals, the US, Japan, the European Union and Canada, the so-called Quadrilateral governments, will be pressing developing countries for guaranteed, irreversible access to southern markets. They will also seek from each other more privatisation and commercialisation of public services such as education and health care, and further deregulation of publicly regulated sectors such as media, publishing, telecommunications, energy, transport, financial, postal and other services: Ibid 8.

[45] Kelsey, above n 1, 4.

[46] Ibid 5.

[47] EC, *Opening World Markets for Services—Towards GATS 2000* (2003), cited in Kelsey, above n 1, 3.

> International trade in services has become an important issue because international trade in services has become big business, and the enterprises that conduct trade are counted among the largest corporations of the world ... A model of the world economy that does not accommodate trade in services has become increasingly unacceptable to enterprises selling services. These enterprises do not see a fundamental distinction between the sale of services and the sale of manufactured goods to customers in other countries.[48]

Ananya Raihan argued that growth potential through the liberalisation of markets was not obvious for less-developed countries. It remains unclear how the liberalisation of trade in services could work for their development and, to be more specific, for poverty alleviation. In his observation, the experience of trade liberalisation since the 1990s has shown that opportunities for growth through trade liberalisation are often theoretical, though the danger of jeopardising the domestic economy through unplanned liberalisation is real. He was sceptical about the multilateral efforts for liberalising trade in services, which have failed to convince developing countries that the outcome of the negotiations at multilateral forums will benefit them equally.[49]

3.3 A Third Line of Argument: Reconciliation Efforts

Between these two extremes, another line of argument is that services trade liberalisation offers great opportunities and potential that are, however, associated with substantial risks to the domestic economy. Hence, the process of liberalisation needs to be properly managed. Deshal de Mel pointed out that developing countries, including LDCs, need to take several steps before they expect to benefit from services liberalisation. These include the development of regulatory frameworks, infrastructural changes to take advantage of technologically sophisticated opportunities, and, importantly, improving information and the analysis of the real impacts of liberalisation of services.[50]

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[48] Geza Feketekuty, *International Trade in Services: An Overview and Blueprint for Negotiations* (1988) 5, 70.

[49] Ananya Raihan, 'Bangladesh' in Saman Kelegama (ed), *Trade in Services in South Asia: Opportunities and Risks of Liberalisation* (2009) 119, 120.

[50] Deshal De Mel, 'Sri Lanka' in Saman Kelegama (ed), *Trade in Services in South Asia: Opportunities and Risks of Liberalisation* (2009) 94, 95.

The plight of LDCs is also acknowledged by the dynamic supporters of expanded services trade. Mattoo and Stern conceded that developing countries like Brazil, India, China and South Africa have significant negotiating leverage because of their large service markets, parts of which are still protected. But LDCs, such as Haiti, Nepal and Zambia, have such small markets that they have very little bargaining power, individually and even collectively. It follows that the larger developing countries are in a position to play the mercantilist game in a way that the small countries are not.[51]

Similarly, a group of developing countries and LDCs expressed that benefits related to market opening in the services sector do not come automatically.[52] Positive and development-oriented results from privatisation and liberalisation of the service markets may be achieved only if the appropriate preconditions are in place, including those to help improving access to essential services for the poor, and if policies to encourage and enhance technological capacity and diffusion are set up. The vast range of service sectors precludes any generalisation of market-opening policies, as each sector affects the economy differently when liberalised. Moreover, services liberalisation entails adjustment costs. Thus, without adequate flanking policies, liberalisation might not achieve the goal of promoting economic growth for all trading partners and the development of developing countries and LDCs.[53]

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[51] Mattoo and Stern, above n 34, 24.

[52] *Assessment of Trade in Services*, WTO Doc TN/S/W/3, 3; WTO Council for trade in Services Special Session, *Assessment of Services Trade and Liberalisation in Underdeveloped Economies*, WTO Doc TN/S/W/44 (17 June 2005) (Communication from Cuba) (hereinafter *Assessment of Services Trade and Liberalization in Underdeveloped Economies*, WTO Doc TN/S/W/44).

[53] *Assessment of Trade in Services*, WTO Doc TN/S/W/3 3; *Assessment of Services Trade and Liberalization in Underdeveloped Economies*, WTO Doc TN/S/W/44, 3-4.

3.4 Impacts of Trade in Services on Sustainable Development

3.4.1 Effect on Poverty

Both market access and market liberalisation of services have their effect on LDCs' poverty. LDCs have unequivocal export interest in the temporary movement of workers. L. Alan Winters identified one of the links between this temporary mobility and poverty through remittances.[54] Remittances from temporary workers directly benefit their poor relatives in the exporting country by increasing their purchasing power and standards of living. A large portion of remittances is sent to rural areas. This ultimately boosts the whole economy.[55] Another sector of export interest for LDCs is tourism. Tourism accounts for 80 per cent of total goods and services exports for Samoa, and 43 per cent for Vanuatu.[56] Apart from the direct contribution to economic growth and poverty reduction, tourism has a potential 'spill-over effect' that leads to the establishment and/or improvement of airports, roads, ports, passenger ferries, medical clinics and hospitals, electrical generation and transmission facilities, water treatment plants, telecommunications and financial services (such as cash machines). Airports built to handle increased tourist arrivals will invariably also provide greater opportunity for air cargo exports. An excellent example is the increased frequency of Kenya's cut flower and vegetable deliveries to Europe, made possible by the greater number of international flight arrivals and departures due to growing tourist levels.[57]

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[54] L Alan Winters, 'The Temporary Movement of Workers to Provide Services (GATS Mode 4)' in Aaditya Mattoo, Robert M Stern, and Gianni Zanini (eds), *A Handbook of International Trade in Services* (2008) 480, 496.

[55] Ibid 496; Inter-American Dialogue, 'All in the Family: Latin America's Most Important Financial Flow' (Report of the Inter-American Dialogue Task Force on Remittances, January 2004) <http://www.oas.org/udse/ingles2004/interamerican04.pdf> at 28 July 2011.

[56] Data is taken from the official website of the World Tourism Organisation <http://www.unwto.org/en> at 28 July 2011.

[57] This example was cited in a recent speech by WTO Director-General Pascal Lamy: *Doha Success will Need Positive Outcome in Services* (speech at the European Services Forum and the London School of Economics Conference, 15 October 2007) <http://www.wto.org/english/news_e/sppl_e/sppl77_e.htm> at 28 July 2011. Also referred in Dale Honeck, 'LDC Poverty Alleviation and the Doha Development Agenda: Is Tourism being Neglected?' (Staff Working Paper ERSD-2008-03, World Trade Organization, Economic Research and Statistics Division, August 2008) 10 <http://www.mdg-trade.org/ersd200803_e.pdf> at 28 July 2011.

Experiences of developing countries and LDCs in the liberalisation of financial, telecommunication environmental and other services are highly diversified. For some, they have generated greater economic efficiency, while for others, the effect on the economy and society was altogether negative in terms of the affordability, availability and quality of services. This pressurises the poor segment of the population and creates economic instability.[58]

3.4.2 Effect on Employment

Market access in service sectors undoubtedly generates employment opportunities. However, the impact of the liberalisation of services trade on employment of LDCs is a mixed one. For instance, Ian Alexander and Antonio Estache found that the privatisation of electricity distribution in Argentina led to a 40 per cent reduction in the workforce after privatisation.[59] Conversely, a number of developing countries have managed to maintain or even increase employment in their liberalised telecommunications sectors.[60] Ben A. Petrazzini and Peter Lovelock found in a study of 26 Latin American and Asian economies that telecom markets with competition were the only ones that consistently increased employment levels, while two-thirds of the countries with monopolies saw considerable declines in their telecom work force.[61] Sometimes, excessive modernisation of a service sector targets the livelihoods of some of the poorest and least skilled people who may find it difficult to be employed in other sectors.[62] This is well illustrated by the Egyptian experience where the informal sector,

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[58] Majluf and Zarrilli, above n 12, 19–40.

[59] Ian Alexander and Antonio Estache, 'The Role of Regulatory Reform and Growth: Lessons from Latin America' (Paper presented at the TIPS Annual Forum, Johannesburg, South Africa, September 1999).

[60] Since many developing countries have low teledensities, roughly 70 per cent of telecom investment in developing countries is directed towards building wire line and mobile networks, which are labour-intensive and hence help to maintain or raise employment levels: Mattoo and Stern, above n 34, 17.

[61] Ben. A Petrazzini and Peter Lovelock, 'Telecommunications in the Region: Comparative Case Studies' (Paper presented at the International Institute for Communication Telecommunications Forum, Sydney, Australia, 22–3 April 1996).

[62] UNDP, 'International Trade in Environmental and Energy Services and Human Development, Contributing to Wellbeing, Growth, and Access for All' (Discussion Paper, Asia-Pacific Trade and Investment Initiative, UNDP Regional Centre in Colombo, September 2005) 22 <http://www.snap-undp.org/elibrary/Publications/IntlTradeEnvironmentalServicesAndHDDiscussionPaper.pdf> at 28 July 2011.

which had for long been in charge of waste collection and recycling in a cost- and environment-effective way, was replaced by foreign waste management companies.[63] Regarding privatisation, which is the precondition of market liberalisation, the ILO observed that:

> the privatisation and restructuring process in water, electricity and gas utilities have in general resulted in a reduction of employment levels, sometimes affecting up to 50 percent of the workforce. ... Moreover, employment increase after privatisation is rare and usually follows periods of large-scale retrenchment.[64]

3.5 Significance of Market Access in Services towards the Achieving of Sustainable Development of LDC

The Preamble of the GATS makes no reference to sustainable development, and remarkably, unlike the *WTO Agreement* and the GATT 1994, the GATS does not even mention the objectives of 'raising standards of living' and 'ensuring full employment'.[65] However, the importance of services trade for sustainable development is recognised in the *2003 LDC Modalities*,[66] which upholds this linkage:

> The importance of trade in services for LDCs goes beyond pure economic significance due to the major role services play for achieving social and development objectives and as a means of addressing poverty, upgrading welfare, improving universal availability and access to basic services, and in ensuring sustainable development, including its social dimension.[67]

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[63] Wael Salah Fahmi, 'The Impact of Privatisation of Solid Waste Management on the Zabaleen Garbage Collectors of Cairo' (2005) 17 *Environment and Urbanization* 155.

[64] ILO, 'Managing the Privatisation and Restructuring of Public Utilities (Water, Gas, Electricity)' (Report for the Discussion at the Tripartite Meeting on Managing the Privatization of Public Utilities, Geneva, 12–16 April, 1999) Part 2: Privatization and Restructuring: The Impact on Employment and Human Resource Development <http://www.ilo.org/public/english/dialogue/sector/techmeet/tmpu99/tmpure2.htm#2.1> at 8 December 2010.

[65] Markus Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (2003) 57.

[66] *2003 LDC Modalities*, WTO Doc TN/S/13. The establishment of these modalities is mandated by Article XIX of the GATS, the provision concerned with setting out the framework for the negotiations.

[67] Ibid para 2.

Hence, the modalities recognise that transcending a purely commercial role trade in services reach the domain of social, cultural and welfare-enhancing functions. In the words of Joy Kategekwa:

> The services sector plays a crucial role in human development in the form of essential services, as a core of economic activity such as in tourism, and through the linkages, both forward and backward, created with other sectors such as manufacturing, investment, agriculture, and others.[68]

4 The Inherent Prejudice of the GATS against LDC: From a Historical Context

Before the services trade achieved its place within the WTO, a national law of the US, *the Trade Act of 1974*,[69] states that 'the term "international trade" includes trade in both goods and services'.[70] A group of executives of the US-based transnational corporations lobbied the Congress to pass this law.[71] The Act provides the US President with authority to retaliate against foreign countries that maintained or imposed unreasonable

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[68] Joy Kategekwa, 'Extension of Mode 4 Commitments to Include Unskilled Workers in the WTO: A Win Win Situation, Especially for LDCs' (Paper prepared for the OECD Development Centre Panel on Migration and Development; WTO Public Forum 2006 – What WTO for the XX1st Century? Geneva, 25-26 September 2006) [1] <http://www.oecd.org/dataoecd/5/26/37501680.pdf > at 21 August 2011.

[69] *Trade Act of 1974*, 19 USC § 2411 (1990).

[70] Ibid.

[71] Kelsey, above n 1, 78. Jane Kelsey gave an account on how the US corporate lobbies accumulated their strength to mould the concept of services trade to influence the politicians in home, and through them, the services negotiations within the GATT. The corporate movement backed up by academic and intellectual input and support of the media gradually expanded from the US throughout Europe. She depicted how a cadre of beneficiaries, theorists and trade policy practitioners were able to capture national governments and international organisations to secure a legal instrument that conformed to their world view: see *Case Study 3: the 'Services Mafia'*, cited in Kelsey, above n 1, 76–82. David Hartridge, the top WTO official responsible for the agreement in its early days, attributes the birth of the GATS to the corporate beneficiaries:

> Without the enormous pressure generated by the American financial services sector, particularly companies like American Express and Citicorp, there would have been no services agreement and therefore perhaps no Uruguay Round and no WTO.

David Hartridge, 'What the General Agreement on Trade in Services (GATS) Can Do' (Speech to the Clifford Chance Conference on 'Opening Markets for Banking Worldwide: The WTO General Agreement on Trade in Services', London, January 1997).

or unjustifiable restrictions against US trade in services.[72] The US adopted a strategic step of 'pre-cooking' trade in services within the OECD before pushing it into the GATT.[73] This served the dual purpose of building a political consensus among major industrialised countries as well as using the resources and expertise of the OECD to deal with the basic conceptual and technical aspects of services trade.[74]

The decision to formally undertake work on trade in services by the GATT was subject to heated debate between the US and developing countries. Developing countries, led by India, insisted that they would not consider any new negotiations before the commitments on development that had been made in both the Tokyo Round and the GATT Work Programme for the 1980s were implemented. The defiance of developing countries made the US authorities furious.[75] From May 1983 to June 1986, developed countries led by the US persisted for thrusting services into the new GATT Round,[76] while developing countries were stubborn to resist such effort by all means.[77] SP Shukla, India's Ambassador to the GATT in the 1980s quotes USTR Clayton Yeutter as declaring that:

> We simply cannot afford to have a handful of nations with less than 5 percent of world trade dictating the international trading destiny of nations which conduct 95 percent or

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[72] *Trade Act of 1974*, 19 USC § 2411 (1990) (commonly known as Section 301 of the *Trade Act of 1974*).

[73] It is to be mentioned that the first tentative study on services was undertaken at the initiative of the OECD. In 1972, the Secretary General of the OECD appointed a High Level Group on Trade and Related Problems, which recommended that the developed countries should take action to ensure liberalisation and non-discrimination in the services sector: OECD, 'Report by the High Level Group on Trade and Related Problems' (OECD, 1972) or the Rey Report; Feketekuty, above n 32, 298.

[74] Kelsey, above n 1, 62.

[75] William Brock, former USTR, claims to have threatened India in the 1982 Geneva meeting that 'hell would be dappled with little icebergs before India got anything out of the US if they continued to act that way'. Addressing Veerendra Patil, one of the senior member of the Indian delegations, he threatened to take action by eight o'clock the next morning if his position remained the same: Steven J Dryden, *Bill Brock's Global Visions* (1991) APF Reporter, 15(2) <http://64.17.135.19/APF1502/Dryden/Dryden.html > at 28 July 2011; also referred in Kelsey, above n 1, 65.

[76] In May 1983, the US proposed a new GATT round including services trade. In April 1985, 25 OECD Members resolved that multilateral negotiations should be held by the GATT as soon as possible and that services should be included as one of the negotiating topics: Jimmie V Reyna, 'Services' in Terence P Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986–1992)* (1993) vol II: Commentary, 2335, 2354.

[77] On 6 June 1985, a group of 23 developing countries led by India and Brazil presented a position paper to the GATT Council wherein they agreed to a new round of GATT negotiations, provided that services would not be included within the negotiations: Ibid 2354.

> more of international commerce in this world. ... Services in particular must be in the round, or we are just not going to have a new GATT round ... and we will have to confront those issues in a different way—plurilaterally or multilaterally.[78]

The intransigence of developing countries paved the way for a middle player in the game,[79] who produced the 'cafe au lait' proposal, calling for multilateral liberalisation of services 'with due regard to development concerns'.[80] Though the proposal was not formally endorsed, it worked as a catalyst in breaking the deadlock. The GATT Contracting Parties agreed to include services in the negotiations by adopting a Ministerial Declaration at Punta del Este in September 1986, which launched the Uruguay Round.[81]

Services negotiations in the Uruguay Round were not at all smooth. Among several contentious areas were the positive and negative list approach,[82] NT provisions[83] and TMNP.[84]

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[78] SP Shukla, 'From GATT to WTO and Beyond' (Working Paper 195, Helsinki: UNU World Institute for Development Economic Research 2000) 16, footnote 14.

[79] A group of nine smaller OECD members, led by Switzerland, and 20 Southern countries, led by Colombia and Jamaica, formed the group 'friends of the negotiations': William J Drake and Kalypso Nicolaidis, 'Ideas, Interests and Institutionalization: Trade in Services and the Uruguay Round' (1992) 46(1) *International Organisation* 37, 66–7.

[80] This proposal ostensibly recognised many of the South's issues: development, technology transfer, legitimacy of government regulation, phasing in of commitments, the risks of cross-linkages in negotiations and cross-retaliation in enforcement, and even the possibility of free labour movements: ibid.

[81] Regarding services, the *Punta del Este Declaration* states:

> Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including an elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalisation and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organisations.

Ministerial Declaration, Punta del Este, GATT BISD, 33rd Supp (1987) 19–28; Christine Fuchs, 'GATS Negotiating History' in Rudiger Wolfrum, Peter-Tobias Stoll and Clemens Feinaugle (eds), *WTO—Trade in Services*, Max Planck Commentaries on World Trade Law (2008) 1, 1-16.

[82] The US and the EC advocated for a 'negative list or 'top down/opt-out' approach under which all services would be covered except those on a 'negative list that would be specifically excluded'. Contrarily, most of the developing countries were in favour of a 'bottom up'/'opt-in' or 'positive list approach in which the only sectors covered would be those that were specifically included. Developing countries opposed the 'negative list approach on the ground that it forced them to make concessions in every sector. Canada and the Nordic countries supported the views of developing countries in this issue. Reyna, above n 76, 2371, 2375; Footer and George, above n 4, 816.

Finally, the GATT Director-General Arthur Dunkel announced a consensus draft text on 20 December 1992. Developing countries had no option other than to stand by the text. Their rejection would have upset the benefits and concessions they had gained in other sectors, for example, in agriculture, which were later found out to be against their interest. The draft agreement was included in the Dunkel package of all draft agreements and understandings of the Uruguay Round, which was finally adopted under the *Final Act Embodying the Uruguay Round Results on 15 April 1994* and appended as *Annex 1B*.[85] The historical analysis plays an important role in the depiction of how services were finally integrated within the WTO and provide a comprehensive picture of LDCs' position throughout this development.

5 Overview of the Structure of the GATS

The GATS, a multifaceted agreement, consists of 29 complex Articles that elaborate the concepts, obligations and procedures on which it is based. There are also eight Annexes, which bring further specificity to sectoral considerations, and in some instances modify the application of the concepts contained in the Agreement. WTO Members are obliged by the GATS's provisions designed in three layers:

- Part II: General Obligations and Disciplines
- Part III: Specific Commitments
- Part IV: Progressive Liberalisation

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[83] The US sought a binding general obligation on NT. It proposed that once a party allows a foreign service to access its market, it must grant the same rights and privileges to the foreign service supplier as are enjoyed by the national suppliers and that parties may not maintain domestic content rules on services that discriminate against other parties. *Communication from the United States: Agreement on Trade in Services*, GATT Doc MTN.GNS/W/75 (17 October 1989) 6–7. Developing countries asked for S&DT in respect of NT: *Communication from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago, and Uruguay: Structure of a Multilateral Framework for Trade in Services,* GATT Doc MTN.GNS/W/95 (26 February 1990) 11–12. Here, the EC shares the same interest with developing countries in lobbying for not having NT or market access obligation of general applicability: Footer and George, above n 4, 814, 816.

[84] See this chapter, s 6.2.2.

[85] M Rafiqul Islam, *International Trade Law of the WTO* (2006) 345.

5.1 General Obligations and Disciplines

Part II of the GATS comprises general (horizontal) obligations, which apply to all WTO Members, across virtually all services sectors, whether subject to access commitments or not.[86] Core GATS obligations under this part include the MFN,[87] transparency,[88] developing countries' participation,[89] regional economic integration,[90] labour market integration,[91] domestic regulation of services,[92] rules on recognition requirements,[93] monopolistic behaviour,[94] restrictive business practices,[95] emergency safeguard measures,[96] balance of payment safeguards,[97] government procurement,[98] general exceptions[99] and subsidies.[100]

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[86] Rudolf Adlung and Antonia Carzaniga, 'MFN Exemptions under the General Agreement on Trade in Services: Grandfathers Striving For Immortality?' (2009) 12(2) *Journal of International Economic Law* 357, 358.

[87] *GATS*, art II.

[88] Ibid art III and art III *bis*.

[89] Ibid art IV.

[90] Ibid art V.

[91] Ibid art V *bis*.

[92] Ibid art VI.

[93] Ibid art VII.

[94] Ibid art VIII.

[95] Ibid art IX.

[96] Ibid art X.

[97] Ibid art XII.

[98] Ibid art XIII.

[99] Ibid art XIV.

[100] Ibid art XV.

5.2 Specific Commitments

This part of the GATS comprises of specific commitments applicable exclusively to listed sectors. These commitments, for the most part, are NT,[101] market access[102] and additional commitments.[103] Both NT and market access have been designed with a 'positive-listing' or 'bottom up' approach for progressive build-up of services' obligations by WTO Members. The flexibility allows each Member to determine the level of obligations they can assume, and to decide which sector to list, that is, to inscribe specific (or sectoral) commitments in its Schedule.[104] It allows wide scope to adjust commitments to domestic policy objectives. Members can structure their commitments in a manner enabling them to discriminate between foreign and domestic service providers and limit the degree of market access.[105]

5.3 Progressive Liberalisation

This part consists of three provisions: negotiation of specific commitments,[106] Schedules of specific commitments[107] and modification of Schedules.[108] Services Schedules are an integral part of the GATS, just as tariff Schedules are an integral part of the GATT.[109] Schedules are thus *bound* and can be changed only through subsequent formal negotiations.[110] Each WTO Member is required to have a Schedule of specific

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[101] Ibid art XVI.

[102] Ibid art XVII.

[103] Ibid art XVIII.

[104] Mary E Footer, 'The General Agreement on Trade in Services: Taking Stock and Moving Forward' (2002) 29(1) *Legal Issues of Economic Integration* 7, 12.

[105] Islam, above n 85, 361.

[106] *GATS*, art XIX.

[107] Ibid art XX.

[108] Ibid art XXI.

[109] Leal-Arcas, above n 41, 343.

[110] New York University School of Law Library, *WTO and GATT Research*, cited in Leal-Arcas, above n 41, 344.

commitments in services.[111] These Schedules identify the services and service activities for which market access is guaranteed, and set out the conditions governing this access. Once consolidated, these commitments can only be modified or withdrawn following negotiation of compensation with the country concerned.[112] Services commitments are binding on national policymakers.[113] The Schedules amount to 'binding commitments on how much access foreign service providers are allowed for specific sectors'.[114]

6 Market Access of LDCs in Services Trade: Examining the Case of Temporary Movement of Natural Persons

In examining the market access issue of LDCs in services trade, this section takes a different approach from that of the existing literature. Though the GATS has a separate Article on market access (Article XVII), this provision itself does not discuss market access for LDCs. To appreciate the arrangement of the GATS for LDCs' market access, it is necessary to examine all relevant provisions of the GATS along with the commitments made in the Ministerial Declarations in the Doha Round having effect on the market access issues of LDCs. The first part of this section undertakes this examination. This chapter has already mentioned the importance of TMNP for sustainable development of LDCs.[115] Hence, there are good reasons for examining the issue of TMNP in light of the provisions of the GATS later in the chapter.

6.1 Analysis of the Provisions of the GATS

6.1.1 Preamble

The Preamble of the GATS pronounces the promotion 'of economic growth of all trading partners and the development of developing countries' as the 'ultimate

[111] Leal-Arcas, above n 41, 345.

[112] Ibid 346.

[113] Public Citizen, *WTO General Agreement on Trade in Services (GATS) Glossary* [1] <http://www.citizen.org/documents/glossary_final_03-06.pdf> at 28 July 2011.

[114] Leal-Arcas, above n 41, 346.

[115] See this chapter s 3.4.

objectives' of the GATS.[116] Henceforth, it places the aim of developing countries' development on an equal footing with economic growth of all Members.[117] This provision does not mention how the GATS aims to achieve this 'development' for developing countries' through the services trade. In the last two paragraphs of the Preamble, Members express their desire to 'facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports'.[118] A specific provision concerning the need of LDCs expresses the collective desire of the participating Members to take 'particular account of the serious difficulty of the least developed countries in view of their special economic situations and their development, trade and financial needs'.[119] Accordingly, the GATS takes account of the special situation of LDCs by providing them 'special priority' in increasing their participation in world trade[120] by mandating the adoption of modalities for special treatment for them[121] and also for technical cooperation with them in telecommunication services.[122]

6.1.2 Article IV: Increasing Participation of Developing Countries

Article IV of the GATS gives effect to Paragraph five of the GATS Preamble. The Article is composed of three clauses; the first two of them refer to all developing countries and the last refers to LDCs exclusively. Among them, only Clause 2 incorporates binding commitments on the part of developed Members. For achieving the goal of 'increasing participation of developing country Members', Article IV commands 'different Members'[123] to negotiate specific commitments relating to:

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[116] *GATS*, Preamble, para 2.

[117] Holger Hestermeyer, 'Preamble GATS' in Rudiger Wolfrum, Peter-Tobias Stoll and Clemens Feinaugle (eds), *WTO—Trade in Services* (2008) 17, 22.

[118] *GATS*, Preamble, para 5.

[119] Ibid Preamble, para 6.

[120] Ibid art IV:3.

[121] Ibid art XIX:3.

[122] *The Annex on Telecommunications* para 6.

[123] From the reference to 'developed country Members' in Article IV:2, it can be inferred that Article IV:1 also refers to developed Members by the words 'different Members'.

(a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through *access to technology on a commercial basis*;[124]

(b) the improvement of their access to distribution channels and information networks; and[125]

(c) the liberalisation of market access in sectors and modes of supply of export interest to them.[126]

A number of factors can be ascertained that deter it from being a truly pro-developing country provision. The term 'relating to' in Article IV:1 of the GATS implies that this is an exhaustive list in respect of which different Members' are urged to make 'specific commitments'. Clause (a) provides for the transfer of technology from developed to developing countries on a commercial basis. It means that developing countries will have to pay for technology. Instead of any preferential access to technology, this provision makes arrangement for developed countries to sell their technology. One important means for expanding capacity, efficiency and competitiveness of services is the foreign direct investment. This might lead to investment liberalisation by the backdoor, which developing countries are struggling to resist.[127]

Clause (c) seems to be a vital provision since it mentions not only sectors of export interest of developing countries, but also 'modes of supply' of export interest to them. However, this provision is a 'best endeavour' one. Members are not monitored in relation to their compliance. Though it uses the word 'shall', it is up to the discretion of developed Members to make any such specific commitments for providing market access in sectors and modes in which LDCs have comparative advantage. This has happened regarding the TMNP. Despite the continuous demand from LDCs, no progress has been made on this account. In case of market access and NT undertakings, each Member shall accord services and service suppliers of any other Member treatment

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[124] *GATS*, art IV:1(a) (emphasis added).

[125] Ibid art IV:1(b).

[126] Ibid art IV:1(c).

[127] Rainer Grote, 'Article IV GATS' in Rudiger Wolfrum, Peter-Tobias Stoll and Clemens Feinaugle (eds), *WTO—Trade in Services* (2008) 114, 119.

no less favourable than scheduled. Hence, the requirement that specific commitments must be made pursuant to Part III and IV of the GATS may also act as a deterrent for developed countries from entering into commitments under Article IV:1 of the GATS. The reason is that they may be reluctant to extend the market access that they are willing to grant to service suppliers from LDCs in certain sectors or modes of supply to providers and competitors from strong service industries of other developed countries.[128]

Unlike Article IV:1, Article IV:2 imposes a specific obligation on Member countries concerning the establishment of an information network concerning the supply of services in their respective markets. Under Article IV:2, Members are given two years from the date of entry into force of the *WTO Agreement*, 1 January 1995, to establish 'contact points'. The information to be provided to developing countries by the contact points is specified in Article IV:2(a)–(c). It includes information on the commercial and technical aspects of the supply of services; the registration, recognition and obtaining of professional qualifications; and the availability of services technology. This provision mirrors and is closely related to Article III:4, which requires Members to establish 'enquiry points' to provide information, as per Article III:3, in relation to any new law, or changes to existing laws affecting trade in services.

The special position of LDCs has been emphasised by dedicating a separate clause (IV:3) for them. However, just as with developing countries in general, the GATS refuses to provide for any S&DT that would make it possible to allocate quotas or to grant specific commitments only to LDCs.[129] Instead, Article IV:3 emphasised the need to give 'special priority' to LDCs in the implementation of above-mentioned provisions in Articles IV:1 and IV:2 of the GATS.

One of the significant shortcomings of the GATS is not to provide for preferential market access for LDCs in sectors and modes of supply of export interest to them.

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[128] Ibid 118–9.

[129] Juan A Marchetti, 'Developing Countries in the WTO Services Negotiations' (Staff Working Paper ERSD-2004-06, World Trade Organization: Economic Research and Statistics Division, 2004) 17.

Bimal Ghosh[130] furnished two justifications for this drawback of the GATS. First, the GATS embodies development considerations and the needs of countries at different stages of development as constituent elements of the agreement, and not as an additive arrangement.[131] Second, because of the nature of trade in services, it is difficult to implement any preferential arrangement for developing countries akin to those in Part IV of the GATT.[132] None of the reasonings are convincing since the operative part of the GATS does not seem to prioritise the market access issue of LDCs. Rather, it appears to make the road clear for MNCs to extend their services trade in LDCs. In response to the second justification, it can be argued that if preferential treatment can be provided for goods, then there should not be any difficulty in providing it for services.

6.1.3 Article XIX: Negotiation of Specific Commitments

Article XIX:3 mandates to establish modalities for special treatment of LDCs under the provisions of Paragraph 3 of Article IV. According to the directives of Article IV and XIX, the LDC Modalities urge Members to 'give special priority to providing effective market access in sectors and modes of supply of export interest to LDCs, through negotiated specific commitments pursuant to Parts III and IV of the GATS'. It also requests LDCs 'to indicate those sectors and modes of supply that represent priority in their development policies, so that Members take these priorities into account in the negotiations'.[133]

6.1.4 Article III: Transparency

This provision has a constructive effect on LDCs' market access since the major constraint LDCs face in services trade involves the lack of adequate access to information on the applicable rules and regulations in the exporting country.[134] Article

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[130] Bimal Ghosh, *Gains from Global Linkages: Trade in Services and Movement of Persons* (1997).

[131] Ibid 86.

[132] Ibid.

[133] *2003 LDC Modalities*, WTO Doc TN/S/13, para 6.

[134] Ghosh, above n 130, 87.

III requires the WTO Members to publish all relevant measures promptly to ensure transparency of their regulatory frameworks and market structures.[135] Modelled on Article X of the GATT 1994, Article III of the GATS sets out the main obligations that WTO Members should comply with respect to transparency. This Article requires (a) transparency in all services activities through the exchange of information, (b) publication of all relevant national measures by way of laws, regulations, and administrative guidelines, and (c) the establishment of national enquiry points for responses to information requests by other Members.[136] Article III:4 accords some flexibility to individual developing countries in relation to the time limit to establish enquiry points.

In comparison to the other provisions of general obligations in Part II of the GATS, particularly MFN and domestic regulation, it can be argued that Article III constitutes the most powerful general obligation of Members with respect to trade in services.[137] One lacuna of this provision is that the 'right to information' has been accorded only to Members who alone may make use of it. Individual service suppliers who are the most interested in transparency are deprived of prompt access to vital information and have to convince their respective governments to question another Member's enquiry or contact point. Thus, it is imperative that access to enquiry points is extended also to allow individual service suppliers to refer their questions to those points.[138]

6.1.5 Article VI: Domestic Regulation

This provision has also bearing upon LDCs' market access. Modelled on the GATT Article X:3, Article VI of the GATS contains obligations concerning measures of domestic regulation. The obligations of Article VI supplement the GATS provisions concerning non-discrimination (Article II and XVII) and market access (Article XVI) by addressing regulatory measures that are neither discriminatory nor market-restrictive,

[135] Islam, above n 85, 351.

[136] Ibid.

[137] Panagiotis Delimatsis, 'Article III GATS' in Rudiger Wolfrum, Peter-Tobias Stoll and Clemens Feinaugle (eds), *WTO—Trade in Services* (2008) 92, 94.

[138] Ibid 106.

but may nevertheless impede trade in services. This is the case in particular for regulations that are considered 'overly burdensome'.[139] Disciplines on domestic regulation are often represented as the GATS equivalent of disciplines on NTBs to trade in goods.[140] Barriers to trade in services are embedded in domestic regulation unlike barriers to trade in goods that are usually imposed at the border.[141] Article VI relates to three forms of domestic regulation: qualification requirements (for example, nursing, medical practicing or teaching); licensing requirements (for example, to run taxis or to work as a surveyor or lawyer); and technical standards (for example, water purity or building codes).[142]

The Article sets out some procedural requirements for Members to follow in administering their domestic regulations affecting trade in services. Members must ensure that:

1. regulations are applied 'in a reasonable, objective and impartial manner';
2. review procedures and remedies are provided through independent judicial, arbitral, or administrative tribunals for administrative decisions affecting trade in service; and
3. where authorisation to supply services is required, applicants are informed of the status and outcome of their application within a reasonable time.[143]

The Council for Trade in Services is entrusted with developing necessary disciplines in order to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. The Council has been mandated to formulate disciplines to ensure that such licensing, procedural and qualification requirements are, inter alia:

(a) based on objective and transparent criteria, such as competence and the ability to supply the services;

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[139] Markus Krajewski, 'Article VI GATS' in Rudiger Wolfrum, Peter-Tobias Stoll and Clemens Feinaugle (eds), *WTO—Trade in Services* (2008) 165, 167–8.

[140] Kelsey, above n 1, 29.

[141] Footer, 'The General Agreement on Trade in Services', above n 104, 8–9.

[142] Kelsey, above n 1, 29.

[143] *GATS* art VI (1)-(3).

(b) not more burdensome than necessary to ensure the quality of the service; and

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.[144]

This is significant for LDCs since qualification and licensing requirements of developed countries create barriers for LDCs' market access, particularly for TMNP, both high- and low-skilled.

6.1.6 Article XVI: Market Access

Article XVI obliges WTO Members to provide market access to services and service suppliers of other Members according to the terms, limitations and conditions agreed and specified in their Schedules.[145] The norm of market access is not defined in the GATS. The clearest indication of the intention of the GATS is to be found in its identification of measures that are considered to obstruct market access.[146] The second paragraph of Article XVI gives a list of six types of measures that a Member agrees not to maintain or adopt unless otherwise specified in its Schedule. Of particular importance for LDCs' market access concerns is the prohibition on maximum limitation on the number of natural persons employed in a particular sector or by an individual service supplier. However, this provision applies only to the specific service sectors that a Member has included in the Schedule.[147] It is the Schedules of Commitments that specify the levels of market access[148] and NT[149] as well as any additional commitments a Member is prepared to make in a particular sector.[150]

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[144] Ibid art VI.4.

[145] Ibid art XVI.1.

[146] Christopher Arup, *The World Trade Organization Knowledge Agreements* (2008) 194.

[147] Eric H Leroux, 'From *Periodicals* to *Gambling*: A Review of Systemic Issues Addressed by WTO Adjudicatory Bodies under the GATS' in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (2008) 236, 254.

[148] For instance, whether there are any restrictions on the number of service suppliers.

[149] For instance, whether some privileges given to local companies will also be given to foreign companies.

[150] *Services Negotiations* <http://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm> at 28 February 2011.

Hence, LDCs cannot claim market access for a sector in developed countries' markets if no specific commitment is made in respect to that sector. The words 'unless otherwise specified in its Schedule' in Article XVI:2 indicate that the GATS does not compel a Member to refrain from setting a maximum limit. Instead, it puts the onus on Members to take up one of the three options: withhold a sector from its Schedule, specify limitations on the commitments that are made, or satisfy explicit exceptions.[151]

Article XVI of the GATS is more appropriately designed to facilitate market access for developed countries and their MNCs. Article XVI:2(a)-(f) state that Members shall not maintain the following measures:

(a) limitations on the number of service suppliers;

(b) limitations on the total value of service transactions or assets;

(c) limitations on the total number of service operations or on the total quantity of service output;

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

The measures, which Members are ordained to refrain from taking, actually inhibit the smooth operation of foreign investments.

6.1.7 Article II: MFN Treatment

LDCs are not in a position to enjoy the benefits of the MFN and NT since these non-discrimination provisions of the GATS leave the market open for competition. LDCs have neither the resources nor skills to compete in the open services market. The MFN

[151] Arup, *The World Trade Organization,* above n 146, 194.

under the GATS is a conditional one since the GATS allows WTO Members to maintain an MFN-inconsistent measure, provided it is listed in accordance with the Annex on Article II Exemptions.[152]

MFN exceptions in the GATS make room not only for more favourable treatment to selected trading partners but also for the denial of market access or other benefits towards countries whose trade regimes do not meet prescribed conditions.[153] Developed countries, in particular, the US were the keen advocate of this provision to use the threat of denial of MFN treatment to concessions from trading partners in commercially important sectors.[154] The threat of wholesale invocation of an MFN exemption in any single sector has proved a powerful 'weapon' for some WTO Members to force others to make commitments in such sensitive service sectors as financial services and telecommunications.[155]

There is one important constraint in maintaining a measure inconsistent with MFN obligation.[156] Relevant measures could be listed only once, at the date of entry into force of the WTO or, in the case of new Members, of accession.[157] These requirements of taking stock of and listing all potentially relevant measures on one single occasion may prove onerous for LDCs, since they have information and coordination problems associated with the broad sector and modal scope of the GATS, than their counterparts in industrialised countries.[158] Hence, it is not surprising that of the 49 WTO Members that have not listed MFN exemptions, 48 are developing or least developed countries.[159] Developed countries have tended to inscribe more measures than developing or least

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[152] Footer, 'The General Agreement on Trade in Services', above n 104, 10, footnote 15.

[153] Adlung and Carzaniga, above n 86, 358.

[154] Anders Ahnlid, 'Comparing GATT and GATS: Regime Creation under and After Hegemony' (Spring 1996) 3(1) *Review of International Political Economy* 65, 65.

[155] Christopher Arup, *The New World Trade Organization Agreements: Globalising Law through Services and Intellectual Property* (2000) 110–12.

[156] *GATS* art II:2.

[157] Ibid art II:2, Annex on Article II Exemptions; Adlung and Carzaniga, above n 86, 363.

[158] Ibid 364–5.

[159] Ibid 365.

developed countries.[160] Of the WTO's 31 LDC Members, only one-third has sought legal cover for Article II inconsistent measures, and the number of exemptions, totalling 37, has remained quite limited.[161]

6.1.8 Developments in the Doha Round Negotiations

On the market access issues of LDCs in general, WTO Members make a collective commitment in the *2005 Hong Kong Ministerial Declaration*. It mandates to develop, in the course of negotiations, methods for 'the full and effective implementation of the LDC Modalities' for 'developing appropriate mechanisms for according special priority including to sectors and modes of supply of interest to LDCs in accordance with Article IV:3 of the GATS and Paragraph 7 of the LDC Modalities'.[162] Members also pledge to undertake commitments, to the extent possible, in such sectors and modes of supply identified, or to be identified, by LDCs that represent priority in their development policies.[163]

6.2 Market Access and Temporary Movement of Natural Persons

6.2.1 Significance of TMNP

LDCs' comparative advantage in services trade lies in labour-intensive services that are delivered through Mode 4 or TMNP.[164] Services through TMNP hold colossal potential for economic and social gains for LDCs by reducing pressure on labour markets and wages resulting from unemployment, providing for technology transfer, development of human capital, and above all by directly contributing to the GDP through remittances.[165] The flow of remittances enables the families of migrant workers to alleviate their

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[160] Ibid 370.

[161] Ibid.

[162] *Hong Kong Ministerial Declaration*, Annex C: Services, para 9(a).

[163] *Hong Kong Ministerial Declaration*, Annex C: Services, para 9(b).

[164] Ghosh, above n 130, 106.

[165] WTO, *World Trade Report 2004: Exploring the Linkage between the Domestic Policy Environment and International Trade* (2004) 47 (hereinafter *World Trade Report 2004*).

liquidity constraints and invest in human and physical capital in their country.[166] It is the flow of less-skilled workers from LDCs to developed countries that promises larger gains than high-skilled workers.[167] For host developed countries, TMNP in low-skilled workers is important due to their shortage of labour force generated by demographics specifics.[168] Two separate reports published by Manpower Inc. show that the category of 'labourer' leads the 'jobs filled with foreign talents' and employers faced the most difficulty in filling them.[169] In another study, Dani Rodrik found such gain to be US$200 billion annually.[170] The *World Trade Report 2004* commented that existing empirical evidence does not take into account the positive spill-overs that the returnees would generate for their home countries, such as transfer of experience and investment of money earned abroad. Gains from Mode 4 services would further increase when these longer-term considerations are included.[171]

Despite this immense significance and strong demand from LDCs, there has not been any progress in TMNP or Mode 4 services in relation to their low-skilled workers. Winters depicted the reasons succinctly:

> There are formidable political problems associated with large-scale permanent unskilled migration. Host countries fear cultural and integration problems because the unskilled are less likely to adapt to Western culture; they fear drains on the public purse; the jobs

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[166] Jean Paul Azam and Flore Gubert, 'Those in Kayes: The Impact of Remittances on their Recipients in Africa' (2005) 56(6) *Revue Economique* 1331, 1333.

[167] *World Trade Report 2004,* 50; Winters, above n 54, 510.

[168] These are low birth rate, ageing population, retirement policies and longer education curricula: *World Trade Report 2004* 48; Crosby, above n 19, 3.

[169] Manpower Inc., *The Borderless Workforce* (2008) [2] <http://schwabfound.weforum.org/partners_logos/pdf/2365/21334.pdf> at 28 July 2011; Manpower Inc., *Annual Talent Shortage Survey Reveals Skilled Manual Trades, Sales Representatives and Technicians Top Most Wanted List Globally* (2008) <http://www.sciencepeople.com.au/assets/pdf/articles/manpower.pdf> at 15 April 2011.

[170] Rodrik estimated the impact of the creation of a temporary work visa scheme, with a quota set at 3 per cent of the developed countries' labour force. Under this scheme, skilled and unskilled workers from developing countries would be allowed employment in developed countries for 3–5 years, to be replaced by new inflows upon return to their home countries: Dani Rodrik, 'Feasible Globalisation' (Working Paper 9129, National Bureau of Economic Research, Cambridge, MA, September 2002) 19–23 <http://www.nber.org/papers/w9129.pdf> at 28 July 2011.

[171] *World Trade Report 2004* 50.

that unskilled immigrants take do not command immediate respect and appear to be at the expense of the employment of local unskilled workers … .[172]

6.2.2 Examining TMNP within the GATS' Framework

The core provision of the GATS on TMNP is laid down in the Annex on Movement of Natural Persons Supplying Services (hereinafter Annex MNP). By virtue of Article XXIX of the GATS, this Annex forms an integral part of the GATS implying that the others provisions of the GATS are equally applicable to TMNP. The reason for putting this issue in a separate Annex was that during the Uruguay Round Members could not come to an agreement on this issue. The 'controversial drafting history of the Annex MNP'[173] reveals the conflicting standpoint of developed and developing countries on TMNP. Developed countries intended to push for commercial presence in the territory of other Members,[174] while developing countries demanded equal treatment to capital and labour, arguing for movement of people to be included within the GATS.[175] The initial stance of developed countries is reflected in a proposal from the US in October 1989, which argued for the scope of the GATS to be limited to the temporary entry of nationals of any other Members who are senior managerial personnel. This instigated a counter-proposal of June 1990 from a group of eight developing countries, explicitly demanding the inclusion of all personnel without distinction relating to skills or position in corporate hierarchies. A procedural agreement reached in December 1990 to deal with the issue in a separate annex on labour mobility and the negotiations would continue in the six months after the WTO came into force. The additional commitments came out of this negotiation are attached to the Third Protocol to the GATS, entered into force on 30 January 1996.[176]

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[172] Winters, above n 54, 510.

[173] Jurgen Bast, 'Annex on Movement of Natural Persons Supplying Services under the Agreement' in Rudiger Wolfrum, Peter-Tobias Stoll and Clemens Feinaugle (eds), *WTO—Trade in Services* (2008) 573, 575.

[174] Mode 3, as defined in Article I:2(c) of the GATS.

[175] A M Young, 'Where Next for Labour Mobility under GATS?' in Pierre Sauve and R M Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (2000) 184, 196.

[176] *Services: Sector by Sector, Movement of Natural Persons*, <http://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm> at 28 July 2011; Bast, above n 175, 575.

In its four paragraph and one footnote structure, the Annex MNP endeavours to make a compromise between the conflicting interests of developed and developing countries. It does not provide for any new obligations for the Members, rather it (through paragraphs 2 and 4) limits the obligations that the Members have accepted under the GATS.[177] Paragraph 1 says:

> This Annex applies to measures affecting natural persons who are service suppliers of a Member; and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.

This paragraph specifies two categories of natural persons: those who are directly the 'service suppliers' of another Member and those who are 'employed by a service supplier of a Member'. This provision complements Article I:2(d) of the GATS, which defines 'trade in services' as the 'supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member'. These two provisions can give rise to some confusion. Here, the natural persons of one Member are providing services to another Member. As long as they directly provide services to the consumers, there is no controversy. However, when they provide services being 'employed' by a service supplier, confusion arises as to which Member the 'service supplier' belongs. Article XXVIII(g) of the GATS defines 'service supplier' as 'any person that supplied a service' and as per Clause j, it can be 'either a natural person or a juridical person'. Article XXVIII(f) of the GATS defines 'service of another Member' as a service that is supplied 'in the case of the supply of a service … through the presence of natural persons, by a service supplier of that other Member'. If taken literally, this service supplier must not be from the host country since it implies that there is no inter-state trade involved. More specifically, the service supplier must be from the exporting Member. However, there is no such limitation imposed in Paragraph 1 of the Annex MNP. Hence, there is ample scope for interpretation that the 'service supplier' can be very much from the home country itself, which employs natural persons of the exporting Member to supply the service.

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[177] For a thorough analysis of the Annex, see Bast, above n 173, 574–95.

Paragraph 2 of the Annex MNP is an exclusion clause that states the GATS shall not apply to four categories of measures: (1) measures affecting natural persons seeking access to the employment market of a Member, (2) measures regarding citizenship, (3) measures regarding residence, and (4) measures regarding employment on a permanent basis.

This provision reduces the scope of application of the entire Agreement by providing that any measures that falls within the scope of these categories is not subject to the obligations and disciplines of the GATS.[178] This clause protects developed countries' employment markets and immigration policies.

Paragraph 3 of the Annex MNP consists of two sentences. The first sentence deals with the possibility of negotiating specific commitments with regard to the movement of natural persons. By inserting the words 'all categories' in this sentence, Members are given explicit leeway to distinguish, in their respective Schedules, not only between different service sub-sectors but also between different categories of natural persons.[179] This sub-section shows below that all Members have, indeed, scheduled Mode 4 commitments utilising their ability to confine their obligations regarding market access and NT to particular categories of natural persons.[180] The second sentence of Paragraph 3 explains the legal effect of such commitments by saying that 'natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment'.[181] These sentences merely restate the normative content of other GATS provisions.[182]

Paragraph 4 of the Annex MNP contains a couple of compromising provisions. It specifies that the GATS shall not:

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[178] Ibid 584.

[179] Ibid 590.

[180] Ibid.

[181] Bast commented that this clause is legally superfluous since there is no doubt that commitments under Parts III and IV of the GATS are binding of the Member that has committed itself to them, subject to the specific procedure for the modification of Schedules in accordance with Article XXI: ibid 589.

[182] Ibid.

prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders

This provision also limits the scope of obligations that come from other GATS provisions. This is balanced by the proviso that states 'such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment'. This is again counter-balanced by footnote 13, which restricts the scope of nullification or impairment by stating that 'the sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment'.

Hence, it can be said that the 'set of specific regulations concerning the movement of natural persons reflects a carefully elaborated compromise',[183] which is ultimately against the interest of LDCs. Annex MNP defines the field for current and future negotiations.

There are several provisions within the GATS framework that are relevant to the TMNP. These include Article VI on domestic regulation, Article VII on recognition and Article III on transparency.[184] If taken together, these provisions greatly reduce the scope for discretion in applying measures to restrict services trade. Members can also seek recourse to the dispute settlement mechanism (DSM) if the provisions are violated.[185] Moreover, the provisions on market access, NT and the MFN treatment are comprehensive enough to take care of most of the constraints that generally impede the movement of persons as services providers.[186] However, there are some important caveats. First, market access and NT are subject to limitations and conditions explicitly listed in the national Schedules for specific modes of supply. Thus, within a sector listed in the national Schedule, a Member may include restrictions on movement of persons as

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[183] Ibid 578.

[184] Rupa Chanda, 'Movement of Natural Persons and the GATS' (2001) 24(5) *The World Economy* 631, 639.

[185] Ibid 640.

[186] Ghosh, above n 130, 107.

service providers while liberalising other modes of supply.[187] In other words, the real impact of the movement of persons as services providers is largely determined by the specific commitments made by a Member on (a) their scope or sector coverage; and (b) the nature and extent of limitations imposed on market access and NT affecting the movement of natural persons as service providers.[188] Secondly, given the permissible exemptions from MFN treatment, a Member may decide not to extend to all countries or in all sectors the provisions liberalising the entry and temporary stay of service-providing foreigners.[189]

6.2.3 Barriers to TMNP for LDCs

Several significant barriers prevent or restrict the flow of low-skilled services suppliers from LDCs to service consumers located in developed countries. Border measures such as quotas and economic needs tests (ENTs) are maintained by all Members to regulate or impede the entry of service suppliers into their market.[190] ENT implies that domestic employers have to prove that no domestic worker is available to do the relevant job in order to be able to employ a foreign worker. Such procedures are time consuming and costly for employers, making it significantly less attractive to hire foreign workers as opposed to domestic ones.[191] If these border measures can be overcome, then there are additional burdens for foreign workers. They have to provide mandatory social security contributions, which are not returned to them. This rule is unfair for LDC service providers. Besides, non-recognition of professional qualification and work experience also represent major barriers for LDCs.[192]

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[187] Ibid.

[188] Ibid.

[189] Ibid 108.

[190] Crosby, above n 19, 11.

[191] *World Trade Report 2004*, 54.

[192] Crosby, above n 19, 11, 12.

6.2.4 Lack of Commitments for TMNP

To date, no WTO Member has scheduled sector-specific Mode 4 commitments targeted at semi- or low-skilled services. Members have limited their Mode 4 commitments in terms of functional and hierarchical characteristics of natural persons. Most Schedules limit Mode 4 market access to executives, managers, specialists, business visitors and contractual service suppliers, for establishing business contacts, negotiating sales or setting up a commercial presence.[193] Members have mostly limited their market access commitments to intra-corporate transferees that require a Mode 3 commitment in order to have legal and economic significance.[194] Therefore, existing GATS commitments have almost no practical economic relevance to LDCs, which do not generally have the means to make Mode 3 services investments and by definition can only supply low-skilled services suppliers.[195]

6.2.5 Development in the Doha Round

Proposals submitted in the Doha Round reflect limited potential improvement of Mode 4 commitments and virtually none for low-skilled service suppliers. The *Hong Kong Ministerial Declaration* sets out laudable objectives for Mode 4 negotiations. It targets new and improved commitments on issues of interest to LDCs in the categories of 'contractual service suppliers', 'independent professionals' and 'others'. Reference is made to delinking market access from the commercial presence mode of supply and to reducing ENTs. Moreover, some positive 'signals' were expressed at the Services Signalling Conference held in Geneva in July 2008. It was reported that 'most participants indicated their readiness to improve access conditions for Mode 4'.[196] These are only positive political statements; it requires commitments on Mode 4 to materialise these commitments.[197]

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[193] Ibid 9.

[194] WTO Council for Trade in Services, *Presence of Natural Persons (Mode 4)*, WTO Doc S/C/W/75 (8 December 1998) (Background Note by the Secretariat) para 38.

[195] Crosby, above n 19, 8.

[196] *Services Signalling Conferences*, WTO Doc JOB(08)/93 (30 July 2008) (Report by the Chairman of the TNC.

[197] Crosby, above n 19, 9.

7 LDCs' Need for Waiver from Making Commitments in Services Trade

Due to the risk entrenched in unregulated market liberalisation, LDCs need waiver from making any commitments in services trade. The Preamble of the GATS recognises the specific need of developing countries in regulating and introducing new regulations, on the supply of services within their territories in order to meet national policy objectives. However, this provision is not of any value for LDCs since the right is accorded to all WTO Members.[198]

Article IV:3 stipulates that 'particular account shall be taken of the serious difficulty of the least developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs'.[199] This provision is given further clarity in *2003 LDC Modalities* in stating that LDCs shall have full flexibility in opening fewer sectors and liberalising fewer types of transactions in accordance with their specific development needs.[200] LDCs are not expected to offer full NT to foreign service providers or to go beyond their institutional and administrative capacities on regulatory issues. They may make their commitments compatible with their trade and financial needs, thereby limiting them in terms of sector, mode of supply and scope.[201] Conversely, Article IV:3 also imposes restraints on the other WTO Members when negotiating services liberalisation with the LDCs. Other WTO Members are to exercise restraint in seeking commitments from LDCs pursuant to Parts III and IV of the GATS. They are not to seek the removal of conditions attached by LDCs in accordance with Article IV to commitments by which they open their service markets to foreign suppliers.[202]

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[198] Hestermeyer, above n 117, 27.

[199] *GATS* art IV:3.

[200] *2003 LDC Modalities*, WTO Doc TN/S/13, para 5.

[201] Ibid.

[202] Ibid para 4. A point that merits attention here is that while LDCs are exempted, in principle, to liberalise under the GATS in the current round, they are undertaking significant obligations in bilateral

However, the structure of the GATS is so complex that LDCs might not make specific commitments prudently. This section highlights two factors which make it essential that LDCs need waiver from making commitments in services trade.

7.1 Wide Scope of the GATS

The typology of services in the GATS includes almost any services in all sectors. As per Article I:1, the GATS applies to 'measures' by 'Members' 'affecting' 'trade in services'.[203] These are, in fact, the four normative prerequisites that must be fulfilled before a measure can be judged by the standards of the relevant special provisions in the GATS.[204] 'Measures' encompass every activity that governments employ to regulate services: 'a law, regulation, rule, procedure, decision, administrative action, or any other form'.[205] This alone takes the GATS into the 'heartland of domestic governance and State sovereignty'.[206] Then, 'measures by Members' have been articulated as measures taken by '(i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities'.[207]

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investment treaties (BITs). For instance, four LDCs—Bangladesh, the Democratic Republic of the Congo, Mozambique and Senegal—have made commitments concerning NT in investment treaties with the US. The obligations assumed are comparable to commitments under Mode 3 of the GATS that guarantee the absence of discriminatory quotas, foreign equity ceilings, joint venture requirements etc. They have included around 130 sub-sectors under these BITs, which is more than seven times the average number of sub-sectors they bound under the GATS: Rudolf Adlung, 'Trade Liberalisation under the GATS: An Odyssey?' in Marion Panizzon, Nicole Pohl and Pierre Sauve (eds), *GATS and the Regulation of International Trade in Services* (2008) 209, 217.

[203] *GATS*, art I:1.

[204] Diana Zacharias, 'Scope and Definition' in Rudiger Wolfrum, Peter-Tobias Stoll and Clemens Feinaugle (eds), *WTO—Trade in Services* (2008) 31, 37. The AB in the *Canada-Autos* argued that that the structure and logic of Article I:1, in relation to the rest of the GATS, required that determination of whether a measure is covered by the GATS must be made before the consistency of that measure with any substantive obligation of the GATS could be assessed.

[205] *GATS* art XXVIII(a).

[206] Kelsey, above n 1, 24.

[207] *GATS* art I:3(a).

The web of the GATS is spread wider by the reference in Article XXVIII(c) to measures 'affecting' trade in services. 'Affecting' explicitly includes government policies and regulations 'in respect of' the purchase, payments and use of service.[208] It also extends to measures 'in respect of' access to and use of services that are needed to supply a services that must be offered to the general public,[209] and 'in respect of' the presence of a foreign person or investment to supply a service.[210] The AB in *EC–Banana*[211] gives a broader scope to the term 'affecting'.[212] The AB states:

> In our view, the use of the term 'affecting' reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word 'affecting' implies a measure that has 'an effect on', which indicates a broad scope of application. This interpretation is further reinforced by the previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'. We also note that Article 1:3(b) of the GATS provides that 'services' includes any service in any sector except services supplied in the exercise of governmental authority', and that Article XXVIII(b) of the GATS provides that the 'supply of a service' includes the production, distribution, marketing, sale and delivery of a service'. There is nothing at all in these provisions to suggest a limited scope of application of the GATS. We also agree that Article XXVIII(c) of the GATS does not narrow 'the meaning of the term 'affecting' to 'in respect of'.[213]

The AB further distinguishes between three categories of trade measures: measures on goods only; on services only; and measures affecting trade in goods as well as trade in services.[214] Measures affecting both services and goods would fall under the scope of

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[208] Ibid art XXVIII(c)(i).

[209] Ibid art XXVIII(c)(ii).

[210] Ibid art XXVIII(c)(iii); Kelsey, above n 1, 25.

[211] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R, AB-1997-3 (1997) (Report of the Appellate Body).

[212] *EC–Banana Case* deals with the EC's banana import licensing regime, that is, measures dealing with the importation, sale and distribution of bananas.

[213] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, AB-1997-3 (1997) [para 220] (Report of the Appellate Body) (footnote omitted).

[214] Ibid para 221.

the GATT and the GATS.[215] This broad scope of tradeable services under the GATS offers new opportunities for market access to developed Members with vibrant service sectors[216] while new challenges for and pressures upon LDCs to open up those service sectors to foreign companies.

The GATS made its only exception for the services supplied in the exercise of a governmental authority, which are provided neither on a commercial basis nor in competition with other service providers.[217] It seems to provide a broad exception in favour of all publicly provided and procured services with public policy objectives. But the ambiguity as to the meaning of 'non-commercial' and 'non-competitive' brings public services provided on commercial basis or in partnership with private entities within the ambit of the GATS.[218] A Note by the WTO Secretariat commented that the exceptions provided in Article I:3(b)(c) are to be interpreted narrowly.[219] It observed that the fact that the variety of policy objectives concerning health, social services, basic welfare and equity consideration led a very substantial degree of government involvement as a direct providers and regulators of these services, does not mean that the whole sector is outside the remit of the GATS.[220] Hence, the exception in Article I:3(c) does not appear to protect most aspects of public education, social services, Medicare and other public services provided through a mix of public and private delivery and funding.[221] All government measures 'affecting trade in services', whatever its aim—environmental protection, consumer protection, enforcing labour

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[215] Ibid para 222.

[216] Islam, above n 85, 348.

[217] *GATS* art I(3)(c).

[218] Rudolf Adlung, 'Public Services and the GATS' (2006) 9(2) *Journal of International Economic Law* 455, 455. Markus Krajewski, 'Public Services and Trade Liberalisation: Mapping the Legal Framework' (2003) 6(2) *Journal of International Economic Law* 341, 358, 367.

[219] WTO Council for Trade in Services, *Report on the Meeting held on 14 October 1998*, WTO Doc S/C/M/30, 12 November 1998 (Note by the Secretariat).

[220] Ibid.

[221] Scott Sinclair, 'How the World Trade Organization's New "Services" Negotiations Threaten Democracy' (Canadian Centre for Policy Alternatives, 2000).

standards, promoting fair competition, ensuring universal service, or any other goal—are, in principle, within the scrutiny of the GATS.[222]

7.2 Scheduling Approach of the GATS

Due to the GATS' scheduling approach, the concrete impact of the GATS varies greatly among individual WTO Members, depending on their country-specific commitments in given sectors and on eventual limitations contained in their Schedule.[223] Hence, it is very likely that LDCs, by scheduling a service sector, may impose restrictions on their policy space. In *Mexico–Telecom*[224] Mexico's (respondent) measures of charging higher interconnection rates to US suppliers was challenged by the US (complainant) on the grounds that they were not 'cost-oriented' as required by the GATS Annex on Telecommunications. Mexico defended the measure stating that it was compatible with Article 5(g) of the Annex on Telecommunications of the GATS, which allowed measures aimed to strengthen domestic telecommunications infrastructure. The Panel found Mexico in violation of the agreement by pointing out that all such measures under Article 5(g) are required to be scheduled.[225] Thus, a welfare policy that can potentially reduce profits of foreign suppliers is likely to be contested, unless it is specifically scheduled as a limitation. Mexico complied with the WTO Panel's recommendation of providing access to US suppliers at reasonable, cost-oriented rates by introducing new regulations for resale. Thus, scheduled measures are irreversible, unless Members agree on alternate means of compensation.

In *US–Gambling Dispute*[226] the US, while scheduling 'other recreational services' could not apprehend that it deter them in future to prohibit cross-border gambling services

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[222] Ibid 4.

[223] Erich Vranes, 'The WTO and Regulatory Freedom: WTO Disciplines on Market Access, Non-discrimination and Domestic Regulation Relating to Trade in Goods and Services' (2009) 12(4) *Journal of International Economic Law* 953, 986.

[224] *Mexico—Measures Affecting Telecommunication Services*, WTO Doc WT/DS204/R (2 April 2004) (Report of the Panel).

[225] Ibid para 7.3888.

[226] *United Stated—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (2005) AB-2005-1 (Report of the Appellate Body); WTO Doc WT/DS285/AB/R (2004) (Report of the Panel).

from Antigua. The AB upheld the Panel's finding that the US Schedule must be interpreted as including gambling and betting services based on WTO nomenclature. While a powerful country, such as the US, with its thousands of trade experts, could not apprehend the consequences of scheduling a service sector, how could an LDC with so minimal resources, utilise the commitment structure prudently enough to guard them from future undeserved situations? These disputes explain why LDCs need waiver exempting them from making commitments in services trade.

8 Technical Assistance and Capacity Building in Services Trade

A group of developing Members and LDCs expressed that service providers of these countries are mostly SMEs that face competition from large services MNCs with massive financial strength, access to the latest technology, worldwide networks and sophisticated IT infrastructure.[227] It has often proved difficult for these countries to gain access to information and communication technologies. However, without the possibility to acquire technology, capital and markets, there is little point in opening domestic services markets. In addition to trade-related technical assistance, there is also the need to address the problem of weaker and inefficient domestic regulatory capabilities and standards of LDCs, and the need for technical standards and capacity building to improve domestic regulatory capabilities and standards.[228]

The *2003 LDC Modalities*[229] focused on the importance of technical assistance by calling for WTO Members to take measures to increase the participation of LDCs in trade in services. These include:

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[227] *Assessment of Services Trade and Liberalization in Underdeveloped Economies*, WTO Doc TN/S/W/44, 3; *Assessment of Trade in Services*, WTO Doc TN/S/W/3, 2.

[228] Suparna Karmakar, 'Disciplining Domestic Regulations Under GATS and its Implications for Developing Countries: An Indian Case Study' (2007) 41(1) *Journal of World Trade* 127, 147. This point was raised by Brazil, Chile and a group of developing countries in the Working Party on Domestic Regulation: WTO Working Party on Domestic Regulation, *Elements for Draft Disciplines on Domestic Regulation*, WTO Doc S/WPDR/W/32 (26 April 2005) (Communication from Brazil, Colombia, Dominican Republic, Peru and the Philippines) (revised room document).

[229] *2003 LDC Modalities*, WTO Doc TN/S/13.

- strengthening programmes to promote investment in LDCs, with a view to building their domestic services capacity and enhancing their efficiency and export competitiveness;
- reinforcing export/import promotion programmes;
- promoting the development of LDCs' infrastructure and services exports through training, technology transfer, enterprise level actions and schemes, intergovernmental cooperation programmes, and where feasible, financial resources; and
- improving the access of LDCs' services and service suppliers to distribution channels and information networks, especially in sectors and modes of supply of interest to LDCs.[230]

The *2003 LDC Modalities* also demand targeted and coordinated technical and financial assistance and capacity building programmes for LDCs in order to strengthen their domestic services capacity, build institutional and human capacity, and enable them to undertake appropriate regulatory reforms.[231]

The *2005 Hong Kong Ministerial Declaration* asks WTO Members to develop methods for the full and effective implementation of the LDC Modalities, including expeditiously:

(a) assisting LDCs to enable them to identify sectors and modes of supply that represent development priorities

(b) providing targeted and effective technical assistance and capacity building for LDCs in accordance with the LDC Modalities, particularly paragraphs 8 and 12.[232]

The *Hong Kong Ministerial Declaration* also calls for technical assistance to be provided through, inter alia, the WTO Secretariat, with a view to enabling developing and least developed countries to participate effectively in the negotiations. By referring to Paragraph 51 on Technical Cooperation provision of the *Declaration*, it requests

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[230] Ibid para 8.

[231] Ibid para 12.

[232] *Hong Kong Ministerial Declaration*, Annex C, para 9.

technical assistance for LDCs in compiling and analysing statistical data on trade in services, assessing interests in and gains from services trade, building regulatory capacity, particularly on those services sectors where liberalisation is being undertaken by developing countries.[233]

9 Conclusion

Drawing upon the voluminous literature on services trade, this chapter found that the services trade leads to both positive and negative outcomes for LDCs regarding poverty, employment, and affordability and availability of services. Both aspects, in fact, lead to the inevitable conclusion that trade in services regulated by the Framework Agreement of the GATS is intertwined with the sustainable development of LDCs.

The services trade, emanating from the US-based MNCs, was included within the WTO disregarding the vehement opposition of developing countries. Hence, it is unsurprising that the provisions of the GATS are drafted upholding developed countries' interests. Chapter Six undertook a critical analysis of the GATS provisions and found that they are not facilitative for LDCs' market access in services. Let alone providing preferential access, LDCs are denied market access in services in which they have inherent comparative advantage, such as in services by the low- and semi-skilled labourers, which are known as Mode 4 services. Annex MNP upholds developed countries' stake in protecting their domestic employment market and immigration sector, thus limiting the operation of the general obligations of the WTO Members in relation to Mode 4 services. The chapter found that by giving wider definition of certain terms, such as 'services', 'affecting' and 'measures', and providing for a broad scope of the GATS, it takes the services trade to the very heartland of State sovereignty. Provisions of technical assistance, both in the GATS and the Doha Round instruments, are in a 'best endeavour' form following the trend in other WTO agreements.

[233] Ibid para 10.

This chapter observed that Articles IV:3 of the GATS should be amended to provide preferential market access to LDCs.[234] To strengthen the domestic services capacity of LDCs Article IV(a) should be amended to transfer technology to LDCs on a preferential basis, rather than on a commercial basis. Article III should be amended to provide the right to information to any individual service suppliers so that they can have prompt access to crucial information regarding supply of services. The *2003 LDC Modalities*, which calls for effective market access for trade in services for LDCs, particularly through temporary movement of semi-skilled workers, should be given full effect. This will, to all intents and purposes, integrate LDCs within the services trade and uphold the CBDR principle in amending the structural imbalances of the GATS.

[234] Para 7 of the LDC Modalities urges WTO Members to develop appropriate mechanism to achieve full implementation of Article IV:3: *2003 LDC Modalities*, WTO Doc TN/S/13.

Chapter Seven:

The Dispute Settlement System of the WTO: Enforcement of the Market Access Rights of LDCs and the Concept of Sustainable Development in Treaty Interpretation

1 Introduction

The dispute settlement system of the WTO has rightly been regarded as a yardstick of its normative framework and a constitutional guarantor of the rights and duties of the WTO Members.[1] WTO intellectuals, which include the former Chairperson of the WTO AB, Julio Lacarte-Muro, depicted the organisation as holding advantages for all Members, with assurance of special security to the economically weaker Members.[2] Poor countries, which often in the past lacked the political or economic wallop to enforce their rights and to protect their interests, as argued by academics, are given the leverage to challenge trade measures taken by economically more powerful Members.[3] In sharp contradiction to these utopian claims, in reality, the poorest countries in the WTO system are almost disengaged from the enforcement of their market access rights through the formal dispute settlement system.[4] It is not simply an idiosyncrasy that 31 LDC Members of the WTO have had no occasion to invoke the dispute settlement system. There are, instead, deep-rooted reasons behind it. As it was revealed by the LDC Group in their proposal to the DSB:

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[1] Asif H Qureshi, 'Participation of Developing Countries in the WTO Dispute Settlement System' (2003) 47(2) *Journal of African Law* 174, 174.

[2] Julio Lacarte-Muro and Petina Gappah, 'Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench' (2000) 3 *Journal of International Economic Law* 395, 401.

[3] Ibid.

[4] Chad P Bown and Bernard M Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8(4) *Journal of International Economic Law* 861, 862.

> this is definitely not because these countries have had no concerns worth referring to the DS (dispute settlement system), but rather due to the structural and other difficulties that are posed by the system itself.[5]

In the previous three chapters—Chapter Four, Five and Six—this thesis examined the market access issues of LDCs in agricultural and non-agricultural products and services. Hence, it is of great importance for the thesis to examine whether and to what extent LDCs can enforce their market access rights through the DSM of the WTO. This chapter has two broad objectives. The first is to examine how the DSM can play a pioneering role in ensuring market access for LDCs to promote their sustainable development. In this respect, it analyses the S&DT provisions of the Dispute Settlement Understanding (DSU)[6] to scrutinise whether these provisions and the way they are interpreted and applied in the WTO Panel and the AB reports are facilitative for LDCs' participation in the DSM to enforce their market access. It also examines the factors that pose challenges for LDCs' participation in the pre-litigation, litigation and implementation stage along with the proposed reforms and the debates thereon.

Another objective of the chapter is to explore whether the treaty interpretation of the WTO leaves any scope for upholding sustainable development for LDCs. Having insight from the AB's interpretation of the concept of sustainable development in *US–Shrimp/Turtle cases*,[7] it argues that the concept can also be interpreted to make a pro-poor argument to favour LDCs' market access.

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[5] WTO Dispute Settlement Body Special Session, *Negotiations on the Dispute Settlement Understanding*, WTO Doc TN/DS/W/17 (9 October 2002) (Proposal by the LDC Group) (brackets added).

[6] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the *WTO Agreement* in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999) 354 (hereinafter DSU).

[7] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (1998) (Report of the AB); *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) (Report of the Panel).

2 Importance of LDCs' Participation in the Dispute Settlement Mechanism of the WTO

As the central mechanism to enforce international trade law, the WTO dispute settlement system holds immense significance for enforcing the market access rights of LDCs. A number of scholarly works highlight the importance of developing countries' participation in the DSM.[8] Since developing countries include LDCs, these observations are equally applicable to them. Chad P. Bown and Bernard M. Hoekman emphasised the importance of the system from an institutional perspective as the possessor of public good characteristics.[9] They observed that the system acts as a public good only when it secures market access rights, i.e. the ownership stake of each Member country in the system. Enhanced security of these rights reduces uncertainty in the market place, increasing the probability that firms and individuals in countries on both the export and import sides of international transactions make mutually beneficial, relationship-specific investments. While such assurance of market access rights is of hefty concern for all WTO Members, it is especially important for LDCs for their complete integration into the system.[10]

A failure of the dispute settlement system to enforce existing commitments and market access obligations may elicit a damaging effect.[11] If LDCs cannot even bring forward legal claims to challenge violations against their rights, the damage is not limited to the fact that they do not benefit from the provisions for legalised dispute settlement.[12] It also generates disbelief that they cannot enforce their market access rights through the DSM.[13] This erodes their confidence in the world trading system itself. If LDCs do not

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[8] Bown and Hoekman, above n 4; Lacarte-Muro and Gappah, above n 2; Gregory Shaffer, 'Recognising Public Goods in WTO Dispute Settlement: Who Participates? Who Decides' (2004) 7(2) *Journal of International Economic Law;* Christine L Davis and Sarah Blodgett Bermeo, 'Who Files? Developing Country Participation in GATT/WTO Adjudication' (2009) 71(3) *Journal of Politics* 1033; Qureshi, above n 1.

[9] Bown and Hoekman, above n 4, 862.

[10] Ibid 862–3.

[11] Ibid.

[12] Davis and Bermeo, above n 8, 1033.

[13] Bown and Hoekman, above n 4, 862–3.

challenge the barriers to their exports, non-compliance in the trade areas of their export interest is likely to continue,[14] and makes it difficult for them to achieve sustainable development.

Conversely, active participation in dispute settlement activity by WTO Member countries can have 'positive externalities' if one country's litigation efforts contribute to the removal of a trade barrier that adversely affect the market access rights of other WTO Members.[15] In *US–Cotton Subsidies*[16] the Western African countries affected by the US export subsidies for upland cotton benefitted by the action taken by Brazil in securing a verdict of the WTO Panel and AB for removing the trade-distorting subsidies by the US. Sometimes, participation in dispute settlement attracts greater response from powerful WTO Members than do diplomatic negotiations.[17] For instance, soon after the AB decision in *US–Shrimp/Turtle*, Pakistan obtained technical support from the US to establish turtle excluder devices in shrimping vessels and received an export certificate from the US.[18]

Asif H. Qureshi pointed out the three-fold importance of the WTO dispute settlement system for developing countries: as a guarantor of rights; as a check against economic domination; and finally, as a mechanism to ensure that systemic changes brought about through the WTO jurisprudence do not undermine developing country interests and concerns.[19] He observed that this importance and relevance is not diminished by the fact that most developing Members do not have much to defend because of their small share of global trade. He identified two reasons for this. First, the WTO normative framework is not merely about facilitating market access, it is also about ensuring that the market

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[14] Davis and Bermeo, above n 8, 1033.

[15] Bown and Hoekman, above n 4, 862.

[16] *United States—Subsidies on Upland Cotton*, WTO Doc WT/DS267/AB/R, AB-2004-5 (2005) (Report of the Appellate Body); WTO Doc WT/DS267/R (2004) (Report of the Panel).

[17] Maki Tanaka, 'Bridging the Gap between Northern NGOs and Southern Sovereigns in the Trade-Environment Debate: The Pursuit of Democratic Dispute Settlements in the WTO under the Rio Principles' (2003) 30 *Ecology Law Quarterly* 113, 150.

[18] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (2001) [para 3.159] (Report of the Panel).

[19] Qureshi, above n 1, 175.

made available is 'appropriately and fairly' accessed. Second, developing Members have a current interest in ensuring that a fair system of dispute resolution is available when they will actually be ready for its use in the future.[20]

Shaffer indicated another aspect of the importance of the system for LDCs. The difficulty of amending or interpreting WTO law through the WTO political process enhances the significance of the WTO jurisprudence.[21] Due to the complex bargaining process, often rules are drafted in a vague manner, thereby delegating *de facto* power to the WTO dispute settlement system to effectively make WTO law through interpretation.[22] Hence, non-referral of LDC disputes to the WTO implies that provisions that are of importance to them will not be interpreted by the panel or the AB.

Finally, it has been correctly observed by Lacarte-Muro and Gappah that participation of LDCs is vital not only for LDCs' integration into the WTO but also to the credibility and acceptability of the system itself.[23]

3 Nature of LDCs' Participation in the DSM: Participation as a Third Party

3.1 LDCs' Participation

WorldTradeLaw.net, a comprehensive legal research tool for the WTO dispute settlement, classifies complaining and responding parties in the WTO disputes by the income level of their economy as follows: 'high income', 'upper middle income', 'lower middle income' and 'low income'.[24] The compilation of 424 disputes from 10

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[20] Ibid.

[21] Shaffer, 'Recognising Public Goods in WTO Dispute Settlement', above n 8, 470. WTO law requires consensus to modify, resulting in a rigid legislative system, with rule modifications occurring through infrequent negotiating rounds: at 470.

[22] Ibid.

[23] Lacarte-Muro and Gappah, above n 2, 395.

[24] The classifications are based on data and terminology from the World Bank. A country's classification in a particular complaint is based on the World Bank classification for that country in the year in which the complaint was brought (some countries have shifted between different income classifications over the years)

January 1995 to 23 August 2011 shows increasing dispute settlement activities by 'upper middle income' countries such as Brazil, Argentina, Peru, Mexico, Chile, Panama, Dominican Republic; lower middle income countries, such as Indonesia, China, Thailand; and low-income countries, such as India.[25] All these three categories of countries are developing countries.[26]

A substantial amount of literature quantifies developing country's participation in the dispute settlement activity, revolving around the controversy of utilisation/underutilisation of the dispute settlement system by developing countries.[27] But when it comes to LDCs, the finding is beyond any controversy: LDCs are virtually absent from the activities of the WTO dispute settlement. In the words of Bown and Hoekman, this 'missing activity' includes both non-initiated cases, as well as non-participation as co-complainants in initiated cases in which poor countries have market access interests at stake.[28] In all these years, only one complaint was made by an LDC—Bangladesh against another developing country, India—in *India-Anti-dumping Measure on Batteries from Bangladesh* (*India–Batteries*).[29] Here, Bangladesh challenged India's anti-dumping duties on its export of batteries. However, this dispute was settled in consultation stage.[30] Apart from this, LDCs participated as third parties in

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<http://www.worldtradelaw.net.simsrad.net.ocs.mq.edu.au/dsc/database/complaintsclassification.asp> at 25 October 2010.

[25] *WTO Complaints Sorted by Type of Economy* <http://www.worldtradelaw.net.simsrad.net.ocs.mq.edu.au/dsc/database/complaintsclassification.asp> at 23 August 2011.

[26] This list has placed Korea and Chinese Taipei within the 'high-income economy' country along with other developed countries.

[27] Chad P Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (2009); Henrik Horn and Petros C Mavroidis, 'The WTO Dispute Settlement System 1995–2006: Some Descriptive Statistics' in James C Hartigan (ed), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (2009) 3; Timothy Stostad, 'Trappings of Legality: Judicialisation of Dispute Settlement in the WTO, and its Impact on Developing Countries' (2006) 39(3) *Cornell International Law Journal* 811; Davis and Bermeo, above n 8.

[28] Bown and Hoekman, above n 4, 863.

[29] *India-Anti-dumping Measure on Batteries from Bangladesh*, WTO Doc WT/DS306/1 (2004) (Request for Consultations by Bangladesh).

[30] *India-Anti-dumping Measure on Batteries from Bangladesh*, WTO Doc WT/DS306/3 (2006) (Notification of Mutually Satisfactory Solution).

altogether eight disputes. The list of these disputes and the participating countries are shown in the table below.[31]

[31] Table is drawn from the information in the website worldtradelaw.net.

Table 4: List of the Disputes of LDCs' Participation as Third Parties

Name of the Dispute	Year	Third-Party LDCs	Complainant	Respondent
EC–Bananas (21.5) (II) (Ecuador)[32]	2008	Madagascar	Ecuador	EC
EC–Bananas (21.5)(Ecuador)[33]	1999	Haiti	Ecuador	EC
EC–Bananas (21.5)(EC)[34]	1999	Haiti	EC	none
EC–Bananas[35]	1997	Senegal	Ecuador, Guatemala, Honduras, Mexico, US	EC
US–Cotton Subsidies (21.5)[36]	2008	Chad	Brazil	US
US–Cotton	2005	Benin, Chad	Brazil	US

[32] *European Communities—Regime for the Importation, Sale and Distribution of Bananas* Second: *Recourse to Article 21.5 of the DSU by Ecuador*, WTO Doc WT/DS27/RW2/ECU (2008) (Report of the Panel).

[33] *European Communities—Regime for the Importation, Sale and Distribution of Bananas: Recourse by Ecuador to Article 21.5 of the DSU*, WTO Doc WT/DS27/RW/ECU (1999) (Report of the Panel).

[34] *European Communities—Regime for the Importation, Sale and Distribution of Bananas: Recourse by the European Communities to Article 21.5 of the DSU*, WTO Doc WT/DS27/RW/EEC (1999) (Report of the Panel).

[35] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*: *Complaint by Ecuador*, WTO Doc WT/DS27/R/ECU (1997) (Report of the Panel); *European Communities—Regime for the Importation, Sale and Distribution of Bananas*: *Complaint by Guatemala and Honduras*, WTO Docs WT/DS27/GTM, WT/DS27/R/HND (1997) (Report of the Panel); *European Communities—Regime for the Importation, Sale and Distribution of Bananas*: *Complaint by Mexico*, WTO Doc WT/DS27/R/MEX (1997) (Report of the Panel); *European Communities—Regime for the Importation, Sale and Distribution of Bananas*: *Complaint by the United States*, WTO Doc WT/DS27/R/USA (1997) (Report of the Panel); *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R (1997) (Report of the Appellate Body).

[36] *United States—Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil*, WTO Doc WT/DS267/RW (2007) (Report of the Panel); WTO Doc WT/DS267/AB/RW (2008) (Report of the Appellate Body).

Subsidies[37]				
EC–Sugar Subsidies[38]	2005	Madagascar, Malawi, Tanzania	Australia, Brazil, Thailand	EC
US–Textiles Rules of Origin[39]	2003	Bangladesh	India	US
US–Shrimp[40]	1998	Senegal	India, Malaysia, Pakistan, Thailand	US

The table above shows that very few African and Caribbean LDCs participated as third parties in the DSM, and the role of other Asian and Pacific Island LDCs remained nil. The reason why LDCs have not been respondents on any WTO case may be that they enjoy a longer transition period to implement WTO obligations.[41] Their nil performance as complainants may be due to the fact that most of their exports take place under voluntary tariff preferences granted under the *1979 Enabling Clause*,[42] which made GSP unenforceable[43] and pursuant to special WTO waivers, such as those for EC tariff preferences under the *Cotonou Agreement* with the ACP countries.[44] Though the DFQF

[37] *United States—Subsidies on Upland Cotton*, WTO Doc WT/DS267/R (2004) (Report of the Panel); WTO Doc WT/DS267/AB/R., AB-2004-5 (2005) (Report of the Appellate Body).

[38] *European Communities—Export Subsidies on Sugar*, WTO Docs WT/DS265/R, WT/DS266/R, WT/DS283/R (2004) (Report of the Panel); WTO Docs WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (2005) (Report of the Appellate Body).

[39] *United States—Rules of Origin for Textiles and Apparel Products*, WTO Doc WT/DS243/R (2003) (Report of the Panel).

[40] *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Doc WT/DS58/R (1998) (Report of the Panel); *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (1998) (Report of the Appellate Body).

[41] Qureshi, above n 1. In the current Doha Round, LDCs virtually will not have to make any commitments in respect of tariff reduction for agricultural and non-agricultural products.

[42] *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of 28 November 1979, (L/4903), GATT BISD, 26th Supp, 203–18 (1980).

[43] It is discussed in Chapter Three that both the 1970 Agreed Conclusions and the 1971 GSP Decision clarified that granting of tariff preferences does not constitute a binding commitment.

[44] *The Cotonou Agreement: Overview of the Agreement* (2000) <http://europe.eu.int/comm/development/body/cotonou/overview_en.htm> at 25 October 2010. Ernst-Ulrich Petersmann, 'Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of

provision in the *Hong Kong Ministerial Declaration* is drafted in binding language, it is still not clear whether violation of such provisions would enable LDCs to bring a claim in the DSB. Other reasons for overall non-participation, which are discussed at length in Section 4 of this chapter, include lack of legal, economic and professional resources for costly and time-consuming WTO litigation, insufficient private support from their export industries to prepare a WTO complaint, and ineffective WTO remedies.[45]

3.2 Participation as Third Parties in *US–Cotton Subsidies*

In order to examine the effectiveness of LDCs' participation as third party in dispute settlement, this sub-section analyses *US–Cotton Subsidies.* In September 2002, Brazil filed a complaint against the US,[46] claiming that various subsidies granted to cotton farmers and processors by the US government were adversely affecting Brazil's potential to exploit the global cotton market by negatively affecting international cotton price. Brazil alleged the measures[47] to be inconsistent with certain US obligations under the AoA, the SCM Agreement and the GATT 1994.[48] With several other Members, two African LDCs, Benin and Chad, joined the Panel as third parties. This section aims to establish two arguments. First, Benin, Chad and other Western African countries had sufficient grievances to participate as complainants, and it will not be an exaggeration to remark that their grievances were more significant than those of Brazil, given that cotton accounted for 77 per cent of Benin's exports,[49] 25 per cent of Chad's exports,[50]

Dispute Settlement in International Trade' (2006) 27(2) *University of Pennsylvania Journal of International Economic Law* 273, 308.

[45] Petersmann, above n 44, 308.

[46] On 27 September 2002, the Government of Brazil requested consultations with the Government of the US. Failing this, Brazil requested the establishment of Panel on 3 February 2003.

[47] They include measures referred to as marketing loan programme payments (including marketing loan gains and loan deficiency payments [LDPs]), user marketing payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, cottonseed payments and export credit guarantee programmes: *United States—Subsidies on Upland Cotton*, WTO Doc WT/DS267/R, para 2.2.

[48] Ibid para 2.1.

[49] WTO Trade Policy Review Body, *Trade Policy Review: Benin*, WTO Doc WT/TPR/S/131 (24 May 2004) (Report by the Secretariat) x.

[50] *Further Third Party Submission of Benin: Third Party Submission of Chad*, WTO Doc WT/DS267/R/Add.1 (2003), Annex E-4 to *United States—Subsidies on Upland Cotton*, WTO Doc

57 per cent of Burkina Faso's,[51] and 98.8 per cent of Mali's agricultural export revenue.[52] Second, participation as third parties may not be sufficient for LDCs to establish their market access rights where they have the grievances to become complainant themselves.

3.2.1 Western African Countries Could Be Complainants

In their written submission,[53] Benin and Chad referred to an Oxfam report.[54] The Report noted that Benin's actual cotton export earnings in 2001/02 were US$124 million. However, had US subsidies been withdrawn, Benin's export earnings would have been estimated to have been US$157 million. Therefore, the value lost to Benin as a result of the US subsidies was US$33 million.[55] Chad's cotton export earnings in 2001/02 were US$63 million, although in the absence of the US subsidies, Chad would have earned US$79 million, resulting in a loss of US$16 million.[56] As the submission went on, for the period from 1999/2000 to 2001/2002, Oxfam estimated a total cumulative loss of export earnings of US$61 million for Benin and US$28 million for Chad.[57] Benin and Chad agreed with Oxfam when it emphasised, 'the small size of several West African economies and their high levels of dependence on cotton inevitably magnified the

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WT/DS267/R, para 12. It is mentioned in para 12 of the Third Part Submission that 1.5 million people in Chad were affected by cotton production. This was the submission of Chad for the Resumed Session of the First Substantive Meeting (Annex E).

[51] African Development Bank and OECD, *African Economic Outlook 2003/2004, Country Studies: Burkina Faso*, (2004) [82] <http://www.oecd.org/dataoecd/44/57/32411965.pdf> at 30 July 2011.

[52] WTO Trade Policy Review Body, *Trade Policy Review: Mali*, WTO Doc WT/TPR/G/133/Rev.1 (2 June 2004) (Report by the Government: Revision) 11.

[53] *Further Third Party Submission of Benin: Third Part Submission of Chad*, WTO Doc WT/DS267/R/Add.1, paras 17–21.

[54] Kevin Watkins, 'Cultivating Poverty—The Impact of US Cotton Subsidies on Africa' (Oxfam Briefing Paper 30, Oxfam, 2002) <http://www.oxfam.org.uk/resources/policy/trade/downloads/bp30_cotton.pdf> at 30 July 2011.

[55] Ibid 17–18.

[56] Ibid.

[57] Ibid 32; *Further Third Party Submission of Benin: Third Part Submission of Chad*, WTO Doc WT/DS267/R/Add.1, para 21.

adverse effects of US subsidies. For several countries, US policy generated what can only be described as a major economic shock'.[58]

Benin and Chad also relied on an International Food Policy Research Institute (IFPRI) research paper[59] to support their contentions on serious prejudice due to the effects of the US subsidies on world cotton prices.[60] Their legal submissions used the data in the study that indicated that a 40 per cent reduction in farm prices of cotton was likely to result in a reduction in rural per capita income of five to six per cent in the long term. This would lead to the rise of poverty equivalent of an increase of 334,000 individuals in families that would find themselves below the poverty line of US$0.33 cents a day, merely a third of the US$1 per day poverty line used by the World Bank.[61] There were other contemporary studies that revealed the plight of Western African cotton-producing countries, such as Burkina Faso, Mali, Benin and Chad, due to the US export subsidies in relation to upland cotton.[62]

Thus, being fully aware of their grievances that could put them in the role of co-complainant, only two cotton-producing and exporter Western African countries chose to engage themselves in the costly WTO DSM as third parties to build their claim dependening on the claim of Brazil. This is not to say that participation as a third party was an easy task for Benin and Chad, given the commitment required by both countries to the proceedings for over two years. This was not a matter of intervention from time-to-time, rather it required persistent concentration to the arguments of the complainant,

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[58] *Further Third Party Submission of Benin: Third Part Submission of Chad*, WTO Doc WT/DS267/R/Add.1, para 21; *United States—Subsidies on Upland Cotton*, WTO Doc WT/DS267/R, footnote 1330.

[59] Nicholas Minot and Lisa Daniels, 'Impact of Global Cotton Markets on Rural Poverty in Benin' (MSSD Discussion Paper No 48, International Food Policy Research Institute, 2002).

[60] *Further Third Party Submission of Benin: Third Part Submission of Chad*, WTO Doc WT/DS267/R/Add.1 paras 22–4.

[61] Ibid. Also cited in Hilton E Zunckel, 'The African Awakening in *United States-Upland Cotton*' (2005) 39(6) *Journal of World Trade* 1071, 1086.

[62] Ousmane Badiane et al, 'Cotton Sector Strategies in West and Central Africa (World Bank Policy Research Working Paper 2867, World Bank 2002) <http://www.spa-psa.org/resources/Working%20Paper%20Cotton%20Sector.pdf> at 30 July; Louis Goreux and John Macrae, 'Reforming the Cotton Sector in Sub-Saharan Africa (SSA)' (Africa Region Working Paper Series No 47, World Bank, 2003) <http://www.worldbank.org/afr/wps/wp47.pdf> at 30 July 2011.

respondent and the other 11 third-party participants to the dispute.[63] The next part of the section examines whether all these efforts by Benin and Chad were rewarded by the verdict of the *US–Cotton Subsidies* Panel and the AB.

3.2.2 Adequacy of Third-Party Participation

Third-party participation of Benin and Chad in the *US–Cotton Subsidies* has been widely acclaimed by WTO commentators to have removed the difficulties of LDCs in enforcing their market access rights. Jide Nzelibe observed that LDCs may obtain spill-over litigation benefits if they share the same export base with other countries that are more capable of bringing claims before the WTO.[64] In support of his argument, he referred to this cotton case in which, as he perceived, 'African cotton producers obviously stand to benefit if Brazil eventually succeeds in getting the US to modify its cotton subsidy regime, especially if it does so on an MFN basis'.[65] Frieder Roessler, the Executive Director of the Geneva-based Advisory Centre on WTO Law (ACWL),[66] similarly commented that LDCs with their capacity constraints need not actually bring a case to the WTO, since they will receive their remedy from the litigation brought about by other Member countries and by means of the MFN rule of the WTO.[67] However, the commentators acknowledged that sometimes the hope of free riding and enjoying the market access benefits created by the litigation efforts of other countries may not be realised.[68] This happens in particular when the violating Member, instead of removing the trade offending measure on an MFN basis, provides a discriminatory increase in

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[63] Zunckel, above n 61, 1074.

[64] Jide Nzelibe, 'The Case Against Reforming the WTO Enforcement Mechanism' (2008) *University of Illinois Law Review* 319, 351.

[65] Ibid

[66] See this chapter, s 4.1.4.

[67] Frieder Roessler, 'Developing Countries in the WTO Dispute Settlement' (Lecture in Sydney Law School, University of Sydney, 23 March, 2010) http://www.usyd.edu.au/news/law/457.html?eventid=5475 (in file with the author). However, he acknowledged in the question–answer session after the lecture that this spill-over benefit does not provide LDC an entitlement in the system.

[68] Chad P Bown, 'Participation in WTO Dispute Settlement: Complaints, Interested Parties, and Free Riders' (2005) 19(2) *World Bank Economic Reveiw* 287, 290.

access to the complainant Member.[69] Hilton E. Zunckel acknowledged that real situation of Benin and Chad as third-party participants in the dispute:

> It is necessary to bear in mind that a third-party participant is not taking a lead in the dispute but is informed to a large degree by the direction taken by the principle plaintiff and defendant. This was certainly true for Benin and Chad in Upland Cotton, where we have noted that Benin and Chad saw their interest as coinciding with that of Brazil[70]

In this regard, certain submissions of Benin and Chad and the reply of the WTO Panel and AB to these submissions are examined. Benin and Chad asked the Panel to take into account the effects of the US subsidies on their interests separately from Brazil's (the complaining Member) in assessing the WTO-consistency of the US subsidies.[71] They based this claim on several provisions of the SCM Agreement and DSU.[72] Particularly relevant for this discussion is the submission of Benin and Chad that 'if Article 24.1 of the *DSU* has any meaning, this "special situation" of Benin and Chad must be given full, substantive consideration by the Panel'.[73] The Panel, in response, took note of Article 24.1 of the DSU as requiring the Panel to give particular consideration to the situation of LDCs at all stages of the dispute settlement procedures, which includes the Panel process.[74] However, the Panel understood this direction in Article 24.1 of the DSU only 'to address the procedural aspects of the dispute settlement process, rather than [Panel's] substantive examination under the covered agreements'.[75] This thesis does not find any indication towards this procedural aspect of examination in the text of Article 24.1 which states:

> At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least developed country Member, particular consideration shall be given to the special situation of least developed country Members.

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[69] Ibid.

[70] Zunckel, above n 61, 1082.

[71] *United States—Subsidies on Upland Cotton*, WTO Doc WT/DS267/R (Report of the Panel), para 7.1400.

[72] Ibid.

[73] Ibid.

[74] Ibid para 7.1409–10.

[75] Ibid para 7.1410.

By this narrow interpretation, the *US–Cotton Subsidies* Panel misused the rarest and the first ever opportunity for the WTO jurisprudence to enrich WTO rules in favour of LDCs and give some real meaning to the toothless S&DT provisions in the DSU.[76]

Another pertinent submission of Benin and Chad was to enhance third-party rights by invoking Article 10.1 of the DSU. As third parties, they demanded their rights to the full attention of their interests by the Panel. They were not satisfied merely with their right to present views. The submission states that 'Article 10.1 is not limited to providing third parties with the right to present views, as it mandates that the "interests" of the third parties shall be "fully taken into account"'.[77] This time, the Panel declined the Western African LDCs by observing that:

> by the terms of Article 10.1 of the *DSU*, we are already bound to take the interest of *all* WTO Members—naturally including least developed country Members—*fully* into account in our substantive examination under Part III of the *SCM Agreement*. In taking such full account of all Members' interests, we do not view it as conceptually or practically possible to take certain Members' interests *more fully* into account than those of other Members.[78]

Thus, the Panel did not give Benin and Chad any special treatment as third-party LDCs. The written submission of Benin and Chad to the Panel focused on the claim of 'serious prejudice' caused by the US export subsidies. The Panel observed that they took into account serious prejudice allegations of Benin and Chad only 'to the extent these constitute evidentiary support of the effect of the subsidy borne by Brazil as a Member whose producers are involved in the production and trade in upland cotton in the world market'.[79] Then, the Panel specifically stated that they did not base their decision on any alleged serious prejudice caused to Benin and Chad.[80]

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[76] Section 5 of this chapter discusses Article 24.1 of the DSU.

[77] *United States—Subsidies on Upland Cotton*, WTO Doc WT/DS267/R (Report of the Panel), para 7.1400.

[78] Ibid para 7.1411 (emphasis in original).

[79] Ibid para 7.1415.

[80] Ibid.

Benin and Chad again participated as third parties in the appeal. This time, being fully equipped with the legal assistance of the Advisory Centre[81] and the US-based law firm 'White and Case', they sharpened their legal arguments. They linked Article 24.1 to their main claim to convince the AB to decide that they have suffered prejudice as a result of the increase in the US world market share of exports.[82] It is worthy for the purpose of this section to quote their principal argument:

> Benin and Chad argue that the Appellate Body should take into account the impact of United States upland cotton subsidies on the 'fragile economies of West and Central Africa', as reflected in the Panel's findings and evidence on the record. Benin and Chad point out that Article 24.1 of the DSU, which requires particular consideration to be given to the special situation of least developed country Members, would be given meaning if the Appellate Body acknowledged that the increase in the United States' world market share caused serious prejudice to Benin and Chad by reducing their market share. Furthermore, nothing in the text of Article 6.3(d) limits a finding of serious prejudice to the complaining party. Therefore, Benin and Chad urge the Appellate Body to draw conclusions under Article 6.3(d) that would require the United States to withdraw the subsidy or remove the adverse effects, not only with respect to Brazil, but also with respect to Benin and Chad.[83]

The response of the AB to these prayers was not different from that of the Panel. The AB preferred to apply judicial economy[84] than to give a verdict in favour of Benin and Chad. The AB recognised the importance of Article 24.1 of the DSU. However, they recalled that Benin and Chad requested the AB to find that their interests have suffered serious prejudice in the sense of Article 5(c) of the SCM Agreement, if the AB finds that Brazil has suffered serious prejudice as a result of an increase in the US' world market share in upland cotton in the sense of Article 6.3(d) of the SCM Agreement. As the AB found it unnecessary to rule on Brazil's appeal regarding the interpretation of the phrase 'world market share' in Article 6.3(d), they, therefore, were not in a position

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[81] See this chapter, s 4.1.3.

[82] *United States—Subsidies on Upland Cotton*, WTO Doc WT/DS267/AB/R, para 211, 214.

[83] Ibid para 214.

[84] In international adjudication, the principle of judicial economy requires the judge to obtain the best result in resolving the dispute with the most rational and efficient use possible of his or her powers: Fulvio Maria Palombino, 'Judicial Economy and Limitation of the Scope of the Decision in International Adjudication' (2010) 23 *Leiden Journal of International Law* 909, 909.

to accede to the submission of Benin and Chad to complete the analysis and to find that, in addition to Brazil, Benin and Chad also had suffered serious prejudice to their interests in the sense of Articles 6.3(d) and 5(c) of the SCM Agreement.

The findings of the AB clearly show that Benin and Chad could not manage to have a verdict in their favour since they based their claim on that of Brazil. The objective of this detailed discussion is to put forward the argument that where an LDC has a substantive case, it is improvident to add such a case to the claim of another Member.[85] It has been suggested in academic literature that third-party rights created unique avenues for developing countries and hence enhanced third-party rights have been asked for.[86] This chapter also supports the view that when LDCs participate as third parties, they should be provided with enhanced procedural rights. However, it maintains that third-party participation is unlikely to produce the equal benefit of participation as a complainant.

The final findings of *US–Cotton Subsidies* Panel and AB in favour of Brazil have turned out to be a triumph for Benin and Chad. Nevertheless, this case could hardly be regarded as a watershed for LDCs' participation in the DSM. A number of political and technical factors did exist in this dispute, which might not be present in other disputes. Outside the DSB, the four Western African country Members, with their Heads of States, lodged a political campaign against the US cotton subsidies both within and outside the WTO.[87] Several influential parties, including international organisations,[88]

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[85] Guled Yusuf, 'The Marginalisation of African Agricultural Trade and Development: A Case Study of the WTO's Efforts to Cater to African Agricultural Trading Interests Particularly Cotton and Sugar' (2009) 17 *African Journal of International and Comparative Law* 213, 234.

[86] Tanaka, above n 17, 150–8, 173–9.

[87] Elinor Lynn Heinisch, 'West Africa *versus* the United States on Cotton Subsidies: How, Why and What Next?' (2006) 44(2) *Journal of Modern African Studies* 251, 262–3.

[88] IMF and World Bank, *Market Access for Developing Country Exports—Selected Issues* (September 2002) <http://www.imf.org/external/np/pdr/ma/2002/eng/092602.pdf> at 31 July 2011; UNCTAD Trade and Development Board, *Economic Development in Africa: Issues in Africa's Trade Performance*, UN Doc TD/B/50/6 and Corr. 1 (28 July 2003) <http://www.unctad.org/en/docs/tb50d6&c1_en.pdf> at 30 July 2011; FAO, 'Cotton: Impact of Support Policies on Developing Countries—Why Do the Numbers Vary?' (Trade Policy Brief No 1, 2004) <ftp://ftp.fao.org/docrep/fao/007/y5533e/y5533e00.pdf> at 30 July 2011.

and the US media[89] have voiced their concerns for cotton issue of the West Africans. Besides, in this dispute, Benin and Chad received adequate legal support. In addition the assistance of the Advisory Centre, they received pro bono legal assistance from an American law firm, White and Case, which again maintained close tie with Brazil' counsel, another US-based law firm.[90]

4 Challenges in the Participation of LDCs: Possible Way-out

4.1 Challenges in Pre-litigation and Litigation Stage

Many factors inhibit LDCs from resorting to the DSM to enforce their market access rights, negatively affecting LDCs' sustainable development. This section summarises these arduous impediments faced by LDCs and a variety of reforms proposed to improve the system to the benefit of LDCs, based on the voluminous literature on these issues.[91]

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[89] 'Harvesting Poverty: the Unkept Promise', *New York Times* (New York) (30 December 2003) <http://www.nytimes.com/2003/12/30/opinion/30TUE1.html> at 30 July 2011; Scott Miller, 'WTO Cotton Ruling may Help Subsidy Opponents', *Wall Street Journal* (28 April 2004) <http://www.bilkent.edu.tr/~akdeniz/courses/micro/case_9.htm> at 30 July 2011; Ashley Seager, 'WTO Rules American Cotton Subsidy Illegal', *The Guardian* (28 April 2004) <http://www.guardian.co.uk/business/2004/apr/28/brazil.usnews> at 31 July 2011; Nicholas Stern, 'Remove These Trade Barriers', *International Herald Tribune* (19 December 2002) <http://www.highbeam.com/doc/1P1-70488305.html> at 31 July; Roger Thurow and Scott Kilman, 'How a Cotton Glut Bred by US hurts Poor African Farmers', *Wall Street Journal* (26 June 2002); Amadou Toumani Toure and Blaise Compaore, 'Your Farm Subsidies are Strangling Us', *New York Times* (New York) (11 July 2003) <http://www.nytimes.com/2003/07/11/opinion/your-farm-subsidies-are-strangling-us.html> at 31 July 2011.

[90] Zunckel, above n 61.

[91] Gregory Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (Paper presented at the WTO at 10: The Role of Developing Countries in Negotiations and Dispute Settlement, Cairo, Egypt, 11–13 February, 2006) (also published as Gregory Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' (2006) 5(6) *World Trade Review* 177); Horn and Mavroidis, above n 27; Chad P Bown, *Self-Enforcing Trade*, above n 27; Stostad, above n 27; Gregory Shaffer, *Defending Interests: Public–Private Partnership in WTO Litigation* (2003); Bown and Hoekman, above n 4; Shaffer, 'Recognising Public Goods in WTO Dispute Settlement', above n 8; Davis and Bermeo, above n 8; Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' (2007) 25(1) *Development Policy Review* 25; Mohammad Ali Taslim, 'How the DSU worked for Bangladesh: the First Least Developed Country to Bring a WTO Claim' in Gregory C Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Country Experience* (2010) 230.

4.1.1 Resource Constraints or Lack of Human and Economic Capital

The difficulties of LDCs start with identifying a case. These countries essentially lack the domestic expertise, both in the public and private sectors, necessary to identify that their export industries are suffering from the WTO-inconsistent measures taken by their trading partners. These deficits form part of what may be referred to as a human capital problem. In developed countries, the private sector is highly vigilant in monitoring and patrolling its own market access rights,[92] and the governments tend to have effective mechanisms in place for public–private interaction. Within these mechanisms, private firms can lobby to their governments to take action. By the time a disputable case reaches the trade minister's desk, much of the pre-litigation work, in terms of compiling facts, conducting economic analysis, and researching the legal basis for the complaint, has already been done by the affected industry associations.[93] Such mechanisms are largely absent in LDCs. In most of the cases, the private sector is small business that is reluctant to pursue their case. This occurred with the local firms of Bangladesh when the US imposed anti-dumping duties on cotton shop towel from Bangladesh in February 1992. These local firms, which were all of very modest size, reportedly did not wish to contest the US action when they became aware of the cost implications.[94] Hence, Bangladesh was not able to challenge the anti-dumping measures imposed by the US during the 13 years these were in effect.[95]

Public–private partnership is immensely important not only in identifying a dispute but also in successfully pursuing it. The effectiveness of the legal challenge depends on the coordination and cooperation between the government and the private (public) enterprises. Behind the success of Bangladesh in *India–Batteries* was an excellent partnership between the affected firm, Rahimafrooz and the Government of

[92] Shaffer, *Defending Interests*, above n 91.

[93] Ibid 21.

[94] Mohammad Ali Taslim, 'Dispute Settlement in the WTO and the Least Developed Countries: the Case of India's Anti-Dumping Duties on Lead Acid Battery Import from Bangladesh' (ICTSD, 2006) 11 <http://ictsd.org/downloads/2008/06/ma_taslim.pdf> at 31 July 2011; Taslim, How the DSU worked for Bangladesh, above n 91, 240.

[95] The US revoked the anti-dumping duties on shop towels with effect from 17 February 2005 since no domestic interested parties participated in the review: Taslim, 'Dispute Settlement in the WTO', above n 94, 3.

Bangladesh.[96] In preparing a strong case, the government would need full disclosure of information and data on all relevant issues. In most cases, private firms in LDCs often do not keep records of all their transactions and some of the records may not be in a usable format. They are also sometimes reluctant to divulge information about the financial aspects of their business to the government.[97]

The next difficulty is due to the enormous cost of participation. The WTO AB and WTO panels employ a highly contextualised, case-based approach, based on jurisprudence where individual case opinions average in the hundreds of pages. Consequently, the demand on lawyer time, and the cost of specialised legal expertise, has skyrocketed.[98] Litigation at the international level involves a distant forum in which legal expertise is the US and Euro-centric, highly sophisticated and quite expensive. Developing countries can face fees ranging from US$200–$600 (or more) an hour when they hire private law firms to advise and represent them in WTO cases.[99] This cost is disproportionately burdensome to LDCs. Hence, LDCs, with smaller volumes of trade, are more likely to tolerate WTO-inconsistent measures because litigation costs for such countries represent a greater percentage of the expected gain from litigation.[100] Spending their hard-earned currency for pursuing a WTO case may not be the priority of these LDCs, which have to address other more important development and social concerns.

Compared to larger, wealthier Members, LDCs face much higher relative and absolute costs in WTO litigation. First, the relative costs of litigation are much higher for them in relation to the size of their economies and government budgets. Investing in the WTO legal expertise thus makes less sense for them in relation to other budgetary needs. Second, LDCs will face higher absolute costs for an individual case. Since they would

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[96] Ibid 12, 13; Mohammad A Taslim, 'WTO and Indo-Bangladesh Trade Dispute', *The Financial Express*, (Dhaka) (3 January 2008) <http://www.thefinancialexpress-bd.com/search_index.php?page=detail_news&news_id=21355> at 25 October 2010.

[97] Taslim, 'WTO and Indo-Bangladesh Trade Dispute', above n 96.

[98] Shaffer, 'Recognising Public Goods in WTO Dispute Settlement', above n 8, 473.

[99] Ibid.

[100] Stostad, above n 27, 826.

participate less frequently in the WTO dispute settlement, they do not benefit from economies of scale.[101] The benefits for an LDC from bringing a WTO case are less likely to exceed the threshold of litigation costs that make the suit worthwhile, especially in light of the uncertainty of the WTO remedies.[102]

Besides, LDCs face considerable internal bureaucratic hurdles where several government departments or agencies become involved in the administrative procedures leading to filing a case in the WTO. Non-cooperation amongst these departments may result in the case being caught up in a bureaucratic tangle causing long delays and inaction.[103] This problem would be less severe if a single department held the statutory authority to decide on the case while other departments may assist in an advisory capacity, which happened in case of Bangladesh in *India–Batteries*.[104]

Language constraints have also been identified as a barrier.[105] It appeared to a barrier to Bangladesh when Brazil supplied all legal documents in Portuguese in relation to an anti-dumping dispute with Bangladesh.[106] It took many months for the authorities in Bangladesh to have these deciphered.[107] This shows how the large developing countries also pose threat for LDCs like Bangladesh.

4.1.2 Lack of Political Will

It requires a great deal of political will on part of LDCs to move against an economic giant. They are more likely to be reliant on the larger and richer potential respondents for development assistance or preferential market access. This makes them vulnerable to

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[101] Shaffer, 'The Challenges of WTO Law', above n 91, 9.

[102] Shaffer, 'Recognising Public Goods in WTO Dispute Settlement', above n 8, 474.

[103] Taslim, 'How the DSU Worked for Bangladesh', above n 91, 241.

[104] Ibid 243–4.

[105] Shaffer, The Challenges of WTO Law, above n 91, 9.

[106] Brazil decided to impose anti-dumping duties on jute bags imported from Bangladesh (and India) in September 1992. Brazil conducted sunset reviews of the anti-dumping measures in September 1998 and September 2004. On both occasions, the final decision was to continue with the measures: Taslim, 'Dispute Settlement in the WTO', above n 94, 2, footnote 2.

[107] Ibid footnote 2.

extra-WTO retaliation.[108] They fear that if they legally win a case, the respondent may engage in retribution outside of the WTO system, for example, through the reduction of bilateral (for example, development or military) assistance or reductions in preferential access under the GSP or another preferential trade agreement.[109] It is not difficult to imagine how this could have a chilling effect on a developing country's willingness to initiate a dispute.

This is not always an empty threat. For instance, as a partial response to *EC–Banana*, the US began to exert extra-WTO counter-retaliatory pressure against the signatory countries to the Framework Agreement on Bananas.[110] First, the US used its Section 301 trade law to investigate Costa Rica and Colombia in 1995, which could have resulted in retaliatory measures.[111] Second, the US Senator (and later Republican presidential candidate) Bob Dole also backed legislation to counter-retaliate against Colombia by withdrawing the US' unilateral trade preferences granted under the *1991 Andean Trade Preference Act (ATPA)*,[112] if Colombia did not withdraw from the Framework Agreement.[113]

Hence, an LDC's susceptibility to various extra-WTO modes of retaliation may cause it to shun formal dispute settlement for the sake of preserving delicate diplomatic balances with nations that are more powerful.[114] In such circumstances, a decision to confront the opponent in the WTO is no longer a simple decision based on the merit of the case. With their political, economic and financial strength, these countries can certainly discourage the aggrieved LDCs from taking action.[115]

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[108] Bown and Hoekman, above n 4, 863.

[109] Ibid 866.

[110] Bown, *Self-Enforcing Trade*, above n 27, 61.

[111] Ibid.

[112] It was awarded as partial compensation for its participation in the War on Drugs.

[113] Daniel Mazuera, 'A Trade Dispute Gone Bananas', *Wall Street Journal* (17 November 1995), cited in Bown, *Self-Enforcing Trade*, above n 27, 61.

[114] Stostad, above n 27, 826–7.

[115] Taslim, *WTO and Indo-Bangladesh Trade Dispute*, above n 96.

4.1.3 Lack of Retaliatory Capacity

LDCs may be unwilling to spend substantial resources on litigation tied to their market access interests if they believe that legally 'winning' a case would lead to an economically unsuccessful outcome[116] or, more specifically, if they know that they will not be able to enforce a ruling in their favour. Such a lack of retaliatory capacity works as a disincentive to pursue any genuine case. This point is discussed further in Section 4.2.

4.1.4 Suggestions for Reform

Various recommendations emanate from the academic literature. Gregory Shaffer proposed three types of solutions to address the three particular challenges for developing countries in using the WTO dispute settlement system:

1. The challenge of internal capacity has to be addressed by bureaucratic and public–private network coordination.[117]
2. The financial challenge needs to be addressed by subsidised legal assistance; private sector support; generating resources through regional and international legal centres.
3. The political challenge needs to be tackled by the North–South NGO-Government alliances.[118]

Bown and Hoekman[119] catalogued and examined a number of different proposals to reduce the litigation costs. Using the 'private-public partnership model'[120] as their guiding framework, they identified a number of useful roles for various self-interested

[116] Bown and Hoekman, above n 4, 865.

[117] Shaffer, 'The Challenges of WTO Law', above n 91, 6–9.

[118] Ibid 16.

[119] Bown and Hoekman, above n 4.

[120] Shaffer provides an excellent synthesis describing details of the process by which public sector interests in the US and the EU work with private sector interests to develop a litigation agenda to pursue and defend issues before the WTO. Shaffer finds that firms, industry associations, private sector attorneys and consultants do much of the pre-litigation and behind the scenes work forming the crux of the arguments that are litigated by the US and the EU government officials in Geneva: Shaffer, *Defending Interests*, above n 91; Bown and Hoekman, above n 4, 867, 889.

and altruistic groups—including legal service centres, NGOs, development organisations, international trade litigators, economists, consumer organisations and importers, and even law schools—in the enforcement process. These groups may assist with needed information-generation and increased transparency, if they are willing to invest in technological (legal and economic) upgrading to contribute to the provision of these services to help poor countries use the formal WTO dispute settlement process.[121]

Busch and Reinhardt[122] concluded from an examination of 380 GATT/WTO cases that developing countries essentially require more assistance in the lead up to a case, not just in litigating before a panel or the AB. They noted that nearly all of the GATT/WTO legal reforms focus on helping developing countries progress more quickly to a panel, and then to litigate through to a ruling. They submitted that more attention needs to be directed at helping developing countries make more of consultations, and that there should be more negotiations at the panel stage prior to a ruling. They argued that more negotiations in the shadow of the law, rather than litigation *per se*, would help level the playing field for developing countries at the WTO.[123]

Nordstrom and Shaffer made a preliminary proposition for the creation of a small claims procedure in the WTO for small trading nations, which are effectively constrained from being able to use the legal system to the full extent.[124] They argued that addition of small claims procedures would reduce the the cost of using the DSM for LDCs with small trade stakes.[125]

Some of the problems related to the litigation cost have been overcome with the establishment of the ACWL[126] in 2001, with financial assistance from both developed

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[121] Bown and Hoekman, above n 4, 889.

[122] Marc L Busch and Eric Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement' (2003) 37(4) *Journal of World Trade* 719.

[123] Ibid 733.

[124] Hakan Nordstrom and Gregory Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' (2008) 7(4) *World Trade Review* 587.

[125] Ibid 631.

[126] The Advisory Centre was established under the Agreement Establishing the Advisory Centre on WTO Law, 15 July 2001.

and developing countries. The ACWL assists developing countries in their enforcement through the DSU of WTO market access rights by providing a variety of subsidised legal services to developing country governments. Specifically, its services are available to any developing country that is a member of the Centre as well as any WTO Member designated by the UN as an LDC. LDCs need not pay any membership fee.[127] The ACWL provided low-cost legal assistance to Bangladesh in filing its WTO complaint against India, and Benin and Chad in participation as third parties in the *US–Cotton Subsidies*. In a study to detect the influence of the ACWL on self-enforcement actions of developing countries, Bown and McCulloch found that the availability of low-cost ACWL services has not been enough to expand the set of developing countries that undertake litigation under the DSU to enforce their market access rights. Rather, it facilitated the prior users of the DSU to make more use of the system with the support of the ACWL.[128] Besides, the centre is heavily overburdened with its limited resources. Hence, it does not offer a complete solution to promote effective participation of LDCs in the DSM.[129]

4.2 Challenges in Implementation Stage

The DSU in its Article 22 states that if a government fails to bring into compliance a measure found to be inconsistent with a WTO rules, it shall enter into negotiations with the government invoking dispute settlement. Further, if they do not agree upon mutually acceptable compensation, the complaining government may seek authorisation from the WTO DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.[130]

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[127] *Agreement Establishing the Advisory Centre on WTO Law* art 7, Annex III.

[128] Chad P Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' (2010) 19(1) *The Journal of International Trade & Economic Development* 33, 58.

[129] Tanaka, above n 17, 155.

[130] *DSU* art 22.2. This is based on the similar language of Article XXIII: 2 of the GATT 1994. Relevant portion of Article XXIII:2 provides: 'If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorise a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances'.

Though Hudec did not agree with the 'conventional wisdom' that blames the WTO dispute settlement system to be totally biased against the interests of developing countries, he acknowledged that:

> the 'law' of the WTO does not, in fact, give weaker countries the same protection that well-developed domestic legal systems usually afford their weaker citizens. The remedies provided by the WTO system allow larger countries to exert significantly stronger enforcement pressures against developing countries than developing countries can exert in the reverse situation. The shortcomings of the WTO legal system in this regard thus raise a legitimate issue for developing country governments when they must decide whether to employ the dispute settlement procedures against larger countries.[131]

Thus, retaliation by larger countries tends to be most effective when used amongst themselves and against smaller countries. The threat of retaliation by smaller countries against larger countries is simply meaningless. Kym Anderson similarly observed that the current WTO retaliation rules pose a question of fairness since it creates disparities between developed and developing countries.[132] For instance, when the complainant is an LDC and the remedy it chooses is a withdrawal of concessions by the complainants towards the respondent's exports, the complainant's economy is more affected by such retaliation, since it increases the cost of imports. Conversely, the high-income respondent country does not suffer any economic loss. This makes them more reckless in their dealings with smaller economies.[133] Moreover, trade retaliation under the WTO only targets non-compliance after the 'reasonable period of time' expires following a panel or AB finding against the measures taken by the respondents.[134] The economic loss caused since the formation of the dispute until the whole dispute settlement proceedings is just dispensed with by the DSU procedures.[135] This may make a victory in the dispute devoid of any practical outcome for an LDC.

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[131] Robert E Hudec, 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Countries Perspective' in Bernard Hoekman, Aaditya Mattoo and Philip English (eds), *Development, Trade, and the WTO: A Handbook* (2002) 81, 81.

[132] Kym Anderson, 'Peculiarities of Retaliation in WTO Dispute Settlement' (2002) 1(2) *World Trade Review* 123, 129.

[133] Ibid.

[134] *DSU* art 21.3.

[135] Anderson, above n 132, 129.

In *EC–Bananas*, the WTO Panel and the AB concluded that the complex, discriminatory EC banana regime violates WTO rules in numerous ways.[136] The DSB gave the EC a 'reasonable period of time' of just over 15 months to bring its banana regime into compliance, and when the EC failed to do so, the US gained authority in April 1999 to suspend tariff concessions equivalent to US$191 million.[137] The US government took this action immediately by imposing 100 per cent duties on selected products from various EC countries.[138] Likewise, in response to the pleading of Ecuador for Article 22 retaliation authority, the Arbitrator determined the level of nullification and impairment of Ecuador at US$202 million per year and accordingly the DSB authorised it to undertake the suspension.[139] However, unlike the US, Ecuador never exercised this right.[140] This illustrates the argument that although retaliation works for developed countries, it does not work for LDCs.

4.2.1 Proposal by Developing Countries for Reforming the Remedies

Developing countries raised concerns regarding the ineffectiveness of the GATT dispute settlement remedies back in 1965. One of these proposals by developing countries resulted in the *1966 Procedure*[141] providing for a special procedure for resolving complaints made by developing countries and is still in force. Two other proposals concerned the improvement of remedies: a proposal for monetary damages to be paid to

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[136] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Docs WT/DS27/R/ECU, WT/DS27/R/GTM,HND, WT/DS27/R/MEX, WT/DS27/R/USA (1997); WTO Doc WT/DS27/AB/R.

[137] *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WTO Doc WT/DS27/ARB (1999) [para 8.1] (Decision by Arbitrators).

[138] 'Trade War Escalates as EU Fights US Sanctions Move', *Financial Times* (5 March 1999) 1.

[139] *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WTO Doc WT/DS27/ARB/ECU (2000) [para 170] (Decision by Arbitrators).

[140] Steve Charnovitz, 'Rethinking WTO Trade Sanctions' (2001) 95 *The American Journal of International Law* 792, 795; Lucas Eduardo F A Spadano, 'Cross-agreement Retaliation in the WTO Dispute Settlement System: An Important Enforcement Mechanism for Developing Countries?' (2008) 7(3) *World Trade Review* 511, 512.

[141] See this chapter, s 5.1.

developing countries injured by the GATT-illegal trade sanctions, and a proposal for collective retaliation.[142]

4.2.1.1 Monetary Compensation for Harm Done

Developing countries argued that forward-looking remedies were not enough to remedy the harm already done. Hence, they proposed that they should be entitled to collect retroactive damages in the form of money awards. The money would compensate the government's economic development program, rather than private interests. It was understood that the obligation to extend monetary compensation would remain in force until the measure was corrected.[143] Developing countries laboriously advocated for monetary compensation through a long series of committee meetings in 1965.[144] Conversely, developed countries opposed the proposal with equal conviction, asserting that monetary compensation was impossible. One of the principal objections raised against the proposals of the developing countries was that 'it was inconceivable that national legislatures will be willing to vote budgetary provisions for this purpose'.[145] Ultimately, the proposal was turned down.[146]

Hudec expressed his support for the consistent GATT practice of denying refunds of GATT-illegal tariffs and all other kinds of GATT-illegal charges. One obvious reason, as identified by him, was that many governments have lacked domestic legal authority to refund taxes and charges in such cases.[147] Jide Nzelibe also argued that the costs associated with monetary damages—including the likelihood they will lead to socially

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[142] Hudec, 'The Adequacy of WTO Dispute Settlement Remedies', above n 131, 84.

[143] Ibid.

[144] Brazil and Uruguay proposed that panels be given authority to propose an 'indemnity of a financial character' in complaints by developing countries: Kenneth W Dam, *The GATT: Law and International Economic Organisation* (1970) 368, quoting report of the Ad Hoc Group on Legal Amendments to the General Agreement, reprinted in GATT, *Expansion of Trade of the Developing Countries* 112, 119 (December 1966).

[145] Ibid.

[146] Hudec,'The Adequacy of WTO Dispute Settlement Remedies', above n 131, 85.

[147] Ibid.

undesirable litigation levels—are likely to be higher than their putative benefits to developing countries.[148]

4.2.1.2 Proposal for Collective Retaliation

Developing countries also proposed collective retaliation.[149] The justification for this proposal was that it was impossible for an individual developing country with a very small share of the respondent country's market to cause any significant hardship for large industrial countries. The idea of developing countries was that in such cases, a number of countries would be authorised to deny market access to the large-country defendant.[150] Developed countries strongly resisted this proposal. Among several grounds were that these multiple retaliations would soon produce so many new restrictions that they would choke the channels of commerce. This would make the countries that are not involved in disputes harm their own citizens by raising import costs.[151]

Hudec pointed out theoretical objections against the proportional or collective retaliation as proposed by developing countries.[152] Nevertheless, he revealed that:

> behind the scenes, of course, was the awareness by industrial countries that the existing limitations on remedies suited them quite well, for the very same reasons that developing countries did not like them. Viewing things from the perspective of their role as potential defendants, industrial countries were quite content with membership in a legal system in which they could hurt others but some of the others could not really hurt them.[153]

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[148] Nzelibe, above n 64, 322.

[149] Robert E Hudec, *The GATT Legal System and World Trade Diplomacy* (2nd ed, 1990) 242–3.

[150] Robert E Hudec, 'The Adequacy of WTO Dispute Settlement Remedies', above n 131, 86.

[151] Ibid.

[152] The purpose of retaliation remedy is to rebalancing the GATT obligations undertaken by the Member countries but not to impose any punitive sanction: ibid.

[153] Ibid 87.

There are arguments both for and against monetary compensation and collective retaliation.[154] However, LDCs in their 2002 Proposal made a strong case for monetary compensation and collective retaliation. This remedy is important for LDCs that suffer for the time that an offending measure remains in place. Such monetary compensation should be equal to the loss or injury suffered and directly arising from the offending measure or foreseeable under the offending measure. The quantification of loss or injury to be compensated should always commence from the date the Member in breach adopted the offending measure.[155] Regarding collective retaliation, the LDC Group claimed that where a developing or least developed country Member has been a successful complainant, collective retaliation should be available automatically, as a matter of S&DT. In determining whether to authorise collective retaliation, the DSB should not be constrained by quantification based on the rule on nullification and impairment.[156]

4.2.2 Cross-retaliation

Another feature of economic and political significance in the retaliation procedures has to do with Article 22.3 of the DSU. This Article states that the complainant should retaliate in the same sector wherever practicable. For example, retaliation against a goods violation should be in goods. However, it incorporates the possibility of cross-retaliation. Article 22.3 allows a country to retaliate against a violation of obligations under one WTO agreement by suspending obligations under another agreement in cases

[154] Jagdish Bhawati has proposed that the defending country provides cash compensation to the complaining country, which could then be donated to the exporting industry: Jagdish Bhagwati, 'After Seattle: Free Trade and the WTO' (2001) 77 *International Affairs* 15, 28; similar argument has also been made in Claude Barfield, 'WTO Dispute Settlement System in Need of Change' (2002) 37(3) *Intereconomics* 131; Chi Carmody, 'Remedies and Conformity under the WTO Agreement' (2002) 5(2) *Journal of International Economic Law* 307; Robert MacLean, 'The Urgent Need to Reform the WTO's Dispute Settlement Process' (2002) 8 *International Trade Law and Regulation* 137. Jide Nzelibe argued that under a collective or third-party sanction scheme, the administering third-party countries will have no incentive to choose a retaliation strategy that maximises compliance because they will not face any export group pressures to do so. Rather, such countries will have an incentive to choose a retaliation strategy that maximises the returns to their protectionist groups. In other words, collective or third-party sanctions are likely to increase the global level of protectionism without any offsetting compliance benefits: Nzelibe, above n 64, 321-2; Bryan Mercurio, 'Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding' (2009) 8(2) *World Trade Review* 315.

[155] *Negotiations on the Dispute Settlement Understanding*, WTO Doc TN/DS/W/17, para 13.

[156] Ibid para 14.

where suspension of obligations under the violated agreement would not be 'practicable or effective'.

In *EC–Bananas (22.6) (Ecuador)* Ecuador filed its claim for cross-retaliation by invoking Article 22.3 of the DSU,[157] arguing that retaliation against EC exports of goods or services was not 'practicable or effective' under Article 22.3.[158] The Arbitration Panel authorised Ecuador to suspend concessions under other agreements, including TRIPS, and gave a certain degree of approval to the decades-long argument of developing countries regarding the inadequacy of trade retaliation as a legal remedy for them.[159]

The most fascinating aspect about cross-retaliation is that this provision was originally demanded by industrial countries to allow them to impose trade retaliation under the GATT to sanction violations of the TRIPS or GATS agreements and was adopted over strong objections by developing countries.[160] The same cross-retaliation has turned out to be a boomerang for them. Recently, in *US–Cotton Subsidies (22.6)*, Brazil was authorised to retaliate against the US through TRIPS. [161] In *US–Gambling Services (22.6)*, Antigua and Barbuda managed to obtain authority for cross-retaliation involving IPR belonging to American nationals.[162] Hudec was sceptical as to whether TRIPS

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[157] Article 22.3 of the DSU allows a country to retaliate against a violation of obligations under one WTO agreement by suspending obligations under another agreement in cases in which suspension of obligations under the violated agreement would not be 'practicable or effective'.

[158] *European Communities—Regime for the Importation, Sale and Distribution of Bananas: Recourse by Ecuador to Article 21.5 of the DSU*, WTO Doc WT/DS27/RW/ECU (1999), para 68.

[159] Ibid paras 171–7. Hudec, 'The Adequacy of WTO Dispute Settlement Remedies', above n 131, 89.

[160] Cross-retaliation was included in the DSU at the instance of developed countries, following an initiative of the US. They felt that in case of non-compliance by developing countries in the area of intellectual property rights (IPRs), withdrawal of concessions could only be effective if it affected goods or services, because most of these countries would have few, if any, trademarked or patented products of their nationality: Hudec, 'The Adequacy of WTO Dispute Settlement Remedies', above n 131, 89.

[161] *United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WTO Doc WT/DS267/ARB/1 (2009) [paras 5.233, 6.3, 6.5] (Decision of the Arbitrator); *United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*, WTO Doc WT/DS267/ARB/2 (2009) [paras 5.233, 6.3, 6.5] (Decision of the Arbitrator).

[162] Spadano, above n 140, 513. *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recoure to Arbitration by the United States under Article 22.6 of the DSU*, WTO Doc WT/DS285/ARB (2007) [para 6.1] (Decision of the Arbitrator).

retaliation is the key to the long-troubling problem of developing countries.[163] The Arbitration Panel in *EC–Bananas (22.6) (Ecuador)* indicates that TRIPS retaliation might involve a number of distinctive legal, practical and economic problems for the retaliating country.[164] Regarding LDCs, since they have until 1 July 2013 to implement the TRIPS Agreement (and until 2016 with respect to pharmaceutical patents), they do not yet have IPR-related obligations that can be suspended.[165] In a recent article, Andrew D. Mitchell and Constantine Salonidis argued that cross-retaliation could provide developing country Members with a powerful tool to induce compliance, as long as they are able to create and sustain a credible threat of retaliation.[166] LDCs individually are unlikely to create such threat even through cross-retaliation.

5 Critical Analysis of the Special and Differential Treatment Provisions of the Dispute Settlement Understanding

The DSU embodies S&DT provisions to facilitate the participation of developing countries and LDCs within the DSM. Amongst the 11 S&DT provisions,[167] only four[168] have been interpreted by the WTO Panel and AB. Apart from one LDC-specific provision, others are applicable to all developing countries including LDCs. Developing countries raised the issue of uncertainty concerning the manner in which the S&DT provisions in the DSU are interpreted and implemented. It was reported that even the prescriptive language of 'shall' and 'should' in Articles 4.10, 8.10, 12.11, 21.2, 21.7 and 21.8 of the DSU do not provide certainty of the practical implementation of special and preferential treatment to developing countries, as those provisions were

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[163] Hudec, 'The Adequacy of WTO Dispute Settlement Remedies', above n 131, 89.

[164] The Panel analysed the prospective perils of TRIPS retaliation at length: *European Communities—Regime for the Importation, Sale and Distribution of Bananas: Recourse by Ecuador to Article 21.5 of the DSU*, WTO Doc WT/DS27/RW/ECU (1999) [paras 130–65] (Decision of the Arbitrator). For more analysis on the merits and limits of 'cross-retaliation' as a mechanism to induce compliance in WTO dispute settlement from the perspective of developing countries, see Spadano, above n 140.

[165] Spadano, above n 140, 541.

[166] Andrew D Mitchell and Constantine Salonidis, 'David's Sling: Cross-Agreement Retaliation in International Trade Disputes' (2011) 45(2) *Journal of World Trade* 457, 460, 488.

[167] *DSU* arts 3.12, 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8, 24.1, 24.2, 27.2.

[168] *DSU* arts 12.10, 12.11, 21.2, 24.1.

considered hortatory only.[169] In most cases, developing countries cannot benefit from these provisions because of their vagueness.[170]

5.1 Alternative Procedure for Developing Countries under Article 3.12

Under Article 3.12 of the DSU, the complainant developing country is allowed to invoke the alternative dispute settlement procedures specifically designed for them in the *1966 Procedures*,[171] in case it brings the complaint against a developed country. These are alternative provisions to four DSU provisions contained in Article 4 (Consultations); Article 5 (Good Offices, Conciliation and Mediation); Article 6 (Establishment of Panels); and Article 12 (Panel Procedures). The alternative procedures of the 1966 Procedure is given priority over the regular DSU provisions if any conflict arises between them.[172] However, a simple comparison between these two sets of principles reveals that they afford similar treatment, which explains why these provisions have never been invoked.[173]

For example, the provisions of consultations in Article 4 and good offices, conciliation and mediation in Article 5 are virtually similar to those of the 1966 Procedure. The 1966 Procedure confers a right to a developing country to invoke the good offices of the Director-General 'if consultation between a less-developed contracting party and a developed contracting party in regard to any matter falling under paragraph 1 of Article XXIII do not lead to a satisfactory settlement'.[174] Article 5 of the DSU permits any

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[169] WTO CTD, *Concerns Regarding Special and Differential Treatment Provisions in WTO Agreement and Decisions*, WTO Doc WT/COMTD/W/66 (16 February 2000) (Note by the Secretariat), 31.

[170] Amin Alavi, 'On the (Non-) Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process' (2007) 41(2) *Journal of World Trade* 319.

[171] *Decision of 5 April 1966 on Procedures under Article XXIII*, GATT BISD, 14th Supp, 18 <http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a2s1p1_e.htm> at 31 July 2011 (hereinafter *1966 Procedure*).

[172] The last line of Article 3.12 states that 'to the extent there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail'.

[173] Mary E Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement' (2001) 35(1) *Journal of World Trade* 55, 63.

[174] *1966 Procedure* para 1.

WTO Member, not just the developing country Members, to request the Director-General, acting in an *ex officio* capacity, to assist with good offices, conciliation or mediation of a dispute. Hence, it no longer remains a special procedural S&DT provision for LDCs.

5.2 Consultations under Article 4 and 12

Even if developing country Members do not opt for the alternative provisions referred to in Article 3.12 of the DSU, the DSU provides for several S&DT provisions for developing countries. One of them is Article 4.10, which states:

> During consultations Members should give special attention to the particular problems and interests of developing country Members.

However, the Article does not illustrate what 'special attention' should be given and more importantly, the use of the term 'should' makes this provision only a best endeavour one. Chile alleged violation of this provision in a DSB meeting, at which its joint request with Peru for a panel in the matter of *EC–Scallops*[175] was considered. Chile complained that 'its request for consultations with another Member (developed) had been disregarded, thus discriminating against and impairing its interests in deviation from the provisions of Article 4.10 of the DSU'.[176]

Two proposals forwarded by the LDC Group,[177] in order to make this provision LDC-specific, recommended adding the words 'especially those of least developed country

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[175] *European Communities-Trade Description of Scallops: Request by Canada* WTO Doc WT/DS7 (1996) (Report by the Panel); *European Communities—Trade Description of Scallops: Request by Peru and Chile*, WTO Docs WT/DS12, WT/DS14 (1996) (Report of the Panel). The request by Chile to be joined in consultations, requested by Canada with the European Communities, is contained in WTO Document WT/DS7/2, cited in Footer, Developing Country Practice, above n 173, 65.

[176] *Minutes of Meeting of the DSB*, WTO Doc WT/DSB/M/7 (27 October 1995), cited in *Concerns Regarding Special and Differential Treatment Provisions in WTO Agreement and Decisions*, WTO Doc WT/COMTD/W/66, 32.

[177] WTO Dispute Settlement Body Special Session, *Negotiations on the Dispute Settlement Understanding*, WTO Doc TN/DS/W/17 (9 October 2002) (Proposal by the LDC Group); WTO Dispute Settlement Body Special Session, *Text for LDC Proposal on Dispute Settlement Understanding Negotiations*, WTO Doc TN/DS/W/37 (22 January 2003) (Communication from Haiti).

Members' in Article 4.10.[178] In view of the human resource constraints of LDCs in representing them in Geneva, the LDC proposals asked for a consideration of holding consultations with LDCs in the capitals of LDCs.

Another S&DT provision for consultation is Article 12.10 of the DSU, which permits the consultation period to be extended beyond the regular timeframe provided in Article 4.7[179] and Article 4.8 of the DSU,[180] when allegation is against a measure taken by a developing country Member.[181] However, the term 'the parties may agree to extend the periods' imply that this provision does not allow a developing country to ask for an extension of consultation period as of right in case the other parties object to it. In *Pakistan–Patent Protection*,[182] Pakistan challenged the request by the US for the establishment of a panel, on the ground that parties were still engaged in consultation process.[183] In raising the issue of developing countries' difficulties in consultation process, the representative of Pakistan referred to Article 12.10. He contended that:

> the process raised a number of questions in relation to the DSU such as (i) the real difficulties faced by developing countries on the insistence by a developed country that consultations be held only in Geneva; (ii) the meaning and significance of the consultations stage; (iii) whether a Member could decide unilaterally that consultations had been concluded in particular since Article 12.10 of the DSU provided that '[i]n the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the period established in paragraphs 7 and 8 of Article 4'.[184]

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[178] *Negotiations on the Dispute Settlement Understanding*, WTO Doc TN/DS/W/17, para 3; *Text for LDC Proposal on Dispute Settlement Understanding Negotiations*, WTO Doc TN/DS/W/37, para 1.

[179] Article 4.7 provides that 'if the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request for the establishment of a panel'.

[180] Article 4.8 provides that in case of emergency, including those concern perishable goods, a party may request the establishment of a panel after the completion of 20 days of the date of receipt of the request for consultation.

[181] First line of Article 12.10 of the DSU.

[182] The dispute was settled by mutual agreement between the parties: *Pakistan—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc WT/DS36 (1997) (Notification of a Mutually-Agreed Solution).

[183] *Minutes of the Meeting of the DSB*, 15 and 16 July 1996, WTO DocWT.DSB/M/21 (5 August 1996).

[184] Ibid 4; *Text for LDC Proposal on Dispute Settlement Understanding Negotiations*, WTO Doc TN/DS/W/37, 32.

Finally, the US acquiesced in Pakistan's protest and the matter was deferred to the next DSB meeting. However, the statement could not prevent the consultation from taking place in Geneva.[185]

5.3 Composition of the Panel under Article 8.10 of the DSU

Under Article 8.10, the panel is obliged to include at least one panellist from a developing country Member if the dispute is between a developing country Member and a developed-country Member and if that developing country Member makes any such request.

LDCs proposals, as mentioned above, suggested a modification of Article 8.10 by inserting Article 8.10b:

> When a dispute is between a least developed country Member and a developing or developed country, the panel shall include at least one panellist from a least developed country Member and if the least developed country Member so requests, there shall be a second panellist from a least developed country Member.[186]

5.4 Procedure of the Panel under Article 12.10 of the DSU

Article 12.10 stipulates a mandate for the panel in a vague fashion: 'in examining a complaint against a developing country Member, the panel *shall* accord *sufficient time* for the developing country Member to prepare and present its argumentation'.[187] By using the mandatory expression 'shall', this provision arouses the expectation in developing countries that they are entitled to have sufficient time for submitting their written statement. This is not a privilege accorded to developing countries since 12.4 requires the panel, in determining the timetable for the panel process, to provide sufficient

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[185] Footer, Developing Country Practice, above n 173, 67.

[186] *Negotiations on the Dispute Settlement Understanding*, WTO Doc TN/DS/W/17, para 4; *Text for LDC Proposal on Dispute Settlement Understanding Negotiations*, WTO Doc TN/DS/W/37, para III.

[187] Third sentence of Article 12.10 of the DSU (emphasis added).

time for the parties to the dispute (this includes developed country parties to the dispute) to prepare their submissions.

Another drawback of Article 12.10 is that it applies only when a developing country party is a respondent, depriving the third-party developing country or LDCs from asking for enough time to prepare their submissions when their important stakes are involved in the dispute but they have no scope to participate as respondents. This was the case with the ACP third parties[188] in *EC–Bananas,* where they stated that they were given inadequate time to prepare and present their arguments and submissions. They maintained that this was in breach of Articles 12.2 and 12.4 of the DSU. Article 12.2 requires panel procedures to provide sufficient flexibility to ensure high quality reports. Article 12.4 requires the panel to provide sufficient time for the parties to prepare their submissions. Moreover, they claimed that it was in breach of Article 12.10, which specifically provides that, when examining a complaint against a developing country, a panel must accord sufficient time for the developing country Member to prepare and present its argumentation.[189] The Panel in *EC-Bananas* did not address this issue because of the clear provision of Article 12.10 to the effect that the provision is applicable when the developing country is respondent.[190] Though this provision of Article 12.10 was wrongly invoked by the ACP third parties in this case, it reveals the disadvantage of third-party LDCs when they are affected by the matter in the dispute but cannot join in any way other than as a third party.

In *India—Quantitative Restrictions*,[191] the Panel granted India an extra 10 days' time to submit its first written submission in response to the request by India of an additional three weeks' time. The Panel granted this extra-time on the basis of Article 12.10 of the

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[188] Belize, Cameroon, Côte d'Ivoire, Dominica, the Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Senegal, and Suriname (the 'ACP third parties'): *European Communities—Regime for the Importation, Sale and Distribution of Bananas,* WTO Docs WT/DS27/R/ECU, WT/DS27/GTM, WT/DS27/R/HND, WT/DS27/MEX, WT/DS27/USA, para 5.1.

[189] Ibid para 5.17.

[190] The Panel in the *EC–Bananas* referred to Article 10 and Appendix 3 as the provisions dealing with the right of the third parties, ibid para 7.5.

[191] *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products,* WTO Doc WT/DS90/R) (1999) (Report of the Panel).

DSU and particularly acknowledged the administrative reorganisation resulting from the change of Government in India.[192]

Again, Panels in both *EC–Bananas, Article 21.5 II (Ecuador)*[193] and *Turkey-Rice*[194] noted that they took into account the interests of developing country Members. However, by referring to Article 12.10 and 12.11 of the DSU, the Panels found that these S&DT provisions were neither applicable to this case nor even raised by the developing countries concerned.[195]

Hence, it appears that in each of the cases, sufficient time was allowed based on the facts and circumstances of the case.

5.5 Procedure of the Panel under Article 12.11

A significant S&DT provision embodied in Article 12.11 reads:

> Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken account of relevant provisions on differential and more favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

This Article contains several features:

(a) A developing country must raise the S&DT provision in a dispute.[196]

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[192] Ibid para 5.10.

[193] *European Communities—Regime for the Importation, Sale and Distribution of Bananas: Second Recourse to Article 21.5 of the DSU by Ecuador*, WTO Doc WT/DS27/RW2/ECU.

[194] *Turkey—Measures Affecting the Importation of Rice,* WTO Doc WT/DS334/R (2007) (Report of the Panel).

[195] Ibid paras 7.302–7.305; *European Communities—Regime for the Importation, Sale and Distribution of Bananas:* Second Recourse to Article 21.5 of the DSU by Ecuador, WTO Doc WT/DS27/RW2/ECU (2008), paras 2.74–2.76, 7.505.

[196] However, the phrase 'which have been raised by the developing country Member' can be read as qualifying either 'the relevant provision on special and differential treatment' or the 'agreement', which are the subject-matter of the dispute.

(b) The provision must be raised in the course of the dispute settlement procedures. The Article does not specify what this 'course of dispute settlement' particularly refers to, i.e., whether the S&DT provision has to be invoked when the written submissions have to be made or whether it is enough if included in the request for consultations but subsequently not included in the 'terms of reference'. In *US-Offset Act (Byrd Amendment)*,[197] India and Indonesia in their consultations invoked Article 15 of the Anti-dumping Agreement, which is a S&DT provision, but this Article was not included in the Panel's terms of reference. The question was whether the panel should address this provision or not. The Panel found that since the provision was not included in the request for the establishment of Panel, it did not fall within its terms of reference, but since this S&DT provision had been invoked during the proceedings, they would nevertheless address the issue.[198]

(c) The provision invoked must be relevant to the dispute.[199]

(d) The Article requires the panel only to 'explicitly indicate' how they have taken account of the S&DT provision.

In several cases, such as *EC–Bananas, Article 21.5II (Ecuador), Turkey-Rice*, the reports of the Panel contained a separate paragraph on 'special and differential treatment' where the reports indicate that they have taken into account the complainant's/respondent's status as a developing country. The reports considered the S&DT provision even when the complainant/respondent developing country Members did not 'raise any specific provisions on differential and more favourable treatment for developing country Members that would require additional consideration' and also when the panels do not find that these specialised provisions are relevant for the resolution of the specific matter brought before the Panels.[200] Rather detailed analysis of S&DT provision was undertaken in *India-Quantitative Restrictions*,[201] where the Panel report notes:

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[197] *United States—Continued Dumping and Subsidy Offset Act of 2000*, WTO Docs WT/DS217/R, WT/DS234/R (2002) (Report of the Panel).

[198] Ibid paras 7.87–7.89.

[199] Alavi, On the (Non-) Effectiveness, above n 170, 323.

[200] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Second Recourse to Article 21.5 of the DSU by Ecuador, WTO Doc WT/DS27/RW2/ECU (2008) para 2.75; *Turkey—Measures Affecting the Importation of Rice, Report of the Panel*, WT/DS334/R, 21 September 2007, para 7.304.

> Article 12.11 of the DSU requires us to indicate explicitly the form in which account was taken of relevant provisions on special and differential treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures. In this instance, we have noted that Article XVIII:B as a whole, on which our analysis throughout this section is based, embodies the principle of special and differential treatment in relation to measures taken for balance-of-payments purposes.[202]

The requirement of the panel and the AB to indicate how S&D provisions have been taken into account is not limited only to the S&DT provisions of the DSU, but also to the S&D provisions of all WTO agreements.[203]

LDCs proposed that Article 12.11 should be modified to address not only developing countries as a whole but to specifically bear in mind their concerns by inserting the words '*and least developed country Members'* after the phrase 'developing-country Members'. They also drew attention to the fact that the current requirement in Article 12.11 that the developing country Member ('or least developed country Member') needs to highlight any provisions on differential and more favourable treatment in the course of the dispute settlement procedures places an unnecessary additional legal burden on them and falls afoul of the well-settled legal principle *jura novit curia* (that the judge or the court is supposed to know the law). The panel or AB Division presiding over a dispute is vested with the authority to invoke all applicable legal principles. Consequently, LDCs recommended that the phrase 'which have been raised by the developing country Member in the course of the dispute settlement proceedings' should be deleted from Article 12.11.[204]

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[201] *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products,* WTO Doc WT/DS90/R (1999), above n 187.

[202] Ibid para 5.157.

[203] A detail account of how S&DT provisions of other WTO Agreements have been interpreted and implemented by the panel and the AB, has been made in Alavi, On the (Non-) Effectiveness, above n 170; Footer, Developing Country Practice, above n 173.

[204] *Negotiations on the Dispute Settlement Understanding*, WTO Doc TN/DS/W/17, paras 7–8; *Text for LDC Proposal on Dispute Settlement Understanding Negotiations*, WTO Doc TN/DS/W/37, para IV.

5.6 Implementation of Recommendation and Rulings under Article 21.2, 21.7 and 21.8 of the DSU

Article 21.2 reads:

> Particular attention should be paid to matters affecting the interest of developing country Members with respect to measures which have been subject to dispute settlement.

Article 21.7 provides:

> If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

Article 21.8 provides:

> If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

LDCs proposed to insert the words 'and least developed country Members' after the phrase 'developing country Members' in Article 21.2. Several points deserve to be mentioned here.

First, Article 21.2 does not specify what 'particular attention' has to be paid or in which occasion the provision can be invoked. However, the placement of this provision in Article 21, which is entitled 'Surveillance of Implementation of Recommendations and Rulings', indicates that the provision applies to determine the 'reasonable period of implementation'. The WTO Arbitration cases in which Article 21.2 has been invoked also confirm this. Article 21.2 can be regarded as an addendum to Article 21.3 that also indicates the criteria to determine reasonable period. Article 21.2 supplies an additional factor for ascertaining the reasonable period. From analysing the WTO cases, it appears that 'particular attention' implies determining a shorter or longer implementation period.[205]

[205] If the developing country that invokes this provision is complainant, then 'particular attention' is asked to be paid by fixing a shorter period of implementation. This will enable the complainant developing country to obtain the findings of the panel or the AB to be implemented within the shortest period. Conversely, if the developing country that invokes this provision happens to be the respondent, then

Second, the provision is not clear as to the developing country Members to whom particular attention has to be paid. In *Indonesia–Autos 21.3(c)*[206] it was established that this provision could affect the determination of the reasonable period where the *implementing* Member was a developing country.[207] It was held in *EC–Chicken Classification (21.3(c)*,[208] that Article 21.2 could affect the reasonable period where the complainant was a developing country.[209] In *EC–Sugar Subsidies (21.3(c)*,[210] the Arbitrator had occasion to decide whether this provision applies to the ACP third parties but Arbitrator refused to make any decision as to whether Article 21.2 is also applicable to developing country Members that are *not* parties to the arbitration proceedings under Article 21.3(c). The ground for such refusal, as Arbitrator stated, was absence of sufficient evidence before it.[211]

Third, the absence of clear language made it possible for the Arbitrator to give a narrow interpretation of this provision and to refuse remedy in a genuine case. In *US–Gambling Services (21.3(c)*,[212] the Arbitrator refused to apply Article 21.2 as requested by Antigua because it found that Antigua could not satisfy the criteria referred to in Article 21.2. The Arbitrator stated that 'Article 21.2 contemplates a clear nexus between the interests

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paying particular attention means fixing a longer time-period for implementation of the rulings. This enables the developing country Member more flexibility to implement the findings against it. However, difficulties arise when both parties are developing Members.

[206] *Indonesia—Certain Measures Affecting the Automobile Industry, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Docs WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12 (1998) (Award of the Arbitrator).

[207] Ibid para 24.

[208] *European Communities—Customs Classification of Frozen Boneless Chicken Cuts, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes,* WTO Docs WT/DS269/13, WT/DS286/15, ARB-2005-4/21 (2006) (Award of the Arbitrator).

[209] In *EC–Chicken Classification 21.3(c)*, the Arbitrator summarised the WTO jurisprudence in this regard in Paragraph 82.

[210] *European Communities—Export Subsidies on Sugar, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Dispute*, WTO Docs WT/DS265/33, WT/DS266/33, WT/DS283/14, ARB-2005-3/20 (2005) (Award of the Arbitrator).

[211] Ibid paras 98–104.

[212] *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS285/13, ARB-2005-2/19 (2005) (Award of the Arbitrator).

of the developing country invoking the provision and the measures at issue in the dispute, as well as a demonstration of the adverse affects [sic] of such measures on the interests of the developing country Member(s) concerned'.[213] It was pointed out that Antigua did not provide any more specific evidence or elaboration of its affected interests and the relationship of those interests with the measures at issue.[214] It is interesting that Article 21.2 does not provide any criteria; rather the Arbitrator formulated those criteria by his own explanation of the Article.

5.7 Special Procedure for Least Developed Country Members under Article 24

Article 24 exclusively addresses the interest of LDCs, although other S&DT provisions for developing countries will equally be applicable to them. This Article is divided into two clauses. The first clause gives overall emphasis on treating LDCs differently and more favourably and discourages other countries to bring complaints against LDCs. Ironically, it does not seem to give equal importance to the possibility that LDC could also bring claim against other countries. Clause one embodies a bundle of provisions. The first sentence states:

> At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least developed country Member, particular consideration shall be given to the special situation of least developed country Members.[215]

This sentence imparts a mandatory obligation on the addressee. However, it has not been specified whose obligation it is to give special consideration to LDCs. Apparently, it might address the DSB, panel, AB, Arbitrator in implementation proceedings, Director-General, in cases he or she acts in his or her good offices. However, it might also include the complainant or the respondent, or both parties, in cases in which LDC is a third party in the dispute. This thesis argues that the wording of this sentence is not confined to LDC as a complainant or respondent in the dispute. The phrase 'involving a least developed country Member' could very well be applicable to LDCs involving in

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[213] Ibid paras 56–60.

[214] Ibid paras 62–3.

[215] *DSU* art 24.1.

the dispute as a third party, whose interest is directly affected by the subject matter of the dispute and hence, their 'special situation' has to be taken into consideration. A similar observation is made in *US–Cotton Subsidies*, in which the Panel states that this provision seems primarily to address a situation in which a least developed country Member would be the Member complained against in a particular WTO dispute settlement proceeding. However, 'the first sentence of the provision is sufficiently generally worded to encompass the situation where least developed country Members are involved as third parties in a Panel proceeding'.[216] The words 'determination of the causes of a dispute' give this sentence a narrow implication as it ignores another aspect, which is the 'impact of the dispute'.

The next three sentences of Article 24.1 urge other countries to be considerate in bringing complaint against LDCs. The second sentence reads: 'In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least developed country Member'. Here, other Members are not prohibited from suing LDCs, but they are strongly discouraged to do so. Similarly, the third sentence obliges complaining parties to exercise due restraint in asking for compensation from or suspending concession to respondent LDCs.[217]

Article 24.2 is nothing but a repetition of already existing rights of developing countries under the 1966 Procedure. In fact, this right to invoke good offices, conciliation and mediation by the Director-General is not even an exclusive right of developing countries; it is a general procedural right of all WTO Members. Article 24.2 reads:

> In dispute settlement cases involving a least developed country member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

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[216] *United States—Subsidies on Upland Cotton*, WTO Doc WT/DS267/R (Report of the Panel) para 7.1410.

[217] *DSU* art 24.1.

This special provision for LDCs does not address a single difficulty that LDCs face in resorting to the DSM of the WTO.

5.8 Provision for Legal Aid to Developing Countries under Article 27.2

Article 27.2 recognises the need for providing 'additional legal advice and assistance in relation to dispute settlement to developing country Members'. As per this Article, this responsibility imposed on the WTO Secretariat is in addition to its usual activity of assisting Members in relation to dispute settlement at their request. In order to provide this additional legal advice and assistance, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member that so requests. In doing so, the Secretariat shall ensure its impartiality.[218] The scope of this provision has been made limited by restricting the obligation of legal assistance only 'in respect of dispute settlement'. Hence, a developing country can request this service only after it has submitted a dispute to the WTO. This limitation deprives developing countries from pleading for assistance at an earlier stage wherein they can weigh up certain *prima facie* inconsistent measures by other Members and ascertain the feasibility of making a formal complaint. This provision seems to have been designed only to provide legal assistance to the respondent developing countries.[219]

The next section argues that the S&DT provisions in the DSU need to be interpreted according to the WTO objective of sustainable development.

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[218] Ibid art 27.2.

[219] Henrick Horn and Petros Mavroidis, 'Remedies in the WTO Dispute Settlement System and Developing Country Interest' (Paper for the World Bank, 11 April 1999) 28.

6 The Concept of Sustainable Development in Treaty Interpretation: Could it Work for LDCs As Well?

Since the incorporation of the concept of sustainable development in the WTO Preamble in 1994, it has only been in *US–Shrimp/Turtle* cases that the DSB has actively engaged the concept in its treaty interpretation. However, it has been explored in Chapter Two, Section 4 that the WTO DSB has found linkage between market access and the constituent principles of sustainable development. For instance, the AB in *US-Shrimp/Turtle* upholds the principle of integration,[220] the Panel in *US-Shrimp, Article 21.5* refers to the principle of intergenerational equity,[221] the AB in *EC-Hormones*[222] refers to the precautionary principle. As mentioned in the previous section, the WTO DSB, on several occasions, dealt with the S&DT principle, which is a modified form of the CBDR principle in the WTO.

This section poses a few questions: Is the concept of sustainable development confined to the issue of the protection of environment and the optimal use of natural resources? Can the concept be used only in relation to Article XX of the GATT 1994? Can it also be applied to give a pro-poor interpretation of the WTO provisions? Can the concept be applied to address LDCs' concerns, such as their plight due to developed countries' subsidies and trade barriers for environmental and health-related concerns? Do the rules of treaty interpretation provide any latitude for LDCs to argue on the basis of the concept of sustainable development, which could sufficiently inform other substantive provisions of the WTO agreements? Since LDCs have not yet filed any case in the WTO nor they have been sued by other Members, this section makes a hypothetical examination of the potential to engage the concept of sustainable development in LDCs' favour.

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[220] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, footnote 107 (Report of the Appellate Body).

[221] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia,* WTO Doc WT.DS58.RW (2001), footnote 202.

[222] *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1998) (Report of the Appellate Body), para 124.

6.1 The Concept of Sustainable Development in *US—Shrimp-Turtle* Cases

This sub-section discusses how the concept of sustainable development has been interpreted.

6.1.1 In Criticising the Panel to Ignore Environmental Objectives of the WTO

In *US–Shrimp/Turtle,* the AB underpins the importance of environmental measures as fundamental to the application of Article XX.[223] In highlighting the significance of environmental purpose, the AB refers to the Preamble of the *WTO Agreement*, which acknowledges that 'the rules of trade should be 'in accordance with the objective of sustainable development', and should seek to 'protect and preserve the environment'.[224] The AB is critical of the approach taken by the Panel, which condones environmental significance of the measure taken by the US. In deciding that the US action is not justified under Article XX of the GATT 1994, the Panel enquires into whether the measure adopted by the US amounted to a 'threat to the multilateral trading system'. Here, the Panel states that 'even though the situation of turtles is a serious one, we consider that the US adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system'.[225]

The AB also criticises the Panel for taking a one-sided view of the object and purpose of the *WTO Agreement* and for its failure to recognise that the *WTO Agreement* has 'a variety of different, and possibly conflicting, objects and purposes'.[226] In the words of the AB:

> While the first clause of the Preamble to the *WTO Agreement* calls for the expansion of trade in goods and services, this same clause also recognises that international trade and economic relations under the *WTO Agreement* should allow for 'optimal use of the world's

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[223] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R para 12.

[224] Ibid.

[225] *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Doc WT/DS58/R para 7.61.

[226] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, para 17.

resources in accordance with the objective of sustainable development', and should seek 'to protect and preserve the environment'.[227]

To take a very critical view of this approach of the AB, this interpretation might, arguably, lead one to conclude that the AB refers to sustainable development to establish the right of a Member to impose unilateral trade-restrictive measure against another Member and thus, to curtail market access for the latter with the objective of protecting and conserving the global environment. However, as this sub-section discusses, this confusion is rebutted by the requirements of the Chapeau of Article XX that the trade-restrictive measure with legitimate environmental purposes must not be applied in a manner as to constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

6.1.2 In Interpreting Article XX (g)

The main question before the AB here is whether 'living' natural resources, such as turtles in this case, can also be 'exhaustible' to be covered within Article XX(g).[228] The AB rebuts the argument of the respondents (here India, Pakistan and Thailand) that 'living' natural resources are not 'exhaustible' to be covered within Article XX(g) by referring to the drafting history of Article XX(g).[229] The AB maintains that though the words 'exhaustible natural resources' was drafted some 50 years back, they must be read by a treaty interpreter 'in the light of contemporary concerns of this community of nations about the protection and conservation of the environment'.[230] In highlighting the contemporary development of the terms 'exhaustible natural resources' the AB accentuates 'the objective of sustainable development' in the Preamble of the *WTO Agreement*. The imperative of the 'optimal use of the world's resources in accordance with the objective of sustainable development'[231] modifies Article XX, particularly

[227] Ibid (emphasis in the original text).

[228] Ibid para 128.

[229] Ibid para 127.

[230] Ibid para 129.

[231] *WTO Agreement*, Preamble.

Clause g. It reflects, in the opinion of the AB, the full awareness among the signatories to the *WTO Agreement* in 1994 of the 'importance and legitimacy of environmental protection as a goal of national and international policy'.[232]

6.1.3 In Interpreting the Chapeau of Article XX

The AB again refers to the preambular objective of sustainable development to interpret the Chapeau of Article XX[233] in order to determine whether the US measure at issue qualifies for justification under Article XX.[234] In its interpretation of the Chapeau of Article XX, the AB notes, once again, that the language of the Preamble 'demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development'.[235] The AB notes that this specific language of the Preamble to the *WTO Agreement* adds 'colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular'.[236] The AB, according to Article 31 of the *Vienna Convention on the Law of Treaties*,[237] interprets 'the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose'.[238] As part of the context of the chapeau, the AB takes into account the specific language of the Preamble of the *WTO Agreement*.[239] This context leads the

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[232] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, para 129.

[233] The Chapeau of Article XX of he GATT 1994 states: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures.

[234] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R para 155.

[235] Ibid para 152.

[236] Ibid 153, 155 (emphasis in the original text).

[237] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). Article 31 of the Convention provides that a treaty shall be interpreted in accordance with the ordinary meaning of its terms, in their context and in light of the object and purpose of the treaty.

[238] *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (1998), para 155.

[239] Ibid.

AB consider that through the Chapeau of Article XX, the WTO Members express the need to maintain a balance between the right of a Member to invoke an exception under Article XX and the substantive rights of the other Members under the GATT 1994.[240] The AB recognises the importance of maintaining this line of equilibrium so that neither of these rights cancels out the other.[241] The Panel in *US–Shrimp/Turtle, Article 21.5* also mentions that while interpreting the terms of the Chapeau, it has to be kept in mind that sustainable development is one of the objectives of the *WTO Agreement*.[242]

6.2 Interpretation of Sustainable Development for LDCs: A Hypothetical Examination

The mandate of treaty interpretation comes from Article 3.2 of the DSU, which requires panels and the AB to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law.[243] The rules of treaty interpretation enshrined in Article 31 and 32 of the *Vienna Convention on the Law of Treaties* attained the status of customary or general international law from the very beginning of the journey of the WTO DSB.[244] Article 31 of the *Vienna Convention* provides that a treaty shall be interpreted in accordance with the ordinary meaning of its terms, in their context and in light of the object and purpose of the treaty. Article 32 deals with supplemental means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. Both articles, reflecting the

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[240] Ibid para 156.

[241] Ibid para 159.

[242] *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW, para 5.54.

[243] *DSU* art 3.2.

[244] The AB clearly states in its first report in *US–Gasoline* that Article 31 of the Convention 'has attained the status of a rule of customary or general international law': *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (1996) (Report of the AB), para III.B; In *Japan—Alcoholic Beverages II*, the AB affirms the same status for Article 32 of the Convention: *Japan—Taxes on Alcoholic Beverages*, WTO Docs WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, AB-1996-2 (1996) (Report of the Appellate Body).

principles of effective treaty interpretation, have become an essential part of the WTO law.[245]

This section examines whether the objective of sustainable development in the Preamble of the *WTO Agreement* is linked to 'the optimal use of the world's resources' or if it can be regarded as the objective of the WTO itself. For this inquiry, the section relies on the 'evolutionary approach' to treaty interpretation, which the ICJ used in several cases.[246] The AB in *US–Shrimp/Turtle* applied the 'evolutionary approach' to treaty interpretation in deciding that the terms 'exhaustible natural resources' in GATT Article XX(g) includes both living and non-living resources.[247]

This chapter argues that 'sustainable development' in the Preamble of the WTO is also an evolutionary concept. Though in the Preamble of the *WTO Agreement* the term 'sustainable development' is associated with the 'optimal use of the world's resources', the subsequent WTO instruments, such as the *1996 Singapore Ministerial Declaration*,[248] *1998 Geneva Ministerial Declaration*,[249] and the *2001 Doha Ministerial Declaration*[250] do not use the term 'sustainable development' in relation to the optimal

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[245] David Palmeter and Petros C Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (2nd ed, 2004) 80.

[246] *Namibia (Legal Consequences) Advisory Opinion,* ICJ Reports 1971, 31:

> The concepts embodied in Article 22 of the Covenant … were not static, but were by definition evolutionary … The parties to the Covenant must consequently be deemed to have accepted them as such.

See also the *Aegean Sea Continental Shelf Case,* ICJ Reports 1978, 3; the more recent *La Bretagne* Arbitration Decision, 90 RGDIP 716, at para. 49 (1986); the *Guinea-Bissau/Senegal Maritime Boundary Arbitration,* Award of 31 July 1989, 83 ILR 1 (1990) para 85; the ICJ, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997, cited in Joost Pauwelyn, 'The Nature of WTO Obligations' (Jean Monnet Working Paper, New York University School of Law, New York, 1 February 2002) footnote 92.

[247] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R paras 128–30. Arthur E Appleton criticised the AB for adopting an 'evolutionary approach' as being unnecessary and creating interpretative problems: Arthur E Appleton, 'Shrimp/Turtle: Untangling the Nets' (1999) 2 *Journal of International Economic Law* 477, 481–2.

[248] Paragraph 16 of the *Singapore Ministerial Declaration* states: 'Full implementation of the WTO Agreements will make an important contribution to achieving the objectives of sustainable development'.

[249] Paragraph 4 of the *Geneva Ministerial Declaration* states: 'We shall also continue to improve our efforts towards the objectives of sustained economic growth and sustainable development'.

[250] Paragraph 6 of the *Doha Ministerial Declaration* states: 'We strongly reaffirm our commitment to the objective of sustainable development'.

use of natural resources. WTO Members unequivocally reaffirm their commitment to the objective of sustainable development in these instruments. This is also supported by the practice of the WTO, as Pascal Lamy, the Director-General of the WTO, announced sustainable development to be the end-goal of the WTO in public speeches.[251] This practice is also evident in the range of topics covered under the banner of 'sustainable development' in WTO public forums and symposiums.[252] Hence, it can be argued that Article XX is not the only place where a claim can be made based on the objective of sustainable development. More importantly, the interpretation of the *US–Shrimp/Turtle* confirms that sustainable development in the Preamble of the *WTO Agreement* adds 'colour, texture and shading to the rights and obligations of WTO Members' not only under the GATT 1994 but also under the *WTO Agreement*.[253] Hence, sustainable development can be employed in interpreting all S&DT provisions in favour of LDCs, in particular the provisions of enhanced market access since they form part of the GATT 1994 and WTO agreements.

The ICJ upholds in *Pulp Mills on the River Uruguay*[254] that the essence of sustainable development is the balance between economic development and environmental protection.[255] However, Maureen Irish argued that there is no reason to conclude that 'the essence is synonymous with the totality and that all aspects must be present in order for sustainable development to influence interpretation'.[256] She argued that even if the question is not primarily an environmental one, the concept of sustainable development

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[251] Pascal Lamy, 'Trade Can be a Friend, and Not a Foe, of Conservation', (Paper presented at the WTO Symposium on Trade and Sustainable Development within the Framework of paragraph 51 of the Doha Ministerial Declaration, Geneva, 10–11 October 2005) <http://www.wto.org/english/news_e/sppl_e/sppl07_e.htm> at 31 July 2011.

[252] The WTO Public Forum 2007 under the banner of 'sustainable development' covers issues such as 'Restoring Morality to the Global Market' and 'An Agreement on Agriculture that Promotes Global Development': WTO, *2007 WTO Public Forum: "How Can WTO Help Harness Globalisation?"* (2008) 229–305.

[253] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R para 153.

[254] *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] <http://www.icj-cij.org/docket/files/135/15877.pdf> at 1 August.

[255] Ibid para 177.

[256] Maureen Irish, 'Special and Differential Treatment, Trade and Sustainable Development' (2011) 4(2) *The Law and Development Review* 71, 84.

can be applied in interpretation of many WTO provisions that promote economic and social development.[257]

This chapter explored whether there could be a pro-poor interpretation of the concept of sustainable development. Article 3.2 of the DSU specifically mentions the role of the WTO dispute settlement system to 'to preserve the rights and obligations of members under the covered agreements'. However, by referring to public international law, it leaves scope for referring to other rules of international law, which are clearly not within the WTO-covered agreements.[258] Two of these non-WTO instruments are the *Rio Declaration* and *Agenda 21*, which are employed in interpreting WTO instruments in *US–Shrimp/Turtle*.[259] As Chapter Two already mentions, Principle 5 of the *Rio Declaration* states that eradicating poverty is an indispensable requirement for sustainable development. On poverty implications of sustainable development, *Agenda 21* states:

> While managing resources sustainably, an environmental policy that focuses mainly on the conservation and protection of resources must take due account of those who depend on the resources for their livelihoods. Otherwise it could have an adverse impact both on poverty.[260]

Therefore, it can be argued that interpretation of the WTO provisions in favour of LDCs according to the objective of sustainable development can further be influenced from the articulation of the concept in the *Rio Declaration* and *Agenda 21*.

7 Conclusion

Chapter Seven addressed research question IV in examining whether LDCs can enforce their market access rights through the dispute settlement system of the WTO, regarded

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[257] Ibid.

[258] The AB in its interpretation of 'exhaustible natural resources' in the *US—Shrimp/Turtle* case refers to a number of instruments that are not covered by the WTO. These are *Our Common Future,* the *1982 UN Convention on the Law of the Sea* (UNCLOS), the *Convention on Biological Diversity*, *Agenda 21*, the *Resolution on Assistance to Developing Countries*, adopted in conjunction with the *Convention on the Conservation of Migratory Species of Wild Animals*.

[259] *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R para 154.

[260] *Agenda 21* art 3.2.

as the constitutional guarantor of the rights and duties of the WTO Members. This chapter considered that though there is immense significance attached to LDCs' participation in the DSM both for LDCs and for reconfirming the legitimacy of the WTO, their participation is very meagre. LDCs have participated only as a third party in a handful of cases. By examining the *US–Upland Cotton*, this chapter recognised that participation as a third party is inadequate for enforcing market access rights. Chapter Seven observed that the transition from the notorious power-based system of the GATT to the rule-based system of the WTO could not do away with the obstacles LDCs face in the pre-litigation, litigation and enforcement stages in terms of the costs and technical and legal capacity. Examination of S&DT provisions of the DSU revealed that most of them are not in an operational state. This chapter concluded that the concept of sustainable development as interpreted in *US–Shrimp/Turtle* is not confined to the application of Article XX of the GATT, but rather that the concept of sustainable development can be put into play in making a pro-poor argument in favour of LDCs. This chapter argues that the DSM of the WTO must ensure accessibility and availability for LDCs to enforce their market access and to rebuild their confidence in the system. This will ultimately integrate them in the WTO as an important stakeholder.

Chapter Eight:
Concluding Remarks

1 Interface between Market Access and Sustainable Development from LDC Perspectives

The main objective of this thesis was to examine the market access regime of LDCs and its inter-linkage with sustainable development. This thesis identified and demonstrated the fundamental legal and policy issues of LDCs' market access. It adopted, as its organising tenet, the principle of S&DT, which is an adapted form of the CBDR principle in the WTO. It argued that implementation of LDCs' market access agenda has a positive co-relation with their sustainable development.

The concept of sustainable development plays a centrifugal role in the world order as it has become clear that economic growth policies need to integrate environmental and social policies to achieve development in a sustained way. But for a sustainable development approach, the trajectory of economic development fails to circumvent the environmental and social costs attenuated thereto. This insight led to the adoption of the concept of sustainable development in the Preamble of the *WTO Agreement*, as a guiding objective in the utilisation of the world's resources.

The principle of integration, a constituent principle of sustainable development, brings forward its most challenging aspect of striking a balance among the three pillars: economic development, environmental protection and social development. The harmonisation becomes more difficult as the perceptions of developed and LDC Members are in juxtaposition to each other. Developed Members' emphasis on the environmental protection and social development pillars of sustainable development is reflected in their position of maintaining higher environmental and social standards through international trade. Conversely, LDCs highlight the economic development pillar of sustainable development and argue for market access for their exports as an important tool to alleviate poverty and achieve sustainable development (see Chapters One and Two). Although the concept of sustainable development is contested, its scope

and renewed emphasis on the interlinkages between trade and other social and environmental policies warrant an integrated approach. LDCs, as one of the major stakeholders in the process, need to be integrated into the global sustainable development initiative. The thesis examined some policy contradictions in the articulation of the sustainable development approach in which both developed countries and LDCs have their own emphasis.

LDCs are particularly apprehensive that developed countries' articulation of the concept of sustainable development for raising social and environmental standards amounts to market access barriers for them. Interestingly, this concern of LDCs has striking similarity with the concern of all GATT Members as revealed in several studies made under the GATT Secretariat. Hence, what used to be a common interest of all countries now remains that of developing countries and LDCs (see Chapter Two). Though observed in context of policy space for developing countries, Ha-Joon Chang quite appropriately depicts this dilemma:

> aren't the developed countries, under the guise of recommending 'good' policies and institutions, actually making it difficult for the developing countries to use policies and institutions which they themselves had used in order to develop economically in earlier times?[1]

These tensions have been encapsulated in *Agenda 21*, which suggests that the 'development process will not gather momentum … if barriers restrict access to markets and if commodity prices and the terms of trade of developing countries remain depressed' (para 2.2). LDCs' emphasis of the poverty dimension of sustainable development finds support in *Our Common Future*, which depicts poverty as a major threat to future in the sense of its damaging activities on environment and notes that the protectionism of developed countries, disadvantageous terms of technology transfer and declining financial flows are responsible for hampering poverty reduction efforts.[2] In *EC–Tariff Preferences*, the AB noted the importance of enhanced market access in

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[1] Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (2003) 3.

[2] World Commission on Environment and Development, *Our Common Future* (Australian ed 1987) 17, 73, 113.

providing developing countries and LDCs with increasing outcome of growing exports, which are crucial for their economic development.[3]

The report of the International Conference on Financing for Development (the Monterrey Consensus) regards international trade as an engine for development.[4] Similarly, the *Doha Ministerial Declaration* is also optimistic about the role of international trade in the promotion of economic development and the alleviation of poverty (para 2). However, this thesis argued that on several occasions, international trade with its unfair rules distempers the protectionism of developed countries. Inadequate and unenforceable S&DT provisions for LDCs turn the lofty preambular promises an empty shell (see Chapters Four, Five, Six and Seven). Hence, the thesis concluded that promoting sustainable development of LDCs through international trade is conceivable when improved market access for exports from LDCs can be assured and rules of international trade can dismantle the trade protectionism of developed countries.

This thesis underscores the standpoint of LDCs, the most disadvantaged segment of developing countries. The LDC designation implies more favourable treatment in commensurate with their more vulnerable situation (see Chapters One and Three). The thesis demonstrates that this distinct group of countries have moulded their stance in the WTO in urging for DFQF market access, waiver for exemption from tariff reduction commitments, trade-related capacity building, and technical and financial assistance to address their deficiencies in availing market access opportunities.

Against this background, this chapter illustrates the vital issues related to LDCs' market access, drawing upon the observations and arguments made in each chapter of the thesis. It also presents some recommendations on the specific market access issues of LDCs, which would contribute to the legal and policy reform in international trading order.

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[3] *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R, AB-2004-1 (2004) [para 106] (Report of the Appellate Body).

[4] UN, *Final Outcome of the International Conference on Financing for Development: The Monterrey Consensus*, UN Doc A/CONF.198/3 (1 March 2002) para 4.

2 Market Access Issues of Particular Concerns of LDCs: Recommendations

2.1 DFQF Market Access for LDCs

Prior to the UN LDC-IV, LDCs called for an 'early harvest' of LDC-specific issues in the Doha Round, including DFQF market access (*2010 Dhaka International Dialogue on UN LDC-IV*, paras 8–11). However, IPOA,[5] adopted in the UN LDC-IV, responded by urging for a 'timely implementation of duty-free quota-free market access, on a lasting basis, for all least developed countries' (IPOA, para 63(c)). However, this falls short of the demand of LDCs for a binding commitment on DFQF market access on a 'secure, long-term and predictable basis'.

This is still uncertain whether DFQF provisions of the final text of the Doha Round would be binding. Some commentators argued that the *2005 Hong Kong Ministerial Declaration* provides for a binding and enforceable DFQF (by referring to the word 'shall'). If the language of Annex F to the *Hong Kong Ministerial Declaration* is retained in the final text, it would amount to a binding provision. However, the practice of developed Members hints at the opposite (see Chapter Three). For instance, the EBA of the EU, which provides DFQF treatment to LDCs, is a part of the EU GSP programme and is designed on the basic tenet of non-bindingness of GSP. Hence, a binding and enforceable DFQF requires WTO Members to adopt or amend their DFQF programmes.

LDCs are also concerned that DFQF treatment, instead of providing 100 per cent product coverage, allows developed countries to exclude three per cent products from its coverage. This might be vital for LDCs as their export is concentrated in a very few products (see Chapters Three, Four and Five).

[5] UN, *Programme of Action for the Least Developed Countries for the Decade 2011–2020*, UN Doc A/CONF.219/3 (UN LDC-IV, Istanbul, Turkey, 9–13 May 2010) <http://ldc4istanbul.org/uploads/IPoA.pdf> at 6 June 2011.

This thesis recommends that DFQF treatment for LDCs need to provide duty-free access to all products from LDCs on a 'secure, long-term and predictable basis' to contribute to their sustainable development.

2.2 Rules of Origin

Rules of origin are onerous for LDCs as they increase production costs where LDCs are inhibited from tracing inputs from the most competitive sources globally. In the absence of harmonisation of rules of origin, LDC exporters have to satisfy different rules of origin for different export destinations for the same product. Since there is no international consensus at present as to how precisely rules of origin should be formulated, WTO Members enjoy a wide degree of discretion in the manner in which these rules of origin are formulated and applied. In fact, they are applied in a manner that protects and promotes the import-competing industries of the granting countries. In particular, the rules requiring the use of inputs from the preference-giving country creates nothing but reverse preferences (see Chapters Three and Five).

Despite repeated demands from LDCs and repeated pledges in the Doha Round instruments for 'simplified and transparent rules of origin', these still do not exist. LDCs call for flexibilities in rules of origin, and their involvement in defining rules of origin (*2010 Dhaka International Dialogue on UN LDC-IV*, 8–11). However, IPOA responds only by incorporating the conventional language of ensuring simple, transparent and predictable rules of origin that would contribute to market access of LDCs without giving any indication as to how this could be done (para 64(i)).

Hence, the crucial matter for ensuring DFQF market access for LDCs is to provide them with simplified, uniform and transparent rules of origin, which will apply a full and global cumulation regarding all preference-beneficiary countries. Different standards attached to the rules of origin, such as origin component, documentary standards and consignment standards, need to be simple and harmonised since they increase the export costs for LDCs. LDCs need to be involved in defining the rules of origin in accordance with their export dynamics. In this respect, the instance of the EC in reforming its rules of origin with more liberal criteria for LDCs is a step forward as it might inspire a

reform in other preferential rules of origin designed on the model of the EC rules of origin (see Chapter Three).

2.3 Preference Erosion

Across-the-border tariff reduction and proliferation of RTAs expose LDCs to the threat of eroding their existing preferences. Particularly LDCs whose exports are concentrated in few highly protected commodities are likely to suffer most from preference erosion. This problem should be addressed by putting into effect both the trade-based solutions and non-trade solutions. Hence, it is important to provide DFQF treatment for all LDC exports in an extended manner ensuring the utilisation of preferences. LDCs' proposal for spreading over the liberalisation of some products for a longer period might be against the spirit of tariff liberalisation and brought them in direct conflict with other developing countries. Nevertheless, recognising the impact of MFN tariff liberalisation on some LDCs, the *December 2008 NAMA Modalities*[6] agreed that since preference erosion will occur only in respect of a limited number of tariff lines, it is possible to spread their liberalisation into a longer timeframe to give an adjustment period to LDCs (para 28). However, the most important tool for addressing preference erosion is to provide extended Aid for Trade, which would assist LDCs to adjust with preference erosion by enhancing their supply-side capacity (see Chapter Five).

2.4 Non-Tariff Barriers

DFQF market access does not exempt LDCs from the plethora of NTBs that restrict LDCs' market access for agricultural and non-agricultural products. This sub-section briefly discusses SPS and TBT standards.

LDCs suffer significant export losses because of their inability to respond to SPS requirements in developed country markets. Such requirements require them to undertake significant investment. However, upgrading of standards does not assure them of continued market access since developed countries continuously revise their

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[6] WTO Negotiating Group on Market Access, *Draft Modalities for Non-Agricultural Market Access*, WTO Doc TN/MA/W/103/Rev.3 (6 December 2008) (Revision).

SPS measures with the advance in scientific research. This requires renewed investments by LDC exporters. This aspect of SPS measures is particularly important because of its developed—developing country dimension where developed countries, in most of the cases, are standard-givers and developing countries are standard-receivers. The impact of SPS measures is magnified when an economically powerful developed country imposes such regulation on weaker countries exporting the products (see Chapter Two).[7]

The SPS Agreement allows Members flexibility to deviate from international standards, either with scientific justification for it (art 3.3), or by doing a proper risk assessment (arts 5.1–5.8). The science-based approach means the SPS Agreement is beyond the comprehension of LDCs. It remains possible only for other developed countries or countries with advanced scientific and technological capacity to disagree on the basis of science that the SPS measures of the importing countries are not based on proper risk assessment or without scientific justification. Hence, LDCs with their lack of advanced scientific knowledge are unable to prove that SPS measures of the importing country are inconsistent with the SPS Agreement (see Chapter Four).

Similarly, technical regulations and standards imposed by governments or private bodies, create market access barriers for LDCs due to their multidimensional and constantly changing nature in different export markets (see Chapter Two). Life-cycle assessment of eco-labelling schemes often require installations of new production facilities increasing the cost of exports for LDCs. In the most recent *2011 Trade Policy Review*, the EU recognised that the number of the EU technical regulations and standards has increased, reflecting the scientific progress and identification of new risks.[8] Provisions of technical assistance and S&DT in the SPS Agreement (arts 9, 10) and TBT Agreement (art 11) are only 'best endeavour' commitments and do not confer on LDCs any entitlement to this assistance (see Chapter Four). Hence, to create an effective market access regime, there need to be concrete commitments on part of developed Members. This thesis recommends that provision for technical and financial

[7] Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (2007) 43.

[8] WTO Trade Policy Review Body, *Trade Policy Review: European Communities*, WTO Doc WT/TPR/S/248 (1 June 2011) (Report by the Secretariat) 45.

assistance and the transfer of technology should be made a prerequisite to the taking of any SPS and TBT measures in respect of exports from LDCs and clear provisions should be inserted in the SPS and TBT Agreements to this effect. For private standards, the importing countries should take responsibility. Article 13 of the SPS Agreement states that Member governments 'shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories ... comply with the relevant provisions of this agreement'. This provision needs to be amended to make the importing country liable for the SPS measures by private bodies within their territories. Technical assistance should be provided to LDCs to enhance their participation in the international standardisation bodies.

2.5 Technical and Financial Assistance and Capacity Building

LDCs have very limited capacity to cope with the emerging complex area of market access and entry conditions. They suffer from a lack of infrastructure, and institutional and technical capacity 'to produce goods competitively and bring them to the market', which are the two pillars of supply-side capacity constraints. Inadequate resources constrain their capacity to invest in productive sectors, including human development and research and development.[9] Hence, it is vital for LDCs to have technical and financial assistance. Without this, they are unable to benefit from existing market access arrangements (see Chapters Three and Five).

There has been unanimous agreement among WTO Members to provide technical and financial assistance and capacity-building programmes for LDCs, as reflected in the Doha Round instruments. The commitments to the needs of LDCs have been strengthened through the Enhanced IF and Aid for Trade to address, among others, the supply-side constraints of LDCs (see Chapter Three). However, technical assistance provisions reiterated in the Doha Round instruments are non-binding and drafted in a 'best endeavour' form.

[9] Rashed Al Mahmud Titumir and M Iqbal Ahmed, 'Aid for Trade Initiative in Multilateral Trade Negotiation: An Illustration with the Case of Bangladesh' in B S Chimni et al (eds), *South Asian Yearbook of Trade and Development* (2009) 251, 267–8.

The UN Secretary General Ban Ki-Moon in his speech at the Third Global Review of Aid for Trade on 19 July 2011 calls for a coherence of aid for trade programmes for LDCs with the broader sustainable development agenda.[10] Hence, in order to make these programmes truly effective for LDCs, there should be predictability, transparency and consistency in their delivery. As demanded by LDCs preceding the UN LDC-IV, Aid for Trade should be additional to existing ODA (*2010 Dhaka International Dialogue on UN LDC-IV*, para 22). LDCs need to have more ownership in the process and must have exclusive rights in identifying priority areas where they need assistance. Although there has been a substantial growth in resources allocated to Aid for Trade,[11] in the absence of effective monitoring and evaluating, the efficacy of the programme at the country level is largely unclear.[12] The WTO needs to make available to LDCs essential tools towards that end and needs to play the key role in administering the programmes.

2.6 Trade-distorting Agricultural Policies of Developed Countries

A group of developing countries and LDCs highlighted the importance of agriculture as being a vital factor of their GDP, labour force, rural livelihood, basic food for people and foreign exchange.[13] Furthering agricultural market access for LDCs is imperative for meeting the MDGs of halving poverty and hunger by 2015 and carrying on the challenge against hunger and poverty. However, rules enumerated in the AoA are entrenched with unfairness to such an extent that they are even regarded as a substantive issue forming part of the WTO's 'legitimacy crisis'.[14] According to the *World*

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[10] *Remarks Delivered by Secretary-General Ban Ki-Moon at the Third Global Review of Aid for Trade*, UNOG (19 July 2011) <http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/98229BEC1D933B9CC12578D200374F19?OpenDocument> at 24 August 2011.

[11] In 2009, resources allocated to the Aid for Trade initiative amounted to US$40 billion. According to IECD figures, this is a 60 per cent increase from the 2002–2005 baseline period: ICTSD, 'Preliminary Aid for Trade Evaluation Hints at Areas for Improvement' (June 2011) 15(24) *Bridges Weekly Trade News Digest* 12.

[12] Ibid.

[13] WTO Committee on Agriculture Special Session, *Agreement on Agriculture: Special and Differential Treatment and a Development Box*, WTO Doc G/AG/NG/W/13 (23 June 2000) (Proposal to the June 2000 Special Session of the Committee on Agriculture by Cuba, Dominican Republic, Honduras, Pakistan, Haiti, Nicaragua, Kenya, Uganda, Zimbabwe, Sri Lanka and El Salvador) 2.

[14] James Thuo Gathii, 'Process and Substance in WTO Reform' (2004) 56 Rutgers Law Review 886, 908.

Development Report 2008, current agricultural policies of developed countries cost developing countries about US$17 billion a year. This amount is about five times the current level of overseas development assistance to agriculture.[15] This sub-section briefly discusses the three pillars of the AoA.

2.6.1 Market Access

Trade-protectionist tariffs, such as tariff escalation and TRQs have been retained in the Doha Round Texts, albeit with minor amendments. The average tariff for agricultural products is generally higher. Both the US and the EU maintain high tariffs on agricultural products by means of TRQs. The US maintains out-of-quota tariff rates for 1,595 lines of the total 1,791 tariff lines for agricultural products.[16] In its most recent notification to the Committee on Agriculture, the US notifies for 44 tariff quotas covering 171 tariff lines, mostly for dairy products, sugar products, products containing sugar and dairy ingredients and cotton.[17] In the US, the average applied MFN tariff is 8.9 per cent for 1.595 tariff lines.[18] The EU notifies 114 separate TRQs as being in operation in the calendar year 2009 and marketing year 2008/09. In 2011, the EU had 1,998 tariff lines for agricultural products, with an average rate of 15.2 per cent.[19]

Average tariff reduction commitments under the AoA enable developed countries to reduce their low tariffs by high rates and high tariffs by low rates. Developed countries can continue to provide high protection to their Sensitive Products. To obviate this protectionism, the *December 2008 Agriculture Modalities*,[20] apply a tiered formula of

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[15] The World Bank, 'World Development Report 2008: Agriculture for Development' (The World Bank, 2007) 103.

[16] WTO Trade Policy Review Body, *Trade Policy Review: United States*, WTO Doc WT/TPR/S/235/Rev.1 (25 August 2010) (Report by the Secretariat) 26, 90.

[17] Ibid.

[18] Ibid.

[19] *2011 Trade Policy Review of the EC*, 110.

[20] WTO Committee on Special Session, *Revised Draft Modalities for Agriculture*, WTO Doc TN/AG/W/4/Rev.4 (6 December 2008) (hereinafter *December 2008 Agriculture Modalities*).

tariff reductions. According to this formula, products with higher tariffs are put in a higher category or tier, which has a steeper cut than lower tiers (see Chapter Four).

However, tariff reductions are subject to several exceptions and flexibilities, which might diminish any benefit that could ensue therefrom. These include Sensitive Products, special products and SSM. The *December 2008 Agriculture Modalities* accords developed countries the right to designate up to four per cent of tariff lines as Sensitive Products,[21] for which tariff cuts will be more moderate than those required by the formula to be agreed upon for overall tariff reduction. Agriculture Chair David Walker in the April 2011 Report notes that Japan and Canada are seeking flexibility to designate additional tariff lines under the Sensitive Products category.[22] Developing Members demand for Special Products and SSM for strengthening their food security, rural development and livelihood security (*December 2008 Agriculture Modalities* para 129). Trade economists caution that classifying even a small number of farm products as 'Sensitive' and subject to lesser tariff cuts might weaken the tariff reduction commitments. Consequently, it would greatly diminish the gains from agricultural reform for LDCs and might have serious repercussion on food security issues of LDCs (see Chapter Four).

This thesis recommends that LDCs should have a waiver in respect of the provisions on Sensitive Products, Special Products and SSM so that no tariff can be imposed on exports from LDCs. WTO rules should be reformed to remove TRQs and tariff escalation in respect of exports from LDCs.

2.6.2 Domestic Support

In the *2001 Doha Ministerial Declaration*, Members commit to 'a substantial reduction in trade-distorting domestic support' (para 13). Accordingly, the *December 2008 Agriculture Modalities* agrees on a linear formula for reduction in the OTDS (paras 3,

[21] *December 2008 Agriculture Modalities* states that where such Members have more than 30 per cent of their tariff lines in the top band, they may increase the number of Sensitive Products by two per cent: ibid para 71.

[22] WTO Committee on Agriculture Special Session, *Negotiating Group on Agriculture*, WTO doc TN/AG/26 (21 April 2011) (Report by the Chairman, H E Mr David Walker, to the Trade Negotiating Committee).

5–7), and Amber Box support (paras 16–18), while putting several limitations on Blue Box support (paras 35–50). However, it leaves the Green Box support beyond any reduction commitments. Hence, the loopholes of the AoA are retained by leaving the door open for developed Members to shift support from Amber Box to Green Box. There are no monetary limits on expenditure under the Green Box (see Chapter Four). Hence, it is no wonder that the *2011 Trade Policy Review* of the EU noted that since 2000/01, the EU Green Box expenditure has increased nearly three-fold, to €62.6 billion, while both Blue and Amber box support have declined by three-quarters, to about €5.2 billion and €12.4 billion respectively (at 111–12).

Decoupled payments, which are a legitimate Green Box subsidy, may have trade-production-distorting effects. Reduction of income risk from agricultural production activities and more certainty of returns create incentives to invest and influence a producer's willingness to plant. The possibility of updating the base period in the future to calculate payments according to present production affects farmer's present decisions. These payments, by requiring land to be kept in 'good agricultural use', induce farmers to produce in an otherwise inactive land. By imposing restrictions on fruits and vegetable production, they encourage farmers for crop production. The leeway for accumulating subsidies provides a cumulative impact on the producer's decision of what and how much to produce. Naturally, when a product derives simultaneous benefits from Amber Box, Blue Box and Green Box measures, then various degrees of distorting impacts are added (see Chapter Four).

Green box payments can affect production and trade, harm farmers in LDCs and cause environmental damage.[23] The *December 2008 Agriculture Modalities* suggests a number of reforms in the Green Box criteria in Annex B. It proposes to amend some Green Box criteria to allow more development programmes by developing countries, such as including policies and services related to farmer settlement, land reform programmes, rural development and rural livelihood security in developing country Members (Annex B, p 39). In order to tighten the criteria for developed countries, the text suggests 'defined, fixed and unchanging' base periods for decoupled income

[23] Ricardo Melendez-Ortiz, Christophe Bellmann and Jonathan Hepburn (eds), *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (2009).

support (Annex B, p 40), structural adjustment (Annex B, p 41) and regional assistance programmes (Annex B, p 43). However, in each of these cases, the 'defined, fixed and unchanging' base period is followed by the proviso that 'an exceptional update is not precluded'. The conditions imposed for 'exceptional update' of the base period virtually leaves it up to developed countries to update the concerned base periods (see Chapter Four).

Hence, this thesis suggests the reform of Green Box to prevent accumulation of subsidies, box shifting and updating of baseline in respect of decoupled income support. The agreements on reduction of Amber and Blue Box support should not wait for the conclusion of the Doha Round in its entirety. Giving effect to these reforms should be among the priority agenda of the upcoming December 2011 Ministerial Conference.

2.6.3 Export Subsidies

There has been remarkable progress in the Doha Round in committing to the elimination of all forms of export subsidies by the end of 2013. The Doha Round also disciplined other type of export subsidies, such as export credits, export credit guarantees, insurance programmes, and export by STEs (see Chapter Four). However, Members continue to provide export subsidies. For instance, as of February 2011, EU export subsidies continue to be available for cereals, beef, poultry meat, eggs, sugar and some processed goods.[24]

Contrary to the demand of developing countries and LDCs for mechanisms to prevent food aid from acting as export subsidies, the *December 2008 Agriculture Modalities on Agriculture* permits in-kind food aid (Annex L), thus putting food-producing LDCs in deleterious condition where the food surplus in the name of food aid might oust them from market. This thesis proposes that the food crisis could be better handled by creating an international fund for food aid, which will provide food aid in cash and by putting in place a strong legal regime to prevent food aid from becoming export

[24] *2011 Trade Policy Review of the EC*, 110. In the marketing year 2007/08, sugar products received most export subsidies in terms of both the quantity of subsidised exports and the value of the subsidies: *2011 Trade Policy Review of the EU*, 110.

subsidies in disguise. Besides, limitation should be imposed on the use of biofuel and biofuel subsidies since they aggravate the food crisis.

2.7 Preferential Market Access for Trade in Services

The *2003 LDC Modalities*[25] asserts the importance of trade in services for LDCs in ensuring their sustainable development by addressing poverty, upgrading welfare and improving availability and accessibility of basic services. However, LDCs are marginalised from international flows of services with clear deficits in trade in services (see Chapter Six).

For increasing the participation of LDCs in international trade in services, the GATS does not have any provision similar to that of Part IV of the GATT 1994 and *1979 Enabling Clause*, which provides for S&DT for developing countries and LDCs through preferential and non-reciprocal market access.[26] Rather the approach of the GATS towards LDCs' integration to the multilateral services network, as codified in Article IV of the GATS, is based on the hypothesis that WTO Members will make good use of their flexibilities in scheduling their commitments in taking due consideration of special needs of LDCs. Therefore, the drafters thought it redundant to make any specific rules on S&DT in the GATS.[27] This is, no doubt, a step back from the progress that the GATT 1994 has achieved all these years by adopting the principles of non-reciprocity, S&DT in Part IV and the *Enabling Clause* (see Chapter Six). Fernando de Mateo, the Chairperson of the Negotiating Group on Trade in Services reported in April 2011 that LDCs made proposals for a waiver that would allow WTO Members to grant preferential market access to services and services providers from LDCs. However, up

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[25] WTO, *Modalities for the Special Treatment for Least-developed Country Members in the Negotiations on Trade in Services*, WTO Doc TN/S/13 (5 September 2003) (hereinafter *2003 LDC Modalities*, WTO Doc TN/S/13).

[26] Rainer Grote, 'Article IV GATS' in Rudiger Wolfrum, Peter-Tobias Stoll and Clemens Feinaugle (eds), *WTO—Trade in Services* (2008) 114, 115.

[27] Ibid 115.

until the submission of this thesis, disagreements exist as to the scope of the waiver, as well as to the rules of origin for services and service suppliers.[28]

The thesis recommends that Article IV:3 of the GATS, an LDC-specific S&DT provision, should be amended to the effect of providing preferential market access for LDCs in sectors and modes of supply of export interest to them. It is to be noted that Article IV(c) urges developed countries to negotiate on liberalisation of market access in those particular sectors and modes in which developing countries and LDCs have comparative advantage. However, the MFN rule requires developed countries to liberalise those sectors and modes for other countries as well. A clear provision on preferential market access for LDCs would take away the obligation of liberalisation on an MFN basis and facilitate market access in services trade for LDCs.

2.8 Market Access in Temporary Movement of Semi-skilled Labourers

Economists estimated that market access in TMNP or Mode 4 services brings about a global welfare. According to L. Alan Winters, an increase in industrial countries' quotas on the inward movements of both skilled and unskilled temporary workers equivalent to three per cent of their work forces would generate an estimated increase in world welfare of more than US$150 billion a year.[29] However, developed countries have always been adamant in restricting the flow of low-skilled services suppliers from LDCs by putting in place several significant barriers such as quotas and ENTs. No WTO Member has scheduled sector-specific Mode 4 commitments targeted at semi- or low-skilled services. The reason could be largely associated with the sensitivity of TMNP as it touches upon the issues of permanent migration and domestic labour market policies (see Chapter Six).

The Annex on Movement of Natural Persons Supplying Services (hereinafter the Annex MNP), which deals with the Mode 4 services, does not provide for any new obligations

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[28] WTO Council for Trade in Services Special Sessions, *Negotiations on Trade in Services*, WTO Doc TN/S/36, (21 April 2011) (Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee) 1, 12.

[29] L Alan Winters, 'The Economic Implications of Liberalizing Mode 4 Trade' in Aaditya Mattoo and Antonia Carzaniga (eds), *Moving People to Deliver Services* (2003) 59, 59.

for Members, rather it limits the obligations that the Members have accepted under the GATS. In order to preserve developed countries' concern of protecting their employment market and immigration policies, Paragraph 2 of the Annex MNP states that the GATS shall not apply to four categories of measures: (1) measures affecting natural persons seeking access to the employment market of a Member; (2) measures regarding citizenship; (3) measures regarding residence; and (4) measures regarding employment on a permanent basis. This provision reduces the scope of application of the entire Agreement by exempting a measure falling within the scope of these categories from the obligations and disciplines of the GATS (see Chapter Six).

Paragraph 3 of the Annex MNP in fact permits Members to retain restrictions in their Services Schedules regarding Mode 4 services for semi-skilled works. Paragraph 4 of the Annex MNP specifies that the GATS shall not 'prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders'. Therefore, the Annex MNP is designed to restrict TMNP by all means rather than facilitate it (see Chapter Six).

LDCs argue that a positive outcome on the Mode 4 issue will be important to achieve a balance in market access negotiations in services. In negotiations on trade in services, they have precisely pointed out that the extent to which Mode 4 request is met is an 'indicator of the fulfilment of the development dimension of the round' (*April 2011 Chairman's Report*, 9). Hence, this thesis recommends that Annex MNP should be removed and a clear provision should be included within the GATS for facilitating market access of LDCs in TMNP. This would remove the stigma of the GATS, which in the very first place came into place in furtherance of corporate interest of developed countries.

2.9 Participation of LDCs in the DSM and WTO Negotiations

Participation of LDCs in the dispute settlement system holds significance not only for enforcement of their market access rights but also to build confidence among them that they can enforce their market access rights, which leads to the acceptability of the WTO

itself. However, LDCs are virtually absent from the activities of the DSM except for a single dispute brought by Bangladesh against India and their limited participation as third parties. This thesis disagrees with the arguments of some commentators to the effect that third-party participation should be enough for enforcing LDCs' market access rights whereby they can benefit from the spill-over effect of the disputes brought by other WTO Members. In *US–Cotton Subsidies,* the petitions of Benin and Chad for full consideration of their 'serious prejudice' met with a stiff response from both the panel and the AB. While the panel categorically states that they did not base their decision on any alleged serious prejudice caused to Benin and Chad, the AB refused to give any verdict on this issue applying the principle of judicial economy. Hence, the thesis argues that third-party participation is not the best possible option for LDCs where they have enough grievances to bring a dispute to the DSB (see Chapter Seven).

The thesis concludes that LDCs need technical and financial assistance right from the pre-litigation stage to address their resource constraints. Coordination between public and private network would enable them to overcome their internal capacity. The political constraint to bring a complaint in the DSB can be overcome through cooperation between the NGOs and governments of both developed Members and LDCs. The establishment of the ACWL is a positive step but its resources should be extended to enable it to deal with more cases. To deal with the challenges in implementation stage, particularly the problem of lack of retaliatory power, LDCs should be provided with monetary compensations for the harm caused during the whole period the measure continues. The options of collective retaliation should be made available for LDCs. The S&DT provisions in the DSU drafted in a vague manner should be amended to give them an unequivocal meaning (see Chapter Seven).

Similar to the participation in the DSM, LDCs' active participation in the WTO negotiations is a significant means to ensure that their particular concerns and interests are adequately reflected in the WTO decisions and agreements.[30] As identified in Chapter Three, LDCs, though a political group formally recognised by the WTO, are unable to participate effectively in WTO negotiations. This under-representation and

[30] T. Ademola Oyejide, 'Interests and Options of Developing and Least-developed Countries in a New Round of Multilateral Trade Negotiations' (G-24 Discussion Paper Series No. 2, Centre for International Development, Harvard University, May 2000) 22.

under-participation problem of LDCs can be addressed, to some extent, by facilitating their participation as a group in all committees and councils, not just in the Sub-Committee on LDCs. Given that all aspects of trade regulation in the WTO affect LDCs in some way or other, their group representation would ensure that their interests are thoroughly represented in those regulations.[31] Such participation is also important to build the capacity of LDC Members to better formulate their policy positions through access to a more efficient channel of information.[32] The problem identified in Chapter Three with regard to LDCs' absent voice in decision-making could be minimized, as suggested by Rolland, by developing quasi proxy mechanisms whereby individual LDCs could participate individually as well representative of LDC group. This could ensure that Members with little capacity gain a better knowledge and understanding of negotiations.[33] These mechanisms should be accompanied with the technical assistance programmes of the WTO and LDCs' trade negotiating strategies, as highlighted in Chapter Three.

3 The Way Forward

By re-emphasising the long-standing aspiration of LDCs' market access in a comprehensive manner, this thesis aimed to make both specific and wider contributions. The specific contribution of the thesis is to identify the areas of LDCs' market access interests, suggest legal and policy reforms in those areas, and suggest the trade negotiators of LDCs to strengthen their position in specific areas. This specific contribution leads to a wider contribution in proposing that ensuring LDCs' market access will have a spill-over effect to the global community. It will facilitate the achieving of the MDGs and 'ensuring higher standards of living, full employment, conditions of economic and social progress and development' (*Charter of the United Nations*, art 55(a)) and finally this would lead to the maintaining of 'international peace and security' (*Charter of the United Nations*, art 1).

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[31] Sonia E. Rolland, 'Developing Country Coalitions at the WTO: In Search of Legal Support' (2007) 48(2) *Harvard International law Journal* 483, 512.

[32] Ibid.

[33] Ibid 523.

After languishing for 10 years since the *2001 Doha Ministerial Declaration*, finally LDC issues have gained momentum in the Doha Round when WTO Members expressed their support to the proposal of the WTO Director-General Pascal Lamy as to an 'early harvest' of LDC issues, such as DFQF market access, rules of origin, the LDC services waiver and cotton in the upcoming December 2011 Ministerial Conference.[34] Now it remains to be seen how Members resolve these issues by December 2011 when there is still no agreement on rules of origin, cotton and the LDC services waiver. Some developed Members (particularly the US and Japan), instead of providing DFQF treatment, still maintain significant trade barriers on export from LDCs.[35] Moreover, disagreements over which non-LDC issues should be included in an LDC-plus package are swelling up to threaten an agreement on LDC-specific issues which are, indeed, at the bottleneck for the successful conclusion of the Doha Round.[36]

The future for the WTO is riddled with more challenges as most of these LDCs graduate from the LDC category whilst still not in the same position to compete with other developing countries. Also significant is the fact that LDCs are increasingly engaged in trade with other developing countries, where they also face the market access barriers they face in developed countries. Hence, if the Doha Round culminates into an 'early harvest' of LDC issues in the upcoming December 2011 Ministerial Conference, there will remain a need for continuous research on the market access issues of LDCs from a sustainable development approach.

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[34] *Trade Negotiations Committee: Informal Meeting: Members Support Lamy's Proposed Three-speed Search for the Doha Outcome in December* (31 May 2011) WTO: 2011 News Items <http://www.wto.org/english/news_e/news11_e/tnc_infstat_31may11_e.htm> at 7 June 2011. In proposing an 'early harvest' for LDC issues, Lamy shifted from his previous position that he expressed in *Dar es Salaam Declaration of LDC* in 2009 by declaring that there would not be any 'early harvest' of LDC issues before the conclusion of the Doha Round: ICTSD, 'No Early Harvest of LDCs' Top WTO Priorities' (January 2010) 14(1) *Bridges Weekly Trade News Digest* 6 <http://ictsd.org/downloads/bridges/bridges14-1.pdf at 23 March 2011> at 4 February 2011.

[35] ICTSD, 'UN LDC Conference Endorses 10-Year Plan, But Criticised for Lack of Accountability Mechanisms' (2011) 15(8) *Bridges Weekly Trade News Digest* 1, 2 <http://ictsd.org/downloads/bridgesweekly/bridgesweekly15-18.pdf> at 7 June 2011.

[36] ICTSD, 'Troubled State of Doha Talks Causing WTO "Paralysis," Says Lamy; Focus for December Ministerial Shifts' (28 July 2011) 15(28) *Bridges Weekly Trade News Digest* 1, 1.

The LDC category is not a privilege, rather it is a means to identify and address the particular difficulties of the most vulnerable Members of the WTO. It is a means to assist these countries to achieve sustainable development by alleviating poverty. It is worth quoting from the submission of Zambia, on behalf of LDCs:

> LDCs reiterate their firm intention to implement policies and programmes which will allow them to graduate out of the LDC category and, by graduating, give up the market access provisions and other SDT provisions granted to LDCs in Annex F of the Hong Kong Ministerial Decision. However, for LDCs to graduate out of the LDC category, it is recognised that they require assistance from other WTO Members who should implement the decisions in the spirit that they were made and in recognition of the fact that LDCs require SDT in order for them to play a more meaningful role in the multilateral trading system.[37]

This thesis concludes that enhanced market access in developed countries is one of the important tools to enable LDCs to achieve sustainable development. Hence, the thesis addressed the issues of particular market access interests of LDCs that require specific attention and cooperation from the WTO Members. It argued that LDC issues need to be focused from a sustainable development point of view that converges the development needs and priorities of LDCs. A sustainable development approach encompassing the need for alleviating poverty would contribute to a paradigm shift and give effect to the objectives of the WTO, as enumerated in the Preamble of the the *WTO Agreement*.

[37] *2006 Communication from Zambia,* WTO Docs TN/CTD/W/31, TN/MA/W/78, TN/AG/GEN/23, para 1.

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