SPECIAL AND DIFFERENTIAL TREATMENT (SDT) PROVISIONS AND THE PARTICIPATION OF DEVELOPING COUNTRIES IN INTERNATIONAL TRADE: A CASE FOR REFORM

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Abstract

This paper examines the usefulness of the Special and Differential Treatment (SDT) Provisions which have been put in place since the inception of the multilateral trading system to help developing countries fully integrate into the world trading system. This paper is in support of the school of thought that the SDT provisions are still beneficial to the integration of developing countries in particular and the multilateral trade system in general; because they help to create equality amongst unequally yoked trading blocks. However, it is acknowledged that these SDT provisions are presently of minimal effect due to some controversial issues. These issues include the duration of SDT provisions, graduation clauses in SDT provisions and the lack of binding obligation of SDT provisions on developed countries. The paper goes further to link these challenges of the SDT provisions to the structural and procedural deficiencies in the WTO setup.

I. Introduction

The importance of international trade to the economic growth and development of countries in the international system cannot be overemphasised and is not widely disputed. However, the method and prescriptions for achieving economic growth and development via international trade participation have been a dilemma within the international system over the years.[1] Also, the

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[1] There are arguments for and against the best means of actualising economic development through international trade. Trebilock and Howse supports the view that unilateral trade liberalisation creates welfare gain, but that in comparison, reciprocal trade liberalisation is an economically rationale strategy which may generate even more welfare gains than unilateral trade liberalisation. See M.J. Trebilcock and R. Howse, *The Regulation of International Trade* (Roultedge: London, 1995). Dollar and Kraay, argue that there is a certain consensus about the belief that openness to international trade accelerates development. D. Dollar and A. Kraay, 'Trade, Growth and Poverty' (2004) 114(2) *The Economic Journal* 22, 47. *Cf*: Rodríguez and Rodrik hold a contrary view on the relationship between liberalised international trade participation and economic development stressing that there is little evidence that open trade policies lead to significant economic growth. See F. Rodríguez and D. Rodrik. 'Trade Policy and Economic Growth: A Sceptic's Guide to the Cross-National Evidence' in B. Bernanke and K. Rogoff, (eds.), *Macroeconomic Annual* (MIT Press for NBER: Cambridge MA, 2000). Also Helpman is not convinced that international trade leads to the convergence of growth rates between countries. See E. Helpman, *The Mystery of Economic Growth* (The Belknap Press of Harvard University Press: USA, 2004). The World Bank provides a 'middle point' view on the debate by advocating that trade protection is not good for economic growth but trade openness by itself is not sufficient for growth. World Bank, 'Trade Liberalization: Why So Much Controversy?' in *Economic Growth in the 1990s: Learning from a Decade of Reform* (World Bank: Washington DC, 2005).

developmental configuration of countries within the international system lacks heterogeneity which further increases the complexity of providing an all-encompassing solution to the challenge of attaining uniform development through international trade.

The multilateral trade system under the GATT/WTO regime was created in 1947 with the mandate to regulate world trade based on multilateral tenets.[2] The GATT/WTO regime is premised on the principles of reciprocity and adherence to an integrated trade policy regime. Since inception the GATT/WTO has been faced with the challenge of addressing the disparity in the developmental status of its members; the GATT/WTO system has had to grapple with the peculiarities of three categories of trading countries: the developed countries, the developing countries and the least developed countries.[3] To address the imbalance in the developmental configuration of its' membership, the GATT/WTO has over the years introduced a plethora of discriminatory and non – reciprocal policies - Special and Differential Treatment (SDT) provisions - which are meant to assist developing and least developed countries fully integrate into the world trading system.

However, it has been argued that the continued use of SDT provisions for developing countries has constituted a stumbling block to the smooth running of the multilateral system.[4] For example, Hoekman argues that multilateral non-discriminatory liberalisation of trade is a more effective and

[2] For a description of the application of multilateral principles in international trade regulation see R.O. Keohane, 'Multilateralism: An Agenda for Research' (1990) 45 *International Journal* 731 cited in L. Powell, 'In Defense of Multilateralism', paper prepared for *Global Environmental Governance: the Post – Johannesburg Agenda* 23-25 October 2003. 5; F. Kratochwill, 'The Genealogy of Multilateralism: Reflections on an Organizational Form and its Crisis' in E. Newman, *et al* (eds), *Multilateralism Under Challenge: Power, International Order and Structural Change* (United Nations University Press: Tokyo/New York, 2006) 139 - 140

[3]The countries in the developing/least developing category constitute about three quarter of the WTO's total membership; but have constantly been agitating that the provisions of the GATT/WTO multilateral trade system do not favour their participation and interests in international trade. See M. Matsushita, *et al, The World Trade Organisation: Law, Practice, and Policy,* 2nd edn (OUP: Oxford, 2006) 782 (hereafter referred to as See M. Matsushita, *et al*); S.W. Chang, 'WTO for Trade and Development Post-Doha' (2007) *JIEL* 553 – 554; O.F. Kofi, 'Africa and anti – dumping issues at the Doha Round' (2009) *AJICL* 166.

[4] C.M. Obote Ochieng, 'The EU – ACP economic partnership agreements and the "development question": constraints and opportunities posed by article XXIV and special and differential treatment provisions of the WTO' (2007) JIEL 363, 364

efficient approach to expand trade opportunities than the use of SDT provisions.[5] He avers that a non-discriminatory approach would result in a reduction of barriers to trade maintained by middle income as well as developed countries.[6] Also, there have been objections to the application of SDT provisions contained in various bilateral trade agreements regulated by the GATT.[7] For example, in the course of the negotiations of Economic Partnership Agreements (EPAs), a point of contention between the European Union (EU) and the African, Caribbean and Pacific Countries Group (ACP) has been whether or not SDT provisions should be a consideration incorporated into the requirements of the obligation for the North-South Regional Trade Agreements (RTAs) under Article XXIV of the GATT.[8] While the ACP countries have called for the inclusion of less stringent obligations, the EU and some other WTO developed country members have insisted on the need to give a literal interpretation to the stipulations of Article XXIV of the GATT.[9]

This paper posits that the SDT provisions are still crucial in advancing the interests of developing countries in particular and the multilateral trade system in general because they help to create equality amongst unequally yoked trading blocks. However, it is acknowledged that these SDT provisions are presently of minimal effect due to some controversial issues; these issues include the duration of SDT provisions, graduation clauses in SDT provisions and the lack of binding obligation of SDT provisions on developed countries. It is argued that the best means of advancing the interests

[5]B.C. Hoekman *et al*, 'Most Favourable and Differential Treatment of Developing Countries; Towards a new Approach in the WTO' World Bank Policy Research Working Paper No. 3107 (World Bank: Washington DC, 2003) cited in B. Guha – Khasnobis, 'Preferential Trading Arrangements For Developing Countries' in P. De Lombaerde (ed) *Multilateralism, Regionalism and Bilateralism in Trade and Investment. 2006 World Report on Regional Integration* (Springer: New York-Dordrecht, 2007) 36.

[6]Above n. 5 at 36

[7] C.M. Obote Ochieng, supra n.4 at 364.

[8]The ACP, are pushing for the maximum level of flexibility and asymmetry required by their level of development in order to protect all of their 'sensitive products.' They argue that the need to adjust their economies to cope with more liberal market access, to find alternative tax sources to compensate for the loss of tariff revenue, and to strengthen their supply-side justify special treatment in their favour. See generally B. Onguglo and T. Ito (october2005) 'In Defence of the ACP Submission on Special and Differential Treatment in GATT Article XXIV.' (ECDPM Discussion Paper 67). Maastricht: ECDPM.16<http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/BBFFE424631677BDC12570BC003996C2/$FILE/05-67e_Onguglo_Ito.pdf> accessed 25 February, 2011.

[9] C.M. Obote Ochieng, supra n. 7 375 - 376

of developing countries in international trade lies in addressing the structural and procedural issues affecting the efficacy of SDT provisions.

The paper is divided into four parts; this being Part I. Part II focuses on the origin and evolution of the agitation for improved participation in international trade by developing countries and the consequent introduction of SDT provisions to address these agitations. Part III addresses how the SDT provisions can be reformed to bring about the desired effect of improving the participation of developing countries in international trade. Part IV proffers recommendations that are perceived as capable of aiding in the utilisation of SDTs in advancing the participation of developing countries in international trade.

II. Reviewing the Evolution of the Agitation

From the outlook of the initial membership of GATT of 1947, it is obvious that the impact of which the new multilateral trade order would have on the disparity in the developmental status of the diverse membership and its consequence on their ability to undertake the commitments provided for under the Agreements uniformly was not envisaged at the outset.[10] One of the first major challenges to the status quo between developing and developed countries participation in international trade was made in the late 1950's when a GATT Ministerial decision acknowledged that the contribution of developing countries to international trade was not in any way at par with that of developed countries under the multilateral trade system of the GATT. This subsequently led to the *Harbler Report* of 1958, which affirmed that the contribution of developing countries to international trade was not satisfactory.[11]

In 1961, Uruguay drew more attention to the plight of developing countries under the GATT system, with a suit it filed against 15 developed countries, listing 576 restrictions under the GATT

[10]H.V. Houtte, *The Law of International Trade* 2nd edn (Sweet & Maxwell: London, 2002) 55; see also M.J. Trebilcock and R. Howse, supra n.1 at 471.
[11]See M. Matsushita, *et al*, supra n.3 at 765.

Agreements that allegedly impaired Uruguayan exports.[12] This was followed in 1964 by the establishment of the United Nations Conference on Trade and Development (UNCTAD). The UNCTAD was initially a conference organised by the United Nations (UN) to address the relationship between trade and development. It subsequently metamorphosed into a permanent International Organisation which developing countries used to apply pressure on the GATT system. The UNCTAD created an avenue for developing countries to air their grievances with one voice and to fashion out strategies to strengthen their position and participation within the international trade system.[13]

In 1964, the Contracting Parties made a definite commitment to the amelioration of the plight of developing countries in international trade with the adoption of Part IV (ARTICLE XXXVI – XXXVIII) of GATT.[14] The three new sections which were introduced into the GATT in 1964 came into effect on the 27th of June, 1966. Part IV of GATT was predominantly a response to the initiatives of UNCTAD, the Harbler Report and the Uruguay Action. It was an expression of the concern by the Contracting Parties for the lack of growth in the export earnings of developing countries and therefore, a call for actions and measures to remedy the situation. These added provisions were generally viewed as unsatisfactory in that they were hortatory.[15]

During this same period and after the adoption of Part IV of the GATT, developments within the UN/UNCTAD was characterised by a considerable push for better and more concrete initiatives aimed at improving the participation of developing countries in international trade. Also, this period coincided with the proliferation of new sovereign states which were at an early stage of

[12]*Ibid*, 766.
[13]G.M. Meier, *The International Economics of Development* (Harper and Row: New York, 1968) 3; see also M.J. Trebilcock and R. Howse, supra n.10 at 475.
[14]The General Agreement on Tariffs and Trade (GATT). Available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf
[15]G.M. Meier, supra n.13 260 – 261.

development.[16] This sparked a new awareness within the international scene of the necessity for seeking ways to bolster the participation of the new entrants to the system in international trade for the benefit of all stakeholders concerned.[17]

These events above led to the birth of a new movement which was termed the New International Economic Order (NIEO), driven by the then proposed 'Most Favoured Nation (MFN) Convention' which was drafted by the International Law Commission.[18] The NIEO was pivoted on the rationale that there was a need to rebalance the international economic order, which at this time was based on the MFN principle of non-discrimination amongst trading nations within the multilateral trade order. It was argued by the proponents of the NIEO that the disparity in the developmental status of countries within the international system could only be best addressed if different standards were applied to each developmental category of countries.[19] The NIEO never really materialised as envisaged by its architects – mostly due to the stiff resistance of developed countries – however, it created the impetus for the development of generalised, non-reciprocal trade preferences for developing countries.[20]

A major initiative which the UNCTAD introduced in line with the discriminatory rationale of the NIEO was the Generalised System of Preferences (GSP) scheme which came into existence in 1970, after the second conference of the UNCTAD in 1968.[21] The GSP is a discretionary scheme which is based on the principle of unilateral non-reciprocal trade relationships between developed and

[16]A. Keck and P. Low, 'Special and Differential Treatment in the WTO: Why, When and How?' World Trade Organization Economic Research and Statistics Division: Staff Working Paper ERSD-2004-03 (2004) 4.
[17] Ibid.
[18]See generally the Report of the International Law Commission on the Work of its Thirtieth Session (UN Doc. A/33/10) 27. Available at http://untreaty.un.org/ilc/documentation/english/A_33_10.pdf. See also Declaration on the establishment of a New International Economic Order, (Res. 3201/S-VI). Available at http://www.un-documents.net/s6r3201.htm. See generally E. Laszlo, *et al, The objectives of the New International Economic Order* (Pergamon Press: New York, 1978).
[19]Cf, F. Roesseler, *Essays on the Legal Structure, Functions and Limitations of the World Trade Order* (Cameron May: London, 2000) 68.
[20]Ibid, 58.
[21]Principle 8 of Recommendation A.I.1 in 'Final Act of the First United Nations Conference on Trade and Development'Geneva: UNCTAD (Doc E/CONF.46/141, 1964) Vol. 1, 20; See also 'The Agreed Conclusions of the Special Committee on Preferences' UNCTAD, (Document TD/B/330, 1968); See generally See A.A. Yusuf, *Legal Aspects of Trade Preferences for Developing States* (Kluwer: The Hague, 1982) 86.

developing countries. It entails developed countries granting tariff preferences to developing countries in a bid to impact the latter's participation in international trade favourably. Participation in the scheme is open to any willing developed country which deems it fit to respond to the call to address the circumstances of developing countries in international trade; and developing country's eligibility to benefit from the scheme is determined by the developed country benefactor. Thus, the GSP is akin to a unilateral promise to developing countries which is not binding on the developed country making the promise.

In 1971, on the request of some developed countries, the GATT contracting parties granted a waiver from the Most Favoured Nation (MFN) principle to allow developed countries to grant preferential trade terms to developing countries under the GSP scheme for a period of 10 years.[22] The objective of the waiver was to bring the GSP scheme developed under UNCITAD into conformity with the legal requirements of GATT.[23]

Sequel to this waiver of 1971, a new round of negotiations themed the 'Tokyo Round' was launched. During this multilateral negotiation round, much deliberation was focused on developing countries. In 1979, the Enabling Clause Agreement formally entitled 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' was introduced.[24] The Enabling Clause was an extension and an expansion of the waiver of 1971. Like the former, it sought to make the granting of generalised, non-reciprocal trade preferences for developing countries permanent. It expanded on the initial provisions of the waiver of 1971 by providing the avenue for developing countries to establish reciprocal trade preferences amongst themselves and created an

[22]See 'Generalised System of Preferences Decision of June, 25 1971', (L/3545, BISD 18S/24 – 26); see also 'GATT Council, Minutes of Meeting held on 25 May 1971'(C/M/69, 28 May 1971).
[23]See generally H. V. Houtte, supra n.10, 56-58.
[24]GATT Contracting Parties, Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation on Developing Countries <http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#enabling_clause> assessed 29 July 2010.

exception to the MFN principle as such preferences will not be extended to developed countries.[25] It also made provision for the granting of special and exclusive concessions to the Least Developed Countries.

In summary, the enabling clause became the legal platform for the GSP, the Global System of Trade Preferences (GSTP) and the other special and deferential provisions within the multilateral trade regime. The enabling clause also introduced the grounds for the justiciability of the initiatives which it regulates. Thus, although it is optional for developed countries to take up the responsibility of providing non – reciprocal tariff preferences to developing countries, there are some stipulations which appear compulsory. This includes the provision that any GSP preference which a developed country provides for a developing country must be made available to all other developing countries in that same state of development. This was the pronouncement of the Appellate Body in the *EC – Tariff preference case.*[26] In this case, India successfully challenged the EU's Drug programme for developing countries under the GSP scheme claiming that the EU's selection of beneficiaries amounted to a violation of Article I of GATT and section 2 (a), and 3 (c) of the Enabling Clause.[27] The Appellate Body held that the Enabling Clause operates as an exception to Article I: 1 of the GATT 1994 and the Enabling Clause does not exclude the applicability of Article I: 1 of the GATT 1994.[28]

Thus the justiciability of any Enabling Clause initiative is limited to ensuring that the designated beneficiary developing countries are treated equally in accordance with their similarities in development status. In the *EC – Tariff Preference case*, the appellate body stated that any GSP provider must take into consideration an objective assessment of the conditions that it uses to select

[25] s 2 (c) of the Enabling Clause Decision; see generally R. Hudec, *Essays on the Nature of International Trade law* (Cameron May: London, 2000) 331 - 335

[26] *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (WT/DS246) (herein after referred to as 'EC – Tariff Preference'); see also G. Shaffer and Y. Apea,'Institutional Choice in the General System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights' (2005) 3 - 11<http://www.worldtradelaw.net/articles/shaffergsp.pdf>accessed 10 August 2010.

[27] Ibid.

[28] See section 2 (a) and 3 (c) of the Enabling Clause; see also *EC – Tariff Preference*

the beneficiaries for its scheme so that all developing countries which fall within that category can be equally eligible and therefore benefit from the scheme.[29]

The introduction of the Enabling Clause did not terminate the evolution process of the initiatives which have been introduced to impact on the participation of developing countries in international trade. In fact, the Enabling Clause decision only marked the beginning of a new era of initiatives aimed at bolstering the participation of developing countries in international trade. Since the introduction of the Enabling Clause, there have been a plethora of hybrid initiatives which have been introduced in line with the spirit and intent of the Enabling Clause decision of 1979. Amongst these are the EU – ACP Cotonou Agreement[30] and the African Growth and Opportunity Act (AGOA), which were initiated by the EU and the USA, respectively. These non-reciprocal initiatives have revolutionalised the relationship between developed and developing countries; created more opportunities for developing countries to better maximise the potentials of trade as an engine for economic growth in particular and overall development in general. The idea behind these hybrid non-reciprocal schemes is to combine aid, technical assistance, capacity building and mutual co - operation with mainstream tariff preferences provision under a single undertaking for developing countries.

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[29] *EC – Tariff Preference* supra n. 29

[30] The EU was amongst the first set of developed countries to initiate such a scheme when it introduced the Lome economic agreement between the EU and the ACP states in 1975. USA introduced her versions of such partnership agreements in the 1980's. The significant distinction between this hybrid non-reciprocal scheme and the other GSP schemes is that the Lome and later the Cotonou agreements is a contractual agreement between the EU and the ACP countries, although it is argued that the terms and conditions of the agreement are still unilaterally tilted in favour of the EU. See Text of Lome Convention <http://ec.europa.eu/development/geographical/cotonou/lomegen/lomeitoiv_en.cfm#0> accessed 31 August 2010; see also The European Commission: Generalized System of Preferences – user's guide to the European Union's scheme of Generalized Tariff Preferences <http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_116448.pdf>accessed 31 August 2010; see also F. DeMaria, et al, 'Agro-Food Preferences in the EU's GSP Scheme: An Analysis of Changes Between 2004 and 2006' [2008] DPR Vol 26 696; Cf: B.F. Onguglo, 'Developing Countries and Unilateral Trade Preferences in the New International Trading System' (Chapter 4) in M.R. Mendoza et al, (eds), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations.* (The Brookings Institution Press/Organization of American States: Washington DC, 1999)2; see also art 12 of the European Union and the African and Caribbean and Pacific Countries (EU – ACP) 'Cotonou Agreement'<http://ec.europa.eu/development/icenter/repository/Cotonou_EN_2006_en.pdf> accessed 10August 2010

From the analysis above, it is unequivocal that the enabling clause is the legal platform for non-reciprocal tariff preferential schemes such as the GSP and other hybrid initiatives such as the EU – ACP Cotonou agreement and the AGOA; the SDT which are contained in the various WTO agreements; the SDT's which are specifically meant for countries categorised as LDC's and the GSTP. Furthermore, from the provisions of the Enabling Clause, it is also deducible that the non-reciprocal schemes like the GSP, relate to the granting of tariff preferences only,[31] while the SDT provisions for developing countries cover only non-tariff measures.[32] Finally, the third sets of Enabling Clause initiatives which are designed exclusively between developing countries encompass both tariff and non-tariff measures alike.[33] These distinctions are important because if participants to one type of Enabling Clause initiative attempt to give a type of preference not covered within the scope of that specific Enabling Clause initiative, it would amount to a breach of the multilateral rules of the WTO and could to lead to a legal challenge by any of the Contracting Parties. The aforementioned distinction was one of the issues raised by the complaining Contracting Parties against the EU in the *EC -Banana's case*[34] where it was argued that the EU's GSP programme for its' Banana importation regime with the ACP countries, was a breach of the WTO agreement on import licensing procedures. While upholding the foregoing, the Appellate Body held that the EU's Banana importation regime amounted to quantitative restrictions which is a non – tariff measure not permitted under the section 2 (a) of the Enabling Clause.[35] It was further held that the principles under which the EU's hybrid non- reciprocal scheme operated was a departure from the strict stipulations of the multilateral trade rules and hence contrary to the provisions of the GATT and the Enabling Clause.[36] Consequently, the EU had to negotiate with the contracting parties for a waiver

[31] Section 2(a) Enabling Clause Decision.
[32] Ibid, section 2 (b)
[33] Ibid, section 2 (c)
[34] *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27)
[35] Ibid; see also Agreement on Import Licensing Procedures<http://www.wto.org/english/docs_e/legal_e/23-lic.pdf> accessed 10 August 2010.
[36] *EC – Banana*; See generally Article XXIV GATT

for its scheme on the promise that the terms of the EU – ACP agreement would be reviewed to bring it in line with the provisions of the GATT.[37]

Thus, since the landmark decision in the *EC – Banana's case*, the legal platform for the operation of hybrid non-reciprocal schemes have now been regulated under the Enabling Clause in conjunction with special waivers granted by the WTO members pursuant to the Understanding in Respect of Waivers and Article IX of the WTO Agreement.[38] Article X (4) of the WTO Agreement states that a decision granting a waiver shall state the exceptional circumstances justifying the waiver and shall state the terms and conditions regulating the waiver.[39] Such waivers granted shall be reviewed periodically to ascertain that the circumstances for which the waiver was granted still exist to justify the continuance of such a waiver.[40]

In summary, it is argued that irrespective of the broader nature and objectives of the hybrid non-reciprocal trade preferences schemes, breach of some of the strict stipulations of the Enabling Clause section 2 (a) and the GATT are still within the spirit and intent of the Enabling Clause. Thus, in as much as these species of non-reciprocal preference arrangement require special waivers, it is argued that the exceptional circumstances envisaged in Article X of the WTO agreement is in tandem with the stipulations in section 3 (c) of the enabling clause which provide that any arrangement aimed at developing countries must be designed and if necessary, modified to respond positively to the development, financial and trade needs of developing countries.[41]

[37]See generally the WTO Ministerial Decision: 'European communities – the ACP-EC Partnership Agreement 'of 14 November, (2001 WT/MIN(01)/15) <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agre_e.pdf> accessed 10 August 2010

[38]The Agreement Establishing the World Trade Organization<http://www.wto.org/english/docs_e/legal_e/04-wto.pdf>accessed 10 August 2010

[39] ibid

[40] ibid

[41] Enabling Clause

III. The Crux of the Matter: Reforming SDT Provisions

The realities of today show that developing countries require special attention to bridge the gap between them and the developed nations. From the preceding section, it is obvious that a plethora of initiatives has been introduced for this purpose.[42] More obvious since the launching of the Doha rounds of negotiations, is that the application of SDTs has met an impasse as to its effect and application. Developing and developed countries have made little or no head way over the implications of SDTs on the uniform application of the MFN and Nationality principles which form the bedrock of the multilateral trade system. While developed countries are of the view that SDTs should be applied as temporary measures, developing countries seek to view them as a legal or political right inherently embedded in the GATT/WTO system.[43] Both sides have also failed to reach consensus as per specific issues on the agreement such as agriculture, textiles etc; while developing countries are still clamouring for enhanced market access in these areas.[44]

In light of these developments, the ability of SDTs to effect change in the participation of developing countries in international trade is questionable.[45] The WTO's ministerial conference conceded to this by its declaration that SDTs need to be reviewed to make them more effective.[46] A perusal of most of the SDT provisions reveals that they tend to favour the granting state. This is because they are temporal in nature, contain controversial graduation clauses and do not create binding obligations on the developed countries.[47] For example, the GSP programmes are discretionary and subject to the unilateral dictates of the granting state.[48] Also, Part IV (ARTICLE XXXVI – XXXVIII) of GATT is

[42] There currently exists more than 155 specific provisions scattered under the various GATT/WTO Agreements which touch on these general initiatives above, yet the disparity between the developing and developed countries under the multilateral trading system is still in existence. S.W. Chang, supra n. 3 at 554.
[43] D. McRae, 'Developing Countries and the Future of the WTO' (2005)JIEL 605.
[44] A.D. Mitchell, 'A legal principle of special and differential treatment for WTO disputes'(2006) WTREVUK 449-450; D. McRae, supra n.43 at 603.
[45] S.W. Chang, supra n.43 at 554
[46] Para 44, of the Doha Ministerial Declaration. Available at: <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> Accessed 13 January, 2010.
[47] O.F. Kofi, supra n. 3 at 167.
[48] M. Matsushita et al, supra n. 11 at 777.

a hortatory provision, lacks binding force and is an expression of the concern as well as a call for actions and measures to remedy the lack of growth in the export earnings of developing countries.[49] Specifically, Article XXXVII (1) provides *inter alia*, that a developed country shall, to the fullest extent possible aid developing countries, except they have compelling reasons to act otherwise. This makes it non-obligatory and creates an escape clause for developed countries to avoid these obligations. Consequently, the conclusion from the above is that Part IV of the GATT is ineffective because it is being utilised by developed countries as a premise for selecting the areas they desire to aid developing countries with.

With the above as a premise, the assertion would be that efforts so far have failed to improve the participation of developing countries in international trade because of the structural and procedural deficiencies of the multilateral trading system. This is further reaffirmed by reason of the existence of some explanation for these disappointments. The first deficiency with the WTO structure as it stems from the classification of countries into developmental categories. The criterion that is generally used to categorise countries was adopted from the World Bank and is based on per capita income (GNI). The World Bank provides four classifications of countries based on income - high income, upper middle income, middle income and low-income countries. Countries with incomes below $935 fall under low-income economies. $936 to $3,705 falls under lower-middle-income economies. $3706 to $11,455 of per capita income is classified as upper-middle-income economies, and above $11,455 of per capita, GNI qualifies as a high-income economy. Based on this classification, low income and middle-income countries are commonly grouped as developing countries. It must be emphasised that this criterion comes with a caveat from the World Bank that the

[49] See Part IV of GATT, 1994 <http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm> Accessed 13 January, 2010.

reference to the low and middle-income countries as 'developing' is more of a convenient classification and does not necessarily reflect the development status of these countries.[50]

Interestingly, none of the constitutive documents of the GATT/WTO provides for a definition of 'developed', 'developing' or 'least developed' countries.[51] Thus, developmental classification of countries has predominantly been by self-selection, most times with reference to the World Bank criterion. This lacuna in the GATT/WTO provisions has created vagueness in the adoption of an objective assessment of the developmental status of its members, thereby creating room for unilateralism under the multilateral trade system. By unilateralism, reference is made to the situation where countries decide by themselves when to be categorised as developing or when to recognise other countries as developing countries.[52]

Secondly, the Marrakesh Agreement, which bestows on the WTO its functions and powers, presents another reason to be dissatisfied. By virtue of it, the WTO is a platform for trade negotiations amongst its members,[53] while the decision-making capacity of the WTO is controlled by the states through the instrumentality of the Ministerial Conference; which is made up of representatives of each member state. Although each state is equally represented and has its mandate secured by the voting procedure of the WTO; but there is an entrenchment of individualistic and personal agendas by all parties.[54] These self-interests of the members of the WTO manifest itself in the inability of countries on either side of the development divide to come to a feasibly workable compromise on the

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[50]<http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458~menuPK:64133156~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html>. Accessed 5 December, 2009.

[51] It is appalling to say the least that the WTO, which has the sole responsibility of setting the standards and maintaining an equilibrium in the multilateral trading system does not have a definition of what constitutes a developing country in any of its constitutive documents, but rather relies on the classification used by the World Bank which was not specifically designed for international trade. How can any substantive provision introduced be expected to achieve its purpose if there is no objective criterion in place to ascertain its target or beneficiary? See A. D. Mitchell, (n 45) 454; see also D. McRae, supra n.45, 606 – 607.

[52] See M. Matsushita et al, supra n. 49, 764 – 765.

[53] N. Blokker and A. Ramses, 'Editorial: Updating International Organisations' (2005) IOLR 2; 4. J. Klabbers, *An Introduction to International Institutional Law*, 2nd Edn (United Kingdom: Cambridge University Press, 2004) 283; C.Z. Deborah, 'The Sutherland Report: The WTO and its Critics' (2005) IOLR 153.

[54] N.P. Pedersen, 'The WTO decision-making process and internal transparency' (2006) WTRVUK 103, 104

way forward. What is more obvious is the fact that in the negotiations for compromise, the developed countries which have better bargaining power insistently try to have their way so as to protect their personal interests.[55] In line with this observation, it is argued that the initiatives introduced to improve the interests of developing countries are commendable but cannot achieve their intended purpose if the individual interests of the developed countries are used as the yardstick for their implementation. A good example is the GSP initiative, while the WTO acknowledges the ineffectiveness of the GSP due to the unilateralism and arbitrariness in the condition for grant set by developed countries, it is incapable of changing the laws, because such a decision can only be taken by the states via the Ministerial Conference. Thus, while the WTO provides expertise in the form of its specialised committees and the staff of the Secretariat, its effect on the final outcome of policies is limited and seriously hampered by its statutory limitations.

Thirdly, there are some factors which are not trade-related but have contributed to the stagnation of most developing countries. Top on this list is corruption and political instability. These two factors are reoccurring decimals in the history of most developing countries. This invariably affects the trade policies and the general growth of their economies. All efforts made towards improving the economic condition of developed countries cannot achieve the desired result if the political environment of developing countries remains unstable and unsuitable for such growth. For example, most financial and technical aid which is provided for developing countries is not channelled to the right quarters due to corrupt practices of government officials, and this hinders any positive effect that SDT provisions may have on developing countries. Also, there are some other factors which are not directly traded related but bother on economic challenges which invariably affect the ability of developing countries to participate in international trade effectively and also hinder any effort that SDT provisions may have on developing countries. These factors stem from the implication of the

[55]P. Ernst-Ulrich, 'Multilevel Judicial Governance of International Trade requires a Commom Conception of Rule of Law and Justice' (2007) JIEL 531.

International Monetary Fund (IMF) loans which have been described as anachronistic and detrimental to the overall development of developing countries.[56]

Fourthly, Developing countries lack the technical expertise and overall capacity to effectively utilise the Dispute Settlement Mechanism (DSM) of the WTO. Developing countries are hindered by the high costs of pursuing claims against developed countries and are also frustrated by their inability to obtain meaningful results even if they successfully pursue their claims. This is so because the compliance mechanism of the DSM is not potent enough to sanction developed countries which run afoul of their obligations towards developing countries.[57]

IV. Recommendations and Conclusion

Notwithstanding the institutional and structural challenges highlighted above, it is submitted that SDT provisions are still beneficial to the advancement of the integration of developing countries in particular and the multilateral trade system in general; because they help to create equality amongst unequally yoked trading blocks.[58] Improving the fortune of developing countries can be achieved by strengthening the SDT provisions in the following ways:

First, the WTO should develop a definitive and objective criterion, which will be the basis for categorising the developmental status of its membership. It is believed that if there is an objective criterion set by the WTO, based on trade statistics and other data it gathers through its Trade Policy Reviews (TPRs), then the categorisation of countries would cease to be by self-selection. Also, if the WTO adopts a definitive criterion for identifying its members which need SDT provisions, it would

[56] F.N. Botchway, 'Is the IMF Conditionality anachronistic?'(2009) LFMR 368

[57] D. Sarooshi, 'The Future of the WTO and Its Dispute Settlement System' (2005) IOLR 129,148.

[58] Ibid; this argument is founded on the view that the concessions which have been made over the years to accommodate the participation of developing countries within the multilateral trade system strengthened the system. It is argued that the strength of multilateralism lies in participation of as many trading countries as possible. The success of the system lies in the realisation that every state in the international system whether developed or developing need each other to survive, thus making the compromises made towards developing countries a price worth making for the greater good of all. Also considering the fact that the aim of the exceptions given to developing countries are temporary measures aimed at integrating developing countries into the mainstream multilateral system of non – discrimination; they are fundamental means necessary to a justified end. On the plus side, the exceptions which have been provided for developing countries has led to the ascendance and universal acceptance of multilateralism in international trade. This much is evident from the increased participation of developing countries in the multilateral trade system of the WTO.

be better able to tailor the agreement specific provisions to meet the pressing needs of such a country.[59] For example, Cottier advocates that economic indicators on an industry-specific basis should be used to outline the SDT needs of countries; rather than applying SDT across board.[60] He argues that these economic indicators or thresholds may offer a more targeted, bespoke and thus perhaps a more legitimate approach at maintaining the application of SDT's within a uniform system of the WTO.[61]

More importantly, it would be a better yardstick for determining the issue of graduation clauses which is a controversial clause in the application of SDT provisions. The tendency has always been there for developed countries to agitate for a return to MFN status with its developing countries trading partners which are enjoying any SDT, based on their own unilateral estimation that such a country's economy has graduated (or improved) enough to return to the status quo *ante*.[62] Mitchell has suggested that a country regrouping on the basis of the peculiarities of each country's needs and stage of development could be adopted as a basis for the application of SDT provisions.[63]This suggestion is supported in this discourse because a regrouping based on economic indicia which would distinguish each country's particular developmental needs re-enforces the objective criteria for ascertaining the developmental status of countries in the first place. It is argued that if this is the yardstick for ascertaining the duration of the application of the SDT provisions and that the country regrouping is handled by the WTO based on objectively ascertained criteria, then developed countries will be curtailed from unilaterally and subjectively determining the duration of their assistance to developing countries. This would also estop developing countries from attempting to manipulate their developmental status (even when they are genuinely ripe for full integration) so as to continue benefitting from the benevolence of their developed country benefactors in perpetuity.

[59]D. McRae, supra n.52 at 608.
[60] T. Cottier, 'From progressive liberalization to progressive regulation in WTO law' (2006) JIEL 799.
[61] Above n. 61 at 781
[62] See S.W. Chang, supra n. 46 at 557.
[63] A.D. Mitchell, supra n. 52 at 456.

The argument above emphasises the importance of the institutional capacity of the WTO to effectively dictate the SDT regime. In this light, it is argued that the WTO should be given a bigger role and mandate under its constitutive documents. If the WTO assumes greater functions in dictating the way forward, it is believed that developing countries would stand a better chance of bridging the gap between them and the developed countries. Seung Wha Chang advocates for a 'measure-specific *exante* approach.' In his analysis, he opines that before SDTs are applied, the individual development needs of each developing nation should be accessed. He suggests that an independent assessment body is required to give an impartial assessment of the terms, effects and conditions for granting SDTs.[64] This argument is adopted to the extent that the WTO needs to play a greater role in the assessment criteria for the application of SDT provisions. This is because it is believed that the ability of the WTO to play an independent and decisive role in the determination of criterion (or criteria) for the application of SDT provisions would be pivotal to breaking the deadlock on negotiations and achieving a uniform and acceptable application of the multilateral trade rules; including the SDT provisions.

The belief expressed *ante* in the ability of the WTO to achieve this, stems from the role which the DSM of the WTO has played so far in the multilateral trade system. It is opined that the evolution of the DSM from a state-driven forum, to an independent institutionalised mechanism, represents the metamorphosis of the WTO which gives it the credence to regularise the SDT provisions effectively. Prior to the establishment of the WTO and the introduction of the institutionalised dispute settlement mechanism, the GATT settled disputes via negotiations and consultation panels. According to Ernst-Ulrich Petersmann,[65] the DSM before 1995 was predominantly 'member driven', with the interests of a powerful few dictating the course of proceedings.[66] A perusal of the provisions of the DSM shows

[64] S.W. Chang, supra n. 62 at 557.
[65]P .Ernst-Ulrich, supra n.56 at *531*.
[66] Ibid; Cf. M. Matsushita et al. supra n. 53, 106 – 107.

that it is intended to be as independent as possible from the mainstream politics of the WTO.[67] Also, since its inception, the trend of its rulings and recommendations show that developed countries like the United States and the EU have had a considerable amount of rulings against them.[68] This is indicative of the fact that they have not been able to manipulate the decisions, even with their hegemonic status in international relations.

This, it is believed, represents the big difference that an independent WTO would provide for the interests of its membership, both developed and developing if it is given a greater role in dictating the course of negotiations on cross-cutting issues. It is suggested that Developing countries should put their numerical superiority to better use by pushing for the empowering of the WTO as an independent arbiter of international trade. Considering the technical expertise of the WTO in trade issues, a more independent WTO would be in a better position to instil the necessary changes to balance the scales between the developed and developing countries. In relation to the issues of graduation, duration and lack of binding obligations of SDTs, it is this writer's opinion that if the WTO is empowered to bring its technical expertise to bear on the course of negotiations, the individual interests of states will give way to common interests for the good of the system.

It is interesting to note that the WTO has already shown the ability to dictate a change in the way states interact under the multilateral trade system, albeit in a subtle form. The WTO has shown traces of this independence through the operations of its specialised committees, the Trade Policy Review Mechanism and the Dispute Settlement Mechanism.[69]

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[67]O. Omiunu, 'Critically Examine the Extent to which International Organisations have become Autonomous of their Member States' (2010) Essay Paper for The Law of International Organisations Module (22943), University of Hull, LLM programme 2009/2010.

[68] Source: World Trade Organisation legal Affairs Division WTO Dispute Settlement: One Page Case Summaries 1995 – 2008 (2009), (online) <http://www.wto.org/english/res_e/booksp_e/dispu_summary95_08_e.pdf> Accessed 15 January, 2010.

[69]O. Omiunu, supra n. 67.

Considering the controversy surrounding the role of international organisations in international law, it cannot be underestimated that states are usually unwilling to give up their sovereign status. Thus, so as not to undermine the sovereignty of states, it is recommended that states restructure their functions to a supervisory role, more like providing checks and balances to any excesses of the WTO.

However, if the previous recommendations above are politically unattainable or the attainment is taking too long, developing countries should explore the avenue of the DSM of the WTO more frequently than they have done in the past. This is because the DSM of the WTO has in practice managed to distinguish itself as an impartial arbiter between the developed and developing countries.[70] The Dispute Settlement Understanding (DSU) contains SDT provisions which in summary give developing countries certain concessions in the application of the DSU rules.[71] Developing countries should also put their numerical strength to good use by pushing for improvements to the DSM which would empower the DSM to take more proactive steps in ensuring that developed countries adhere to the SDT agreements under the GATT/WTO laws. Numerous proposals have been made with respect to these required changes to the DSU.[72] It is estimated that the most important proposals are those which pertain to the ability of developing countries to effectively pursue claims under the DSM and the potency of compliance measures against developed countries.

With respect to the financial handicap that developing countries face, the SDT provisions which provide for technical assistance is a welcome development and should be adequately utilised by developing countries to increase their capacity to bring claims under the DSM. Developing countries

[70] See A.D. Mitchell, supra n. 63 at 457; See also the *EC-Tariff Preferences Case*, supra n. 30.
[71] Articles 4.10, 7, 12.11, 21.2, 21.7, 21.8 and 22 of the Dispute Settlement Understanding (DSU). <http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> Accessed 14 January, 2010.
[72] D. Sarooshi, supra n. 58.

should desist from the attitude of depending on these funds as means of supplementing their budgets, but should rather channel these funds to building their technical expertise.[73]

In relation to the potency and effectiveness of compliance measures under the DSM, it has been proposed severally, that developing countries should be given the option of choosing the areas of retaliation against offending developed countries; or that retaliation against an offending developed country should be a joint effort of all other WTO members.[74] This view is endorsed because it would make compliance with SDT rules in GATT/WTO Agreements more effective. It is believed that it would also deter developed countries from flouting the law and that its adoption is an expression of the commitment of all parties to the attainment of common goals under the multilateral trading system of the GATT/WTO.

To achieve these aims above, transparency, accountability and sincerity are required of the governments of developing countries to address the socio-political issues which have contributed immensely to the economic stagnation of their countries. If developing countries put their house in order, it would reflect in every aspect of their national growth. This would guarantee that technical assistance and aid under the different SDT provisions would be utilised in empowering technocrats from the developing countries to take up sensitive positions in the ranks of the WTO.[75]

With respect to the effect of IMF loans on developing countries ability to effectively participate in international trade, it is advocated that the WTO has a major role to play in this area. The Sutherland Committee, in its report on the future of the WTO, stated this much by proposing that the WTO should chart the course of coherence in economic policy between it and other international organisations.[76] ZC Deborah acknowledges the fact that there is a relationship between the acts of

[73]Ibid, 143; see also O.F. Kofi, supra n.48 at 168.
[74] D. Sarooshi, supra n. 72, 147 – 150.
[75] C. Michalopoulos, 'Developing Countries Participation in the World Trade organisation' (1998) Policy Research Working Paper WPS 1906: The World Bank and The World Trade, 18 – 21.
[76] C.Z. Deborah, supra n. 54, 158 – 160.

these international organisations on the participation of developing countries in international trade, but doubts if it is legally and politically attainable for the WTO to interfere with the institutional integrity of other international institutions.[77] This opinion is not shared as it is believed that corporation between these institutions is necessary and should be given more consideration by all stakeholders.[78] Even before the Sutherland Committee made this proposal, there had been evidence of cooperation in this respect. However, the extent of its effectiveness is questionable, considering the fact that it is still being discussed as a pressing challenge.[79] In the interim, it is suggested that the WTO, through its trade policy review mechanism, should give expert advice to developing countries on the pros and cons of taking IMF loans. With the advantage of having more information at its disposal, the WTO can provide a clearer picture for developing countries on the effect of taking IMF loans.

In conclusion, it is submitted that the interests of developing countries in international trade are still best protected by the SDT provisions under the multilateral trade system. However, these SDT provisions definitely need to be strengthened to reflect the real issues which are in the best interest of developing countries; such as increased market access in the areas of textiles and agriculture. But the focus of this essay has been on the structural and procedural issues which need to be tackled to make these substantive provisions more effective.

This paper has identified the need for:

1. An objective criterion for the assessment and allocation of development status,
2. The increased participation of the WTO in identifying the development status and needs of its membership as a means to effectively applying SDTs to developing countries,
3. The strengthening of the DSM of the WTO, and

[77] Ibid.
[78] C. Michalopoulos, supra n.75 at 7.
[79] F.N. Botchway, supra n. 57 at 369.

4. Greater cooperation between the WTO and the other Bretton woods Financial Institutions.

It has also been suggested that developing countries should aspire to build their technical capacity, so as to participate more effectively in the Dispute Settlement Process.[80] It is also part of the thesis of this paper that developing countries have to play their part by creating the enabling socio-political atmosphere needed for SDT initiatives such as technical aid to be effectively utilised.

In summary, it must be admitted that the challenges bedevilling the interest and participation of developing countries in world trade are multifaceted.[81] Thus a multifaceted approach is required in order to bridge the gap between developed and developing countries. The arguments and recommendations proffered in this paper represent just a dimension to the hydra-headed scenario that the participation of developing countries in world trade represents. But what is more obvious is the fact that the almost 155 SDT provisions albeit its numerous flaws, constitute a foundation and a step in the right direction for developing countries to fully maximise their participation in international trade for economic development ends.[82]

[81]D. McRae, supra n. 60 at 606.
[82]Ibid, (The last paragraph) 610.