

JIMMA UNIVERSITY COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW



**AN APPRAISAL OF WTO SPECIAL AND DIFFERENTIAL TREATMENT FOR LEAST
DEVELOPED COUNTRIES AND ITS POTENTIAL IMPLICATION TO THE FATE OF
ETHIOPIAN ACCESSION**

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Declaration Statement

I hereby declare that, this paper prepared for the partial fulfillment of the requirements for LL.M Degree in Commercial and Investment Law entitled ‘An appraisal of WTO Special and Differential Treatment for Least developed Countries and Its Potential to the Fate of Ethiopian Accession’ is my own work and that it has not previously been submitted for assessment to another University or another qualification. Also, whenever other sources are used or quoted, they have been duly acknowledged.

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Dedication

I dedicate this research to my beloved wife, who shared with me the discomfort I was feeling during my stay in Jimma University. I could not have done it without your help and encouragement. You tired so much to see my success. You cared for my baby whom I left to you at her infancy. I love you so much; you always dwell in my heart. I also dedicate this research to my baby (Lalistu Ebba) whom I love so much.

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Abstract

Liberalization of international trade is the main underlying objective of WTO. But, the issues as to whether the liberalization of international trade equally benefits economically advanced countries and LDCs have been a subject of bargaining. To this effect, SDT scheme was introduced by WTO so as to create a favorable condition for LDC countries to share from the chalice of international trade by assisting them to fully integrate into the MTS by providing certain advantages like tariff preferences and derogations from rules and obligations.

This paper has critically analyzed SDT schemes under WTO in general and its potential implication to the fate of the Ethiopian accession in particular. From the appraisal of SDT provisions for LDCs based on the ways in which they are formulated and implemented, as well as the experiences of acceded countries, the paper identified that, a lot of SDT provisions in WTO Agreements and Decisions did not create any legally binding obligations to act in a way that would advance the LDCs' integration into global trade. Prominently, their vagueness and non-binding nature as well as resource demanding conditions attached to the schemes, and the capacity constraint inherent in the LDCs could be mentioned as a stumbling block their effectiveness.

The paper then examined the potential implication of the SDT schemes on the fate of Ethiopia's accession to WTO. Accordingly, the author found that, it is unlikely that SDT schemes as it stands now will assure Ethiopia's integration into international trade and be serve as a tool to achieve its development objectives, owing Ethiopia's capacity constraint, non-binding nature and tough conditionalities for accessing the schemes. Hence, the author advances the position that Ethiopia must be more proactive in its accession to WTO than solely relying on the ineffective SDT schemes of the LDCs in the system.

Key Words: - Ethiopia, LDC, Special and Differential Treatment, WTO Accession

Abbreviations and Acronyms

AGOA	African Growth and Opportunity Act
CV	Customs Valuation
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
DDA	Doha Development Agenda
DFQF	Duty-Free and Quota-Free
EBA	Everything But Arms
GSP	Generalized System of Preferences
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariff and Trade
IF	Integrated Framework for Trade-Related Technical Assistance
LDC	Least-Developed Countries
MFN	Most-Favoured Nation
MTS	Multilateral Trading System
NTB	Non-Tariff Barriers
SDT	Special and Differential Treatment
SPS	Sanitary and Phytosanitary
TA	Technical Assistance
TBT	Technical Barriers to Trade
TRIMS	Trade Related Investment Measures
TRIPS	Trade Related Aspects of Intellectual Property
UNDP	United Nations Development Programme
UN	United Nations
UNCTAD	United Nation Committee on Trade and Development
WTO	World Trade Organization

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CHAPTER ONE: INTRODUCTION

1.1. Background of the Study

The Marrakesh Agreement Establishing the WTO recognizes and refers to sustainable economic development as one of the objectives of the WTO (as was the case for General Agreement on Trade and Tariff (GATT)). It also specifies that international trade should benefit the economic development of developing and LDCs. It states that:

“the Parties to this agreement are recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, 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.”¹

However, the observed realities of the multilateral trading system (herein after MTS) failed to validate these assumptions.² Of the originally 23 signatory states of GATT, 11 would have been considered as developing countries and treated differentially.³ But, the original GATT does not mention any exception to the basic rule of reciprocity nor other ways to treat developing countries “especially and differentially”. While the original GATT contained no explicit provisions regarding developing countries, soon thereafter developing countries started to raise concerns and identify special challenges that they faced in international trade.⁴

It became clear that developing countries were not deriving much benefits from various GATT multilateral trade negotiations and that very few of these countries actually participated in the

1 See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867U.N.T.S.154, 33I.L.M. 1167(1994) Preamble.

2 See Oyejide, A ‘Costs and Benefits of “Special and Differential” Treatment for Developing Countries in GATT/WTO: An African Perspective’, Collaborative Research Project on Africa and the World Trading System (1998), P. 4.

3 These were Brazil, Burma, Ceylon, Chile, China, Cuba, India, Lebanon, Pakistan, Rhodesia and Syria. See Michalopoulos, C ‘The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization’, Policy Research Working Paper, No 2388, World Bank, Washington D.C., 2000 P. 2.

4ibid.

GATT process.⁵ Various domestic policies in the developed countries contributed significantly to the decline in the exports of developing countries and they were experiencing special difficulties in the GATT negotiating process.⁶

Their willingness and ability to participate were further constrained by their limited capacity in the globalized negotiating framework and the structural features of their economies. Compared with the developed countries, the developing countries were economically small while their exports were typically concentrated on a limited number of commodities.⁷ The latter feature of the typical developing country economy rendered it particularly vulnerable to greater terms of trade volatility and greater susceptibility to external shocks in general.⁸ As a result, the nature of their balance of payments problems could be more long term and thus call for extended use of trade restrictions.⁹

After the birth of WTO, all members must comply with WTO agreements as legally binding regardless of whether they are developing countries, LDCs or developed countries.¹⁰ However, it is difficult as a practical matter to apply WTO rules in the same way to all member countries, which vary in their development stage.¹¹

In essence, therefore, the perspective that was apparently ascribed to the developing countries and LDCs during the 1950s and 1960s and the years after implies that while the GATT framework could assist in enhancing their growth and development, their economies have peculiar characteristics that constrain their trade prospects and these should justify their being given special status under the global trading rules and arrangements embodied in GATT.¹² This was to be achieved through the inclusion of special and differential treatment (SDT) provisions into the MTS. SDT provisions are meant to support developing and least developed member participation and integration into the international trading system by providing special, more relaxed or flexible rules for them.

5 Oyejide, A (1998), supra n 2, P. 4.

6 *ibid.*

7 *Ibid*, p. 5.

8 *ibid.*

9 *ibid.*

10 Yanai, A 'Rethinking Special and Differential Treatment in the WTO' (2013), p. 1.

11 *ibid.*

12 Oyejide, A (1998), supra note 2, p. 5.

To achieve a development concern of the developing countries and LDCs through SDT treatment under the GATT and WTO regime, different activities have been undertaken through the time.

The 1954-55 GATT review session was the first occasion on which provisions were adopted to address the needs of developing countries as a group within the GATT.¹³ The session redrafted Article XVIII entitled '*Governmental Assistance to Economic Development*', that effect specified separate conditions by which trade restriction could be used to protect infant industries and to deal with balance of payments problems of the member developing countries.¹⁴

In 1958, the Haberler report¹⁵ of an expert panel appointed by the 1957 GATT Ministerial produced a report by demonstrating that developing country export earnings were insufficient to meet development needs and focused primarily on developed country trade barriers as a significant part of the problem.¹⁶ The report went on to recommend: (a) stabilization programs to address commodity price fluctuations through buffers stocks, and (b) reductions in developed countries' internal taxes on primary products such as coffee, tea and tobacco which restrained consumption and import demand.¹⁷

In 1961 the GATT adopted another declaration on the 'Promotion of Trade of Less developed Countries,' which *inter alia* called for preferences in market access for developing countries not covered by the preferential tariff systems (such as the Commonwealth preferences) or by preferences in customs unions or free trade areas which were subsequently established. This was the first mention in the GATT of what would later on become the Generalized System of Preferences (GSP) for developing countries.¹⁸

Subsequently, influenced by the founding of United Nation Committee on Trade and Development (UNCTAD), in 1964, the GATT adopted a specific legal framework within which

13 Michalopoulos (2000), supra n 3, p. 4.

14 Ibid, See also Oyejide (1998), supra n 2, p. 8

15 See GATT (1958) *Trends in International Trade: A report by a Panel of Experts*, GATT: Geneva, October 1958.

16 Michalopoulos (2000), supra n 3, p. 4.

17 *ibid*.

18 *Ibid*, p. 5.

the concerns of developing countries could be addressed: Part IV, dealing specifically with Trade and Development and containing three new Articles, XXXVI to XXXVIII.¹⁹

In 1968 UNCTAD proposed GSP and the GATT contracting parties adopted it in 1971 which is an exception to most-favoured nation (MFN) through a waiver for ten years.²⁰ The adoption of this GSP scheme paved the way for according SDT to developing countries and LDCs for the first time in WTO history.²¹ Then after, the parties adopted the decision on ‘Differential and More Favour Treatment, Reciprocity, and Fuller Participation of Developing Countries’²² (also known as Enabling Clause²³) in 1979. The Enabling Clause implemented at that time provided preferential market access for developing countries and LDCs to developed countries' markets on a non-discriminatory and non-reciprocal basis, including favourable treatment under other GATT rules dealing with non-tariff barriers (which otherwise would be a violation of the MFN principle).²⁴ The establishment of the Enabling Clause thus provided a permanent legal basis for SDT under GATT agreements, provided for certain aspects of regional or global preferential agreements among developing countries, and provided a legal basis for the continuation of GSP.²⁵ In spite of that the Clause gave formal embodiment to the concept of SDT, it continued to do so in discretionary and permissive, rather than legally binding terms.

19 See GATT (1964) *Part IV Trade and Development*, at: http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm, Visited on 07/02/2010; Michalopoulos (2000), supra n 3, p. 5

20 See *Waiver for Generalized System of Preferences*, GATT Doc. L/3545 (1971)

21 Michalopoulos (2000), supra n 3, p. 6.

22 See *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*’, Decision of 28 November 1979, L/4903.

23 This clause encompassed a) preferential market access for developing countries on a non-reciprocal and nondiscriminatory basis, b) differential and more favourable treatment of developing countries with regard to GATT provisions on non-tariff barriers, c) the conclusion of preferential agreements between developing countries and d) special treatment of the so-called Least Developed Countries (LDC). See Fritz, T: *Special and Differential Treatment for Developing Countries*, Global Issue Paper, No. 18 (2005), P.8; Fukasaku, K ‘*Special and Differential Treatment for Developing Countries: Does It Help Those Who Help Themselves*, Working Papers No. 197 (2000), pp.5- 6; In addition, the Enabling Clause introduced the principle of graduation by which a developing countries would no longer have the privilege of enjoying SDT provisions and had to shoulder the full responsibility when it would have become economically strong. See *ibid*; See also supra n 21, para 7

24 *Ibid*.

25 See Ewelukwa, U ‘*Special and differential treatment in the international trade law: A concept in search of content*’, 79 *N.D. L. Rev.* 831 (2003) , p. 848

LDC members of the WTO, as well as developing-country members can benefit from a number of SDT provisions contained in WTO agreements. The total number of such provisions amounts to 155, 17 of which are applicable only to the LDCs, and they fall into six categories:²⁶

- i. Provisions aimed at increasing the trade opportunities of developing-country members (i.e. market access);
- ii. (ii) Provisions requiring WTO members to safeguard the interests of developing-country members;
- iii. (iii) Flexibility, commitments to action and use of policy instruments;
- iv. (iv) Transitional time periods;
- v. (v) Technical assistance; and
- vi. (vi) Provisions relating to LDC members.

The above provisions provide LDCs with more flexibility than is given to other WTO member developing countries. One feature of these provisions is that they give LDCs more time to implement WTO agreements, enabling them to prepare institutionally (i.e. with laws, regulations and procedures) for multilateral disciplines.

Therefore, SDT provisions would contribute to support the participation and integration of LDCs into the MTS by providing special, more relaxed or flexible rules for them in general and Ethiopia in particular.

1.2. Literature Review

Different scholars tried to address the issues related with Ethiopia's accession to WTO in different ways. Although there is no research conducted directly on the issue of SDT of WTO in relation to Ethiopia's accession, there are some attempts to deal with the issues indirectly. For instance, Hussein Ahmed Tura has written an article on the title, "Ethiopia's Accession to the World Trade Organization: Lessons from Acceded Least Developed Countries",²⁷ and he tried to examine the experiences of LDCs acceded to the WTO with a view to drawing lessons that will be helpful to Ethiopia to devise successful strategies and avoid mistakes in an effort to gain

²⁶ *World Trade Organization Committee on Trade and Development*, Note by the Secretariat, 14 June 2013, WT/COMTD/W/196

²⁷ Tura, A 'Ethiopia's Accession to the World Trade Organization: Lessons from Acceded Least Developed Countries', *Oromia Law Journal*, Vol.4, No.1 (2015), pp. 125-152.

maximum benefits from its WTO membership. But he failed to discuss the WTO SDT provisions in full text from the beginning whether it integrates Ethiopia into the world trading system or not. He analyzed Ethiopia's accession to WTO based on the experiences of acceded LDCs without focusing on the mere problems related with WTO's SDT provisions. Thus, since the focus of my research from the beginning is on the appraising the SDT provisions (especially regarding its formulation and implementation nature) in general and its implication to Ethiopia's accession in particular, it is a new idea.

The next article selected for review is Henok Birhanu's Article entitled "Ethiopia's Long Walk to WTO Membership: Exploring the Implications of the 2012 WTO Accession Guidelines for Least Developing Countries".²⁸ He analyzed the substantive benchmarks of the accession guidelines in light of the concessions and commitments made by existing members, and examined their implication for Ethiopia and LDCs in general as the principal objective. He concluded that as compared to the benchmarks on services, the benchmarks in the area of goods are measurable and offer LDCs like Ethiopia more flexibility to protect their industries although as non-binding reference points, their application will depend solely on the will of the existing members. He also stated that in contrast, the benchmarks on services are not measureable and leave acceding LDCs vulnerable to demands from existing members and they offer little (if any) help for Ethiopia to fend off pressure from existing members to liberalize its financial and telecommunication service sectors. Although Henok's article is an interesting, his finding is limited only to the problems related with accession guidelines. He has not analyzed the problems related with WTO's SDT as a general, and problems related with Ethiopia's capacity in maximizing the benefits from it in bilateral market access negotiation in particular.

Another article reviewed is Elias N. Stebek's work entitled "WTO Accession in the Ethiopian Context: A Bittersweet Paradox".²⁹ His focus is on the comparative overview of the short-term setbacks vis a vis the eventual advantages that Ethiopia can obtain if the supply side (of goods and services) is nurtured and enhanced during the accession process and thereafter. He is based on the lessons from the problems and achievements of the LDCs (Nepal, Cambodia and

28 Asmelash, B Ethiopia's Long Walk to WTO Membership: Exploring the Implications of the 2012 WTO Accession Guidelines for Least Developing Countries, 12 *Manchester J. Int'l Econ. L.* 318 (2015), pp. 318-343.

29 Stebek, N 'WTO Accession in the Ethiopian Context: A Bittersweet Paradox' *Mizan Law Review* (2007) Vol. 1 No. 1, pp. 91-118.

Vietnam) that have newly acceded to the WTO and the booming economies of China and India. However, the article did not focus on the issues related to WTO SDT, nor did it purport to address the issue whether these provisions facilitates Ethiopia's economic development.

Moreover, the article of Tilahun Esmael Kassahun entitled as "Ethiopia's WTO Accession and Financial Service Liberalization: Striking the Balance between Trade Liberalization and Domestic Policy Space"³⁰ is also reviewed. The central focus of the article is to analyze whether there exists any reason for Members to hold back on GATS commitments in order to retain the freedom to pursue certain macroeconomic and regulatory policy objectives of their internal economy. Based on the examination of the possible commitment scenarios which Ethiopia can possibly commit to, the author argued that there exists no reason why GATS commitments on financial services will have to compromise Ethiopia's ability to pursue sound regulatory and macro-economic policies. The author has not analyzed his arguments in light of the problems related with the formulation and implementation of SDT.

The last article selected for review is Wolde Bulto Adugna's work entitled as "Ethiopia's Accession to the WTO with Emphasis on Foreign Market Access".³¹ He argued that although European Union (EU) member countries and United States offered preferential market access for Ethiopia under the GSP, it is found that Ethiopia's utilization of these preferential market accesses is not satisfactory. The author concluded that without taking these preferential market accesses into account, our empirical estimates show that import barriers imposed by Ethiopia's trade partners do not play an important role in determining the volume of Ethiopian exports. Finally, he recommended Ethiopia should demand long enough periods both for accession process and transition period to address her supply side problems since the results of his research suggest that the most favored nation mechanism and putative improved market access might not be an important criterion for deciding Ethiopia's Accession to the WTO. Hence, the issue of WTO's SDT provisions relating to preferential market access for LDCs (whether it meets their development objectives or not) is not mainly addressed by the author.

30 Kassahun, E 'Ethiopia's WTO Accession and Financial Service Liberalization: Striking the Balance between Trade Liberalization and Domestic Policy Space' *Mizan Law Review* (2012), Vol. 6 No. 2, pp. 201-240.

31 Adugna, B 'Ethiopia's Accession to the WTO with Emphasis on Foreign Market Access', Addis Ababa University(2006), A Master Thesis, pp. 1-150.

1.3. Statement of the Problem

Though developing and LDCs have succeeded for the inclusion of SDT provisions into the multilateral trading system,³² the practice of these schemes continues to suffer from many shortcomings. Currently, doubt is raised over the effectiveness/implementation of SDT treatment as a means of promoting trade and development objectives of least developed countries upon their accession to WTO.

The main difficulty in implementing SDT provisions is that many of them are formulated as best endeavour clauses, soft-law or non-binding. It can also be established that some of the SDT provisions are formulated in a vague manner. Although the developed countries pretend to provide meaningful SDT, in practice their commitments are not legally enforceable either on market access, or on preferential treatment or on technical assistance (TA).³³ For instance, the GSP recognized under the Enabling Clause for LDCs continued to be merely voluntary and the extent of the preferences could be determined by the industrialized nations.³⁴ The industrialized countries may unilaterally modify, expand or limit the GSP or change the group of beneficiaries via graduation.³⁵ This unilateral handling means that the beneficiaries are kept in a permanent state of insecurity as to the extent and the duration of the preferences, which severely limits their usefulness of the preferences.³⁶

The other problem is that market-access opportunities of LDCs to developed countries' markets is limited and riddled with conditions.³⁷ Unrestrained protectionist trade policies and measures of developed countries against products of export interest to LDCs have been pushing LDCs to further marginalization and militating against the 2001 Doha Development Agenda (DDA).³⁸ The Hong Kong Declaration has introduced a new trend of giving preferential treatment to some LDCs and not to others, thereby allowing developed countries to "divide and conquer" in order

32 Michalopoulos (2000), *Supra* n 3, p. 24.

33 *id.*, pp. 33.

34 Ewelukwa (2003), *Supra* n 25, p. 860

35 Fritz (2005), *Supra* n 23, p. 14

36 *ibid.*

37 Islam, R and Zaman, K 'Market Access for LDCs under the Hong Kong Ministerial of the WTO - Outcomes for Bangladesh,' 7 *J. World Investment & Trade* 383 (2006), p. 384

38 *ibid.*

to reap the benefits of trade in their own favour.³⁹ After seventy years of institutionalized trade liberalization, the system is yet to protect the legitimate trading interests of its most vulnerable LDCs.

Hence, Ethiopia could face the apparent reluctance of some WTO members to automatically extend to her the SDT provisions specifically provided for LDCs in the WTO Agreements.

The effective use of SDT schemes under WTO requires adequate and sufficient human and financial resources, strong institutions and better negotiating and implementation capacities of LDC members. Many low-income, LDCs are severely disadvantaged, due to their poor negotiating capacity.⁴⁰ The negotiation of the complex set of multilateral trade rules administered by the WTO is a costly enterprise.⁴¹ These costs include not only being present at the negotiating table but also understanding the impacts of alternatives discussed and formulating domestic priorities in co-operation with civil society.⁴² Institutions in many LDCs, including those that are supposed to implement trade policies and bear the costs of adjustment to globalization, are weak and inadequate to cope with WTO obligations.⁴³ In this sense, it is controversial whether some SDTs seem to be adjusted to conditions in Ethiopia or not.

LDCs acceding to the WTO are facing difficulties in their attempt to benefit from some of the SDT provisions.⁴⁴ Although it is emphasized that LDC members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capacities, in practice however, not only are they being asked to forego the SDT provisions, but are even being required to accept obligations going beyond those of the original WTO members.⁴⁵ In this case, whether Ethiopia could be able to articulate the strategies that could underpin the identification of her negotiating interests, development concerns and options or not is under question.

39 *ibid.*

40 See Jensen, F 'African Demands for Special and Differential Treatment in the Doha Round : An Assessment and Analysis' *Development Policy Review*, 2007, 25 (1), p. 98.

41 *ibid.*

42 *ibid.*

43 Michalopoulos (2000), *supra* n 3, p. 33.

44 UNCTAD, 'A Positive Agenda For Developing Countries' (2000) UNCTAD/ITC 1, p. 77.

45 *Ibid.*, p. 78.

Furthermore, the transition periods of the WTO agreements granted under SDT for LDC are not connected to any coherent development policy criteria, in fact, they seem rather arbitrary.⁴⁶ The same transition periods are valid for the large and heterogeneous group of LDCs and they do not seem to take into consideration the implementation of agreements such as Trade Related Aspects of Intellectual Property (TRIPS) or Sanitary and Phytosanitary (SPS) which requires not only the drafting and adoption of new laws but also significant investments in education and infrastructure.⁴⁷ Even worse: Adjustment costs will be the highest in those countries that suffer from the widest development gap.⁴⁸ Ethiopia could face the same problems as other LDCs, more acutely, in negotiating her accession to the WTO.

Despite the seemingly comprehensive type of provisions, the very challenge of SDT lies in its implementation. Therefore, the issue at hand for this paper is whether the SDT provisions in the WTO are meeting the objectives of supporting and promoting the participation and integration of Ethiopia into the MTS. Hence, because of the lack of capacity and competitiveness of the sector, shortage of skilled personnel; complexity of SDT rules; lack of awareness and full information on the rules; inability to upgrade domestic regulations; weak institutional infrastructure and the domination of country's exports by primary products, the issue as to whether Ethiopia could take full advantage of the opportunities provided by the SDT schemes or not is in quotation.

In general, the issue at hand for this study is whether the SDT provisions in the WTO are meeting the objectives of supporting and promoting the participation and integration of Ethiopia into the multilateral trading system upon country's accession or not.

1.4. Objectives

1.4.1. General Objective

The general objective of this research is to analyze whether the SDT provisions in the WTO in its current form meets the objectives of supporting and promoting the participation and integration of Ethiopia into the multilateral trading system or not.

46 Fritz (2005), supra n 23, p. 22

47 Ibid, p. 23.

48 ibid.

1.4.2. Specific Objectives

So as to achieve the general objective mentioned above, the specific objective of the study would be the following;

- ❖ To assess whether the SDT provisions in the WTO in its current form meet the objectives of supporting and promoting the participation and integration of LDCs into the multilateral trading system
- ❖ To analyze whether the commitments for preferential market access and treatment offered by member countries for Ethiopia under the provisions of SDT would integrate her in to the world trading system or not
- ❖ To scrutinize whether the flexibility offered to Ethiopia under SDT in meeting her WTO commitments contribute to her long term trade and development objectives or not
- ❖ To assess whether a technical assistance provided for Ethiopia under the SDT scheme is sufficient and effective to strengthen her negotiating capacity and to enhance her efforts to implement domestic legislative and economic policies compatible with WTO Agreements or not.

1.5. Research Questions

The research will answer the following questions:

1. Will the SDT in the WTO system be useful to Ethiopia to integrate the country into the multilateral trading system?
2. Are the commitments for preferential market access and treatment offered by developed countries meaningful relative to the constraints Ethiopia face in integrating in the world trading system?
3. Does the flexibility offered under SDT to Ethiopia in meeting her WTO commitments contribute to her long term trade and development objectives relative to the constraints the country could face in integrating in the world trading system?
4. Is the international technical assistance in support of Ethiopia in the WTO accession process could adequate and effective?

1.6. Scope of the Study

The focus of this thesis is only on the appraising whether the SDT provisions in the WTO in its current form meet the objectives of supporting and promoting the participation and integration of LDCs into the MTS in general and to identify the implications it has on Ethiopia's accession to WTO. Therefore, this study only discuss the problems related with the formulation and implementation nature of WTO SDT provisions for LDCs and assess its implication on Ethiopia's accession to WTO.

1.7. Limitation of the Study

The author fears that lack of sufficient time may be a constraint in order to effectively deal on each and every aspect of the subject matter. Hence, shortage of time is the author's big fear concerning the quality of this research.

1.8. Significance of the Research

Ethiopia is on process to join the WTO. Therefore, this study is important to assess the adequacy of WTO SDT schemes from the point of view of meeting the objectives of supporting and promoting the participation and integration of Ethiopia into the MTS relative to the constraints the country could face in integrating in the world trading system and to fill the gaps. Moreover, the study will inform the concerned bodies how to enhance Ethiopia's capacity to utilize effectively, safeguard and promote potential benefits, protect against possible risks and losses in the course of using SDT upon accession to WTO.

1.9. Research Methodology

This study is will be conducted in a doctrinal qualitative type of research. It will be doctrinal because the researcher will systematically analyze the existing primary and secondary sources. Primary sources: legal documents such as international, regional, and domestic instruments, and case laws; and Secondary relevant sources: legal literature, books, journals, journal articles, internet website sources, and unpublished articles will be cited and used.

1.10. Structure of the Study

This thesis provides contents that systematically answer issues raised in the research questions. Therefore, the thesis will contain four chapters, which is organized as follows:

Chapter one is an introduction which contains the proposal of the thesis.

Chapter two covers the general overview of the WTO's special and differential treatment for LDCs. Under this topic the origin and concept of special and differential treatment and the different types of special and differential treatment provisions in the WTO Agreements will be also discussed. The Doha Declaration's approach to special treatment for developing countries will be also discussed.

Chapter three covers the implications of the special and differential treatment principle for LDCs. Under this chapter, the researcher shall examine the current concerns about SDT schemes which LDCs express dissatisfaction with the concept and application of SDT.

Chapter four covers the potential implication of SDT for Ethiopian walk to WTO accession. Under this chapter, the author critically examines whether the SDT in the WTO system be useful to Ethiopia or not.

The last and the fifth chapter consists conclusions and recommendations.

CHAPTER TWO

SPECIAL AND DIFFERENTIAL TREATMENT: A GENERAL OVERVIEW

2.1. Introduction

SDT is one of the most fundamental concepts widely accepted and incorporated in many WTO documents and its predecessor, the GATT. Its purpose has been to assist developing and LDCs integrate fully into the MTS by providing certain advantages, tariff preferences, and derogations to foster their growth and ability to undertake appropriate rules and obligations. Through the time, the LDCs are granted special recognition over and above that given to other developing countries in the WTO, and enjoy special flexibilities in the implementation of WTO Agreements. Such SDT provisions continue to be important instruments of the MTS, although time has come to adapt them to the new reality of both international trade and international politics.

Therefore, under this chapter, the author will discuss the following main issues. First, the concept of LDCs which includes its definition and the rationale of LDC category will be discussed to understand what SDT means and why so it is important. Then, the author will discuss the origin and evolution of the concept of SDT, and categories of SDT Provisions for LDCs in WTO Agreements.

2.2. Least Developed Countries in the GATT-WTO System

2.2.1. Defining the “Least Developed Countries”

The development of the LDC category has a history dating back to 1964, when its establishment was advocated by developed countries at the first session of the UNCTAD I, held in Geneva.⁴⁹ It was presented as an alternative to the idea of a single system of trade preferences for all developing countries. UNCTAD member States agreed to pay “special attention” to what at the time were called ‘the less developed among the developing countries.’⁵⁰ Then after, the LDCs

49 See Committee for Development Policy, Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures, United Nations publication (2015), P. 1, Available at: <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/2015cdphandbook.pdf>; Visited on 15/04/2018; See also The Least Developed Countries Information Portal (<http://www.un.org/ldcportal>), Visited on 15/04/2018

50 Ibid

category was established in 1971 by the UN as a special group of developing countries characterized by a low income level and structural impediments to growth.⁵¹

Since the establishment of the category, the Committee for Development Policy (CDP) was established by UN Economic and Social Council (ECOSOC) and it has been responsible for undertaking a review of the LDC list every three years.⁵² WTO uses the UN list to identify which countries are LDCs in the WTO. Forty-seven countries are currently designated by the UN as LDCs as of March 2018.⁵³ Out of 47 LDCs, 36 were Members of the WTO currently.⁵⁴ WTO LDC Members represent one fifth of WTO Membership (164). 33 of the 47 are African states and 8 of the 47 (Bhutan, Comoros, Ethiopia, Sao Tome & Principe, Somalia, South Sudan, Sudan, and Timor-Leste) are in the process of accession to the WTO.⁵⁵

LDCs are defined by the United Nations system as *“the most vulnerable members of the international community – having both low incomes and facing severe structural and physical impediments to their long term economic and social development”*.⁵⁶ The identification of LDC is based on three criteria:⁵⁷ (a) per capita gross national income (GNI), as an indicator of income-generating capacity; (b) the human assets index as an indicator of human assets; and (c) the economic vulnerability index as an indicator of structural vulnerability to exogenous economic and environmental shocks. A country qualifies to be added to the list of LDCs if it meets inclusion thresholds on all three criteria.⁵⁸ A country qualifies for graduation from the list if it

51 See *Secretariat of the Committee for Development Policy (CDP): Strengthening Smooth Transition from the Least Developed Country Category*, CDP Background Paper No. 14 (2012), p.1

52 See *Alonso, A, Cortez, L and Klasen, S ' LDC and other country groupings: How useful are current approaches to classify countries in a more heterogeneous developing world?'*, United Nations Department of Economic and Social Affairs, CDP Background Paper No. 21 (2014), p. 10

53 See for the list of LDCs on United Nations Committee for Development Policy- Development Policy and Analysis Division Department of Economic and Social Affairs, available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf visited on 18/04/2018

54 See for the list of countries on WTO, *Understanding the WTO: The Organization, Least-Developed Countries*, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm, visited on 18/04/2018

55 Ibid

56 See 2018 Triennial Review Report of the Committee for Development Policy (CDP)

57 See Committee for Development Policy Report on the twentieth session, United Nations • New York, E/2018/33, (2018), p. 15

⁵⁸ Ibid

meets graduation thresholds on two of the three criteria.⁵⁹ For the low-income criterion, the threshold on which inclusion in the current list is based is a GDP per capita of \$900, and the threshold for graduation is a GDP per capita of \$1035.⁶⁰ Ethiopia is one of the 25 countries first identified as a LDC by UN in 1971 and still the country is in the list with GNI of \$644, HAI of 43.3 (62.0 or below for inclusion, 66.0 or above for graduation) and EVI of 32.1 (36.0 or below for inclusion, 32.0 or above for graduation).⁶¹

2.2.2. The Rationale of the Least Developed Country Category

The rationale for establishing the LDC category and for allowing the LDC criteria to evolve on several occasions was that special international support measures ought to be granted to these countries in response to their critical structural handicaps.⁶² Internationally, there are three main types of ‘special support measures’ for countries included in the list of LDCs.: (a) international trade, such as LDC-specific preferential market access and LDC-specific SDT in WTO agreements; (b) official development assistance, including development financing and technical cooperation specifically designed for and targeted at the LDCs by multilateral and bilateral donors; and, (c) other forms of assistance, such as travel-related benefits and special discounts in country assessments to the financing of some international organizations.⁶³

2.3. The Concept of Special and Differential Treatment

The term SDT has a narrow meaning in the WTO.⁶⁴ It describes preferential provisions that apply only to two groups of WTO members: developing countries and the least developed.⁶⁵ The term itself derives from the reference in the 1973 Tokyo Round Declaration which recognizes ‘the importance of the application of differential measures to developing countries in ways which

⁵⁹ Ibid

⁶⁰ See Inclusion Into The LDC Category and Graduation From The LDC Category of Least Developed Countries at: <https://www.un.org/development/desa/dpad/theme/least-developed-countries-category/>, visited on 21/04/2018

⁶¹ See 2018 Triennial Review Report of the Committee for Development Policy (CDP), Country Profile: Ethiopia

⁶² CDP Handbook on the Least Developed Country Category (2015), supra n 49, p. Vii

⁶³ Ibid, p. 11

⁶⁴ See The Danish Institute for International Studies & The Food and Resource Economics Institute, (2005), ‘Special and Differential Treatment and Differentiation between Developing Countries in the WTO’, available at: <http://curis.ku.dk/ws/files/8065189/SDTpolicystudy.pdf>, Visited on 22/04/2018

⁶⁵ Ibid

will provide special and more favourable treatment for them in areas of negotiation where this is feasible and appropriate'.⁶⁶

The definition covering all aspect of the SDT regime is impracticable since the benefits of differential treatment is always treaty based, the concept of SDT is generic, and its content and application is regime-specific. Nevertheless, different authors tried to explain it using different criteria's. To mention few, for example, Pallavi Kishore tried to define the concept of SDT using the principle of non-discrimination⁶⁷ (the cornerstone of GATT). Then, he defined SDT as '*an exception to the MFN clause in GATT.*'⁶⁸ Kishore also tried to define SDT from the perspective of preferential market access as '*a form of affirmative action in the multilateral trading system analogous to the special treatment granted to the underprivileged in a democracy.*'⁶⁹ According to Gibbs, Murray, this instrument is the product of the co-ordinated political efforts of developing countries to correct the perceived inequalities of the post-war international trade system by introducing preferential treatment in their favour across the spectrum of international economic relations.⁷⁰ Another author Peter Lichtenbaum also tries to define SDT as '*the set of trade policies pursued within the MTS to address the complex challenges of development and to respond to the inequitable distribution of wealth among participants in the system.*'⁷¹

For the purpose of this research, the researcher will use the concept of SDT as a useful tool which recognizes the economic and developmental asymmetries among countries in order to

66 Whalley, J 'Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries', *The Economic Journal*, Vol. 100, No. 403 (Dec., 1990), p. 1319

67 The principle of non discrimination has two main rules- the most-favored nation (MFN) treatment and the national treatment (NT): The MFN rule prohibits the granting of any benefit, favour, privilege or immunity affecting customs duties, charges, rules and procedures to a particular country or group of countries, unless they are made available to all like products originating in all other Members of the WTO. The NT principle prohibits Members of the WTO under certain conditions from discriminating between imported products and domestic products. See Kessie, E 'Enforceability of the Legal Provisions Relating to the Special and Differential Treatment Under the WTO Agreements, Paper Prepared for WTO Seminar on Special and Differential Treatment for Developing Countries', 7 March 2000, Geneva, *Journal of World Intellectual Property*, p. 958; See also General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]., Art. I.

68 See Kishore, P 'Special and Differential Treatment in the Multilateral Trading System', *Chinese Journal of International Law* (2014), supra n 37, p.367

69 Ibid, p. 366

70 See Gibbs, M 'Special and Differential Treatment in the Context of Globalization' in Fritz, Thomas: *Special and Differential Treatment for Developing Countries*, Global Issue Paper, No. 18 (2005), p. 4

71 Lichtenbaum, P "*Special Treatment*" vs. "*Equal Participation*." *Striking a Balance in the Doha Negotiations*, 17 *AM. U. INT'L L. REV.* 1003, (2002), p. 1007

provide special advantages to developing and LDCs to help them benefit from trade liberalization and integrate into the MTS.⁷²

2.4. The Origin and Evolution of the Concept of "Special and Differential" Treatment

The key moments of change for the development of SDT for developing and LDCs can be generally divided into four stages: The pre-Uruguay Round Multilateral Trade Negotiations, the period during the Uruguay Round Negotiations, the period from Uruguay Round up to the Doha Round, and finally the Doha Round and beyond. The quality and background of the development of the SDT during these stages will be described below.

2.4.1. Pre-Uruguay Round SDT

The history of the development of SDT during this period lasts from 1947-1986. Although eleven out of twenty-three original founding members of GATT would have been considered as developing countries, the GATT in its original version of October 1947 did not include specific provisions for these countries.

In the years following the coming in to force of GATT, a number of newly independent developing countries (mostly Southern governments) joined the GATT and increased their efforts to have their specific needs taken into consideration in the international trading system and wanted a change to GATT Agreements. In general, the main motivations behind for a Pre-Uruguay Round SDT were:⁷³ i) a special rights to protect balance of payment problems, infant industries, and development strategy considerations; ii) Special rights of access to trade preferences needed to offset the ongoing decline in developing country terms of trade (commodity exporters), and iii) a negotiating approach⁷⁴ of the developing countries.

The above mentioned factors were evoked to ease the normal rules of the GATT for developing countries. As a result changes were made to the GATT framework through the time to include

72 See AALCO, A Study on Special and Differential Treatment in WTO Agreements, Center for Research and Training AALCO Secretariat, New Delhi India (2003), p. 4

73 See Whalley, J "Special and Differential Treatment in the Millennium Round," CSGR Working Paper No. 30/99 (1999), p. 6

74 Developing countries have common problems which are special and different from those of developed countries. They should negotiate as a bloc, not individually; and started to stress enhancement of SDT as a right and insist on non-reciprocity. See Ibid, p.6; See also Oyejide (1998), supra n 2, p. 5

SDT for developing countries. During this period, three main substantive changes were made to the original GATT Agreement which paved the way for the development of SDT for developing and least developed countries. These are: Article XVIII, Article XVIII *bis* (iii), Part VI of GATT, and the Enabling Clause.

2.4.1.1. Amendment to Article XVIII of GATT

This Article was the first concrete attempt by GATT to incorporate into its basic law a major element of the concerns of its developing country members. The 1954-1955 GATT review session redrafted Article XVIII of GATT entitled '*Governmental Assistance to Economic Development*', that effect specified separate conditions by which trade restriction could be used to protect infant industries and to deal with balance of payments problems of the member developing countries.⁷⁵ As a result three main sections were added to Article XVIII of GATT. Section A permits the developing country to modify or withdraw the already negotiated tariff bindings in order to promote the establishment of a particular industry.⁷⁶ Section B allows the use of trade restrictions for alleviating balance of payments problems.⁷⁷ Section C permits developing countries to use quantitative import restrictions to protect infant industry.⁷⁸

Article XVIII *bis*(iii) is also introduced which acknowledges 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.⁷⁹

2.4.1.2. The Incorporation of Part VI to GATT

In spite of the 1954/55 significant changes to Article XVIII of GATT, the DCs trade problems continued to generate concern. As a result of dissatisfaction with GATT, in 1964 developing countries organized the first United Nations Conference on Trade and Development

75 Ibid, Oyejide (1998), supra n 2, p. 8

76 GATT, supra n. 67, Art. XVIII, Para 7 (a). But when this provision is invoked, compensation is expected to be offered or, in the alternative, retaliation may result.

77 Ibid, para. 8.

78 Ibid; Similar to section A, precondition for such support was prior notification and if necessary consultation with the contracting parties. In case such consultations failed, the contracting party to whose detriment the support measure was taken could threaten suspension of trade concessions.

79 Fukasaku (2000), supra n. 23, p. 3; Fritz (2005), supra n. 23, p. 6

(UNCTAD)⁸⁰ meeting and creation of the Group of 77 as a vehicle to pursue their interests and concerns.⁸¹ Influenced by UNCTAD, in 1964 a new Part VI dealing with ‘trade and development’ was introduced to GATT which comprises three new Articles XXXVI to XXXVIII.⁸²

Article XXXVI introduced for the first time the principle of non-reciprocity into the trade regime, i.e. that industrialized countries must grant concessions to developing countries without expecting anything in return.⁸³ Article XXXVII encourages industrialized countries to open their markets more to developing countries.⁸⁴ Article XXXVIII states objectives and principles for the granting of unilateral tariff concessions to developing countries. Some years later this materialized in the form of the GSP System.⁸⁵ The broad principles included, increasing export earnings of developing countries, promoting industrialization in developing countries, and accelerating economic growth in developing countries.⁸⁶ Moreover, Article XXXVIII calls for joint action of contracting parties through international arrangements with a view to improving market access for products of export interest to LDCs.⁸⁷

2.4.1.3. The Enabling Clause

Shortly after years of the inclusion of Part VI to the GATT, UNCTAD proposed a GSP for the first time in 1968. The GATT contracting parties in 1971 adopted GSP scheme which is an exception to MFN through a waiver in response to the continued pressure from developing countries for reform.⁸⁸ Then during the GATT Tokyo Round negotiations, which concluded in 1979, the parties adopted the decision on ‘Differential and More Favour Treatment, Reciprocity,

80 Its purpose has been to design policies for the integration of developing countries in the international trading system and advice developing countries accordingly. See Meyer. M & Lunenborg. P, ‘The Evolution of Special and Differential Treatment and Aid for Trade’ (2012), p. 9;

81 See Pangestu, M, ‘Special and Differential Treatment in the Millennium: For Whom and How Different?’, Blackwell Publishers Ltd (2000), P. 1288 ; See also Meyer. M & Lunenborg. P (2012), supra n 80, p. 9

82 Ibid, p.10, See also Fritz (2005) supra note 23, p. 7

83 Article XXXVI of GATT para. 8 of the Article states the principle of less-than-full reciprocity by specifying that developing country members 'should not be expected' to make contributions which are inconsistent with their level of development in the process of trade negotiations; See Michalopoulos (2000), supra n 3, p. 5

84 GATT (1947), supra n 67, Art. XXXVII (1)(a), (1)(b) and (1)(c)(i)

85 Ewelukwa (2003), Supra note 25, P. 847

86 Ibid

87 Oyejide(1998), Supra n 2, P. 9

88 See *Waiver for Generalized System of Preferences*, GATT Doc. L/3545 (1971)

and Fuller Participation of Developing Countries’⁸⁹ (also known as Enabling Clause).⁹⁰ The adoption of this Clause was the final step on the road towards the official introduction of SDT for developing countries. The international trade regime formally accepted the special development needs of developing countries, especially the LDCs and labeled them as a special group in the GATT for the first time in the GATT/WTO system through this decision.⁹¹ Moreover, it also identified LDCs as a separate category of members that should be accorded even more favorable treatment than the group of developing countries.⁹²

Therefore, the Enabling Clause laid down a permanent legal basis for SDT under GATT agreements, provided for certain aspects of regional or global preferential agreements among developing countries, and provided a legal basis for the continuation of GSP.⁹³

2.4.2. Special and differential treatment under the Uruguay Round Agreement

Even though the Tokyo Round brings many changes to SDT for developing and least developed countries, at the beginning of the 1980s, however, developing countries began to perceive that the positive discrimination received under SDT treatment had become outweighed by increasing negative discrimination against their trade.

Faced with different trade-distorting measures and a re-enforced interest in export-driven growth, the developing and LDCs considered it more important to make less powerful and easily control Western protectionism with multilateral rules than to demand more liberties for themselves.⁹⁴ Unfortunately, their negotiation agenda remained futile since the Uruguay Round adopted an

89 Decision of 28 November 1979, L/4903, supra n 22.

90 This clause encompassed a) preferential market access for developing countries on a non-reciprocal and nondiscriminatory basis, b) differential and more favourable treatment of developing countries with regard to GATT provisions on non-tariff barriers, c) the conclusion of preferential agreements between developing countries and d) special treatment of the so-called Least Developed Countries (LDC). See Fritz (2005), Supra note 23, P.8 Fukasaku (2000), Supra note 23, pp.5- 6; In addition, the Enabling Clause introduced the principle of graduation by which developing countries would no longer have the privilege of enjoying SDT provisions and had to shoulder the full responsibility when it would have become economically strong. Ibid; See also Decision of 28 November 1979, L/4903, supra n 22, para. 7

91 Decision of 28 November 1979, L/4903, supra n 22, para. 2(d)

92 Oyejide(1998), supra n 2, p. 9

93 See Uche (2003), supra n 25, p. 848

94 See Fritz (2005), supra n 23, p.10

identical commitments (Single Undertaking Approach) applying to all members irrespective of their level of development.⁹⁵

Nevertheless, the Uruguay Round negotiation differs from the pre-Uruguay Round period with many key features. These are: i) developing and LDCs are granted a longer time frame for implementation of the WTO Agreements than developed country members;⁹⁶ ii) developing and LDCs members are accorded greater flexibility in application of most of the WTO rules and procedures;⁹⁷ iii) the provision of technical assistance to developing and LDCs has become part and parcel of SDT under the WTO Agreements;⁹⁸ iv) The WTO Agreements incorporated separate special provisions for the LDCs;⁹⁹ and v) the 1994 Ministerial Decision on Measures in Favour of the Least-Developed Countries recognizes the special needs of LDCs in the area of market access through the continuation of trade preferences.¹⁰⁰

2.4.3. Post-Uruguay Round and Up to Doha Round

By the end of the period in 1995, when the Uruguay Round was completed, developing and LDCs had assumed a much higher level of commitments within the system than ever before, because of the Single Undertaking Approach adopted by WTO.¹⁰¹ As a central problem was a limited capability to implement any new arrangements, it seemed clear they needed both time and special help in complex areas such as intellectual property and with fragile and small manufacturing sectors; the adjustment costs they faced in adapting to a changed environment were disproportionately large.¹⁰²

95 See Page, Sh & Kleen, P 'Special and Differential Treatment of Developing Countries in the World Trade Organization' Global Development Studies No. 2 (2005), p. 15

96 See Fukasaku (2000), supra note 23, p. 10; See also Fritz (2005), supra note 23, p.11

97 Ibid

98 Ibid

99 More specifically, the special provisions for LDCs include a) complete or partial exemptions from commitments and obligations (Agriculture, Subsidies, and Countervailing Measures, and TRIPS), b) a further extension of the transition periods, (SPS, and TRIMS), and c) differential and more favourable treatment (Textiles and Clothing, TBT, Import Licensing, GATS, TRIPS, and Dispute Settlement), See Ibid.

100 Ibid, See also the Decisions on Measures in Favour of Least Developed Countries, 15 December 1993, Par. 2(v)

101 Keck, A and Low, P: Special and differential treatment in the WTO: Why, when and how?, WTO Staff Working Paper, No. ERSD-2004-03(2004), P. 5

102 Whalley (1999) supra n 73, p.13

Moreover, advantages that were to accrue to the developing and LDCs failed to materialize.¹⁰³ Complaints and concerns persist over textile and agricultural policies, tariff escalation and tariff peaks, and an improved dispute settlement system that nonetheless remains rather useless to small, impoverished nations.¹⁰⁴

Because of the above mentioned and other factors, the First WTO Ministerial Declaration is held in Singapore on 13 December 1996 and the importance of integrating LDCs into the WTO was reaffirmed at the Conference by recognizing the 'special treatment' accorded to LDCs.¹⁰⁵ In order to assist LDCs to comply with their substantive and procedural commitments, the Declaration agreed to a Plan of Action¹⁰⁶ for taking positive measures, such as duty-free access, targeting to improve their overall capacity-building in tapping the opportunities offered by the MTS. The Ministerial Declaration also pledged to achieve greater coherence in international economic policy-making and to provide technical assistance in conjunction with five other multilateral agencies in 1997,¹⁰⁷ with a view to integrate LDCs into the multilateral system.¹⁰⁸

Moreover, the declaration added four more issues to the concerns of WTO (which continued as a main cause of disagreement in the next Doha Rounds): Trade and investment, trade and competition policy, trade facilitation, and transparency in government procurement (which were termed as Singapore issues).¹⁰⁹ Significantly for the LDCs and the norm of special treatment, the Ministerial Declaration maintained the profile of LDCs in the trade organization and paved the

103 See Gordon, R 'Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime', 8 *Berkeley J. Afr.-Am. L. & Pol'y* 79 (2006), p. 95

104 Ibid

105 See WTO, *Singapore Ministerial Declaration Adopted on 13 December 1996*, WT/MIN(96)/DEC., par. 13

106 The action plan was to be given operational content by: (a) enhancing investment conditions and providing predictable and favourable market access for LDCs' products; (b) fostering the expansion and diversification of LDCs' exports to all developed countries' markets; and (c) promoting an integrated approach to extending technical assistance to LDCS in augmenting their trading opportunities, See Singapore Ministerial Declaration Para. 14.

107 See Hawthorne, H 'Least Developed Countries and the WTO: Special Treatment in Trade', Palgrave Macmillan (2013), p. 55. The five multilateral agencies are IMF, ITC, UNCTAD, UNDP and the World Bank; See also World Trade Organization: Committee on Trade and Development, Special and Differential Treatment for Least-Developed Countries, Note by Secretariat, WT/COMTD/W/135 (2004), para.6.

108 Ibid, paras. 5 and 6

109 *Singapore Declaration* WT/MIN(96)/DEC, supra n 105, paras. 20-21

way for some of its subsequent work on their behalf reinforcing the institutionalization and socialization of the norm.¹¹⁰

The Second Ministerial Declaration, issued in Geneva, Switzerland on 20 May 1998, reaffirmed the deep concern of WTO Members over the marginalization of LDCs, the urgent need to address their chronic foreign debt problems, and the earlier commitment on an integrated implementation of the action plan for LDCs.¹¹¹ It further pledged to improve market-access conditions for all LDC products on a broad and liberal basis and called upon Members to implement their market-access commitments assumed at the 1997 High Level Meeting¹¹². However, progress in negotiations stalled after the breakdown of the negotiations over disagreements concerning agriculture, industrial tariffs and non-tariff barriers, services, and trade remedies.¹¹³

2.4.4. The Doha Round and Beyond

The WTO held its fourth Ministerial Conference at Doha, Qatar, on 9-14 November 2001 and once again reiterated the commitment to address the trading difficulties of LDCs and to improve their effective participation in the trading system in view of their vulnerability and special structural difficulties in the global economy. The Ministers, while reaffirming SDT as an integral part of the WTO Agreements agreed that:

*'All special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.'*¹¹⁴

The Doha Round decided to review all the SDT provisions with a view to making them precise, effective, and operational for the benefits of developing countries, particularly LDCs.¹¹⁵

110 Ibid

111 See WTO, *Ministerial Declaration, Adopted on 20 May 1998*, WT/MIN (98)/DEC/1, paragraph 6, available at: <http://www.jus.uio.no/lm/wto.ministerial.declaration.geneva.1998/landscape.pdf>, Visited on 28/04/2018.

112 Ibid

113 See Elliott, Larry; John Vidal (4 December 1999), 'Week of Division and Off Streets', *The Guardian*. London.

114 See WTO (2001), *Doha Ministerial Declaration*, adopted on 14 November 2001, WT/MIN(01)/DEC/W/1, Para. 44, available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm, accessed on 23/04/2018.

115 Ibid

Technical assistance and co-operation for capacity-building, growth, and integration were the core elements of the Doha development dimension.¹¹⁶ To grant duty-free and quota-free (DFQF) market access for products of LDCs, to actively consider waiver application by LDCs and to allow a grace period for implementation of the WTO Agreements are also another important achievements on SDT at the Doha Declaration.¹¹⁷

The key internal programme for LDCs in the Doha Ministerial Declaration was the 2002 Work Programme¹¹⁸ which was adopted by the WTO following the Doha Ministerial declaration's call for the introduction of such a programme. The Doha Work Programme was required to take fully into account the SDT treatment of developing countries and LDCs embodied in Part IV of GATT 1994, the Enabling Clause, the Uruguay Round Decision on Measures in Favour of LDCs, and all other relevant WTO provisions.¹¹⁹

The 5th Ministerial Conference, which was held in Cancun, Mexico on September 10-14, 2003, marked a turning point for most of the WTO's LDCs members with them beginning to play a more assertive role in the trade negotiations.¹²⁰ Nevertheless, the Conference ended without agreement and the initial deadline was not met because of the disagreement between developed country members in one hand and the developing and LDCs on the other hand over the four Singapore 1996 issues.¹²¹ The major barrier occurred at the Cancun Ministerial Conference in

116 See Bhandari, S 'Doha Round Negotiations: Problems, Potential Outcomes, and Possible Implications', *4 Trade L. & Dev.* 353 (2012), p. 354. Moreover, the Doha Ministerial was hailed as the "*Doha Development Round*", with the hope for a real development for developing countries and LDCs. See Islam and Zaman (2006), *supra* n 37, p.386

117 Doha Declaration WT/MIN (01)/DEC/W/1, *supra* n 114, para. 50

118 The Work Programme was designed to focus on seven systemic issues which LDCs faced in the WTO. These were market access; trade-related technical assistance and capacity-building initiatives for LDCs; providing support to agencies assisting with the diversification of LDCs' production and export base; mainstreaming the trade-related elements of the LDC-III Programme of Action into the WTO's work; the participation of LDCs in the Multilateral Trading System; the accession of LDCs to the WTO; and, the follow-up to WTO Ministerial Decisions/Declarations relating to LDCs. See WTO (2002) *WTO Work Programme for the Least Developed Countries (LDCs) Adopted by the Sub-Committee on Least-Developed Countries*, Sub-Committee on Least Developed Countries, WT/COMTD/LDC/11, 13 February 2002, paras. 1-2; See also Hawthorne (2013), *supra* n 107, pp. 61-62. The seven issues were also all designated to become standing issues on the agenda of the LDC Sub-Committee, thus ensuring that they were periodically reviewed and reinforcing the importance of the LDC Sub-Committee. See *Ibid*

119 Doha Declaration WT/MIN (01)/DEC/W/1, *supra* n 114, para. 50

120 Hawthorne (2013), *supra* n 107, pp. 1-2

121 See Fergusson, F 'World Trade Organization Negotiations: The Doha Development Agenda,' CRS Report for the Congress, Order Code RL32060 (2008), p. 4

relation to the LDCs was the refusal of US to give concessions on its cotton subsidies, which greatly impacted African LDCs.¹²²

After the failure of the Cancun Ministerial Conference, the Sixth WTO Ministerial Conference took place in Hong Kong, 13 to 18 December 2005 and explicitly reaffirmed that provisions for SDT are an integral part of the WTO Agreements.¹²³ The Declaration included some meaningful decision such as developmentally critical commitment that the exports of LDCs enjoy DFQF market access, at least up to 97 percent, by 2008.¹²⁴ Further, the LDCs were granted exemption from making any commitments related to liberalization of services.¹²⁵ The Aid-for-Trade Initiative was also launched at the Conference with the aim of assisting developing countries and LDCs reap greater trade benefits from enhanced market access opportunities.¹²⁶

The Eighth 2011 Geneva Ministerial Conference of the WTO also strengthens the LDC accession guidelines adopted by members in 2002 by approving the 2012 Accession Guidelines.¹²⁷ Moreover, the Conference adopted a waiver decision¹²⁸ under Article XIX.3 of the General Agreement on Trade in Services (GATS) to permit preferential treatment of LDCs service suppliers without creating a right for the LDCs' instead authorizes developed and developing countries to offer preferential treatment at their discretion under GATS Article XIX.3 in the course of future market access liberalization.¹²⁹

On 7 December 2013, at the Ninth WTO Ministerial Conference in Bali, WTO members reached an agreement on the so-called Bali package, a selection of issues from the broader Doha round

122 Keating, E "The Doha Round and Globalization: A Failure of World Economic Development?" *CUNY Academic Works* (2015) p. 48

123 See Ministerial Declaration, Doha Work Programme, Hong Kong, WT/MIN(05)/DEC, adopted 18 December 2005 (Hong Kong Declaration), para. 15 & 47

124 Ibid, Annex F

125 See Vylder, S, 'The Least Developed Countries and World Trade', Second Edition, Sida Studies No. 19 (2007), p.152

126 Hong Kong Declaration WT/MIN(05)/DEC (2005), supra n 123, para. 57

127 See WTO document, *Accession of Least-Developed Countries: Decision of 25 July 2012*, WTO doc. WT/L/508/Add.1, 30 July 2012 [hereinafter 2012 WTO Accession Guidelines for LDCs]

128 The decision reads as follows, "this waiver, which will last for 15 years from the date of adoption, releases developing and developed country Members from their legal obligation to provide non-discriminatory treatment to all trading partners (GATS Article II: Most-Favoured-Nation Treatment), so as to give them legal cover when they give preferential treatment to LDCs." See World Trade Organization, *WTO Ministers Adopt Waiver to Permit Preferential Treatment of LDC Service Suppliers*, December 17, 2012; See also Bhandari (2012) supra n 116, p.364

129 Ibid

negotiations that include provisions for LDCs and development in general.¹³⁰ Moreover, The Bali Conference established a mechanism to review and analyze the implementation of SDT provisions which included the developmental issues regarding LDCs and which allowed for duty free, quota free market access, and waivers for LDCs on services.¹³¹

At the Nairobi Ministerial Conference in December 2015, ministers extended the lifespan of a 2011 decision enabling WTO members to grant LDC services and services providers preferential access to their markets for 15 years.¹³² The waiver, first adopted at the WTO's Eighth Ministerial Conference in 2011, releases members from their obligation under the GATS. The objective is to enhance LDCs' participation in world services trade. Moreover, the conference led to an agreement for developed countries to end export subsidies immediately and developing countries to follow by the end of 2018

At the 11th WTO Ministerial Conference concluded in Buenos Aires on 13 December 2018, together with other developing countries, LDCs proposed negotiating SDTs in ten priority areas (e.g., technology transfer, LDC accession and investment measures), but discussions ended without any agreement on a way forward.¹³³ LDCs, in particular the "Cotton 4" (Benin, Burkina Faso, Chad and Mali) had also aimed for progress in imposing disciplines on subsidies by other cotton producing countries that could prevent LDCs to access markets fairly.¹³⁴ However, as for all other aspects of agricultural trade, there is not even agreement on future work in the area.

In general, even though the WTO has increasingly continued to institutionalize the norm of special treatment for LDCs through its different Ministerial Meetings and in the programmes which the organization has introduced for LDCs, the norm of special treatment for LDCs in different issues has still not been fully internalized and the outcomes of the negotiation do not lead to reinforcement of the legal infrastructure that LDCs have been demanding, nor has the

130 See Report of the High-Level International Workshop on "The WTO Agreements on Trade Facilitation: Implication for LLDCs" (2014), p. 1

131 Keating (2015), supra n 122, p. 39

132 The "LDC Services Waiver" was extended by Nairobi Ministerial Decision T/MIN(15)/48 for an additional four years, until 31 December 2030, See Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade (WT/MIN(15)/48 — WT/L/982), para. 1.1

133 See *Bruckner, M* 'WTO Ministerial concludes – Anything to cheer for LDCs?' December 18, 2017, Available at: <https://www.un.org/ldcportal/wto-ministerial-concludes-anything-to-cheer-for-ldcs/>, visited on 25/04/2018

134 Ibid

granting of substantial SDT been realized. Therefore, there is no concrete consensus currently and negotiations over strengthening SDT still continue. The future of the Doha Round remains uncertain.

2.5. The Categories of SDT Provisions in WTO Agreements

WTO Agreements generally recognize the particular trade, development and financial needs of developing country Members, including the least-developed among them. A number of the WTO Agreements have specific provisions for taking into account the interests of LDCs, in addition to those of developing countries. There are over 170 provisions of SDT across the WTO covered agreements and various Ministerial, General Council and other relevant decisions¹³⁵ and they can be classified in to six categories according to the typology developed by the WTO Secretariat in 2001. These categories are: a) Provisions aimed at increasing trade opportunities through market access, b) Provisions requiring WTO members to safeguard the interest of developing countries, c) Provisions allowing flexibility to developing countries in rules and disciplines governing trade measures, d) Provisions allowing longer transitional periods, e) Provisions for technical assistance, and f) Provisions relating to LDC members.¹³⁶

Since these provisions, whose applicability is limited exclusively to the LDCs, all fall under one of the other five types of provision, this paper adopts the five main groups (a-e) classification of SDT for LDCs.¹³⁷ These categories of SDT provisions for LDCs are discussed briefly as follows by the author.

135 See WTO, Committee on Trade and Development (CTD), ‘Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat’ (22 September 2016) WT/COMTD/W/219, para. 4

136 World Trade Organization: Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decision: Note by Secretariat, WT/COMTD/W/77 (Oct. 25, 2000) [hereinafter Implementation of Special and Differential Treatment], p. 1, available at: http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, visited on 25/04/2018; See also Tortora, M, ‘Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet’ (2003), p. 8, available at http://unctad.org/sections/comtdip/docs/webcdpbkgd16_en.pdf, visited on 25/04/2018

137 Committee on Trade and Development, WT/COMTD/W/135 (2004), supra n 107, par. 1.

2.5.1. Provisions Aimed at Increasing Trade Opportunities Through Market Access

These provisions recognize the importance for least-developed Members to diversify their exports into manufacturing and the difficulties that they may face in breaking into international market for such products, developed countries have provided tariff preferences to exporters of manufacturers from least-developed Members under the GSP- which permits WTO Members to provide special treatment to LDCs without providing it to other WTO members (thus derogating from the MFN principle).¹³⁸

Some of the provisions which provide favourable market access for least-developed Members are: Part IV of GATT 1994 (Articles XXXVI.1, XXXVI.2, XXXVI.3, XXXVI.4, XXXVI.5, XXXVII.1, XXXVII.4, XXXVIII.2(c),(e)); Agriculture (Articles 15 and 16)); Textiles and Clothing (Preamble, The footnote to Article 1(Article 2.18),); the GATS (Preamble, Article IV:1, Article IV:2 and Article IV:3); Agreement on Government Procurement (Article V.2 and Article V.11); Plurilateral Trade Agreements (Articles V:2, V:12, and V:13); TRIPS Agreement (Article 66.2); and Agreement on Import Licensing Procedures (Article 3.5(j)).

In addition to the above provisions under the WTO Agreements, a number of decisions have been taken by WTO Members to provide opportunities for improved market access for LDCs. The main WTO decisions which inculcates the preferential market access for LDCs are: The Enabling Clause¹³⁹; the Decision on Measures in Favour of LDCs¹⁴⁰; the Hong Kong Decision¹⁴¹ on DFQF market access (which has made significant progress towards the goal of providing

138 AALCO (2003), supra n 72, p. 24

139 The Decision of 1979, supra n 22

140 According to this decision, the ministers agreed that ‘*To the extent possible, MFN concessions on tariff and non-tariff measures agreed in the Uruguay Round on products of export interest to the least-developed countries may be implemented autonomously, in advance and without staging; Considerations shall be given to further improve GSP and other schemes for products of particular export interest to least-developed countries, and In the application of import relief measures and other measures referred to in paragraph 3(c) of Article XXXVII of GATT 1947 and the corresponding provision of GATT 1994, special consideration shall be given to the export interests of least developed countries.*’ See the Decisions on Measures in Favour of Least Developed Countries, (1993), supra n 100, paras. 2 (ii) and (iv) and para. 3

141 See Hong Kong Declaration WT/MIN(05)/DEC, Supra n. 123, Ann. F, page F-1; See also Hawthorne (2013), supra n 107, p. 89

DFQF market access on a lasting basis for all products originating from all LDCs); the Decision on Accession of LDCs¹⁴²; and the Decision on Preferential Rules of Origin for LDCs.¹⁴³

2.5.2. Provisions Requiring WTO Members to Safeguard the Interest of Least Developed Countries

There are around 49 provisions spread across WTO Agreements and other decisions that require WTO Members to safeguard the interest of the developing and LDCs Members. These provisions require either positive action from the WTO Members or actions to be avoided, or favourable interpretation by the WTO bodies, so as to protect the interest of the developing and LDCs Members.¹⁴⁴

Some of the provisions which require safeguarding the interest of LDCs Members are: Part IV of GATT 1994 (Articles XXXVI.6, XXXVI.7, XXXVI.9, XXXVII.1, XXXVII.2, XXXVII.3, XXXVII.5, XXXVIII.1, XXXVIII.2(a),(b),(d),(f)); Application of SPS Measures (Article 10.1); Agreement on Agriculture (Articles 16.1 and 16.2); Textiles and Clothing (Articles 6.6(b), 6.6(a) and Annex, paragraph 3(a)); Import Licensing Procedures (Article 3.5(j)); GATS (Articles IV:3; and XIX:3); the Understanding on Rules and Procedures Governing the Settlement of Disputes (Articles 24.1; and 24.2); Plurilateral (Article V.1); the Decision on Measures in Favour of LDCs (paragraphs, 2(i), 2(iii) and 2(iv)); the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (paragraphs 3 (ii); and 4)

142 Pursuant to this decision, '*WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs, taking into account the levels of concessions and commitments undertaken by existing WTO LDCs' Members; and acceding LDCs shall offer access through reasonable concessions and commitments on trade in goods and services commensurate with their individual development, financial and trade needs, in line with Article XXXVI.8 of GATT 1994, Article 15 of the Agreement on Agriculture, and Articles IV and XIX of the General Agreement on Trade in Services.*' See Accession of Least-Developed Countries Decision of 10 December 2002(WT/L/508) and 2012 WTO Accession Guidelines for LDCs, supra n 127

143 See Preferential Rules of Origin for Least Developed Countries (WT/MIN(15)/47 — WT/L/917/Add.1). The decision contains a set of multilaterally agreed guidelines for governments for the first time, which should help make it easier for LDC exports to qualify for preferential market access. See for instance, paras. 1.1(b), 3.1(a), and 4.3

144 AALCO (2003), supra n 72, p.25

2.5.3. Provisions Allowing Flexibility of Commitments, of Action, and Use of Policy Instruments

These provisions relate to actions LDCs may undertake through exceptions, which otherwise apply to Members in general; exceptions from commitments otherwise applying to Members in general; or a reduced level of commitments LDCs Members may choose to undertake when compared to Members in general.¹⁴⁵ The LDCs Members are accorded greater flexibility in application of most of the WTO rules and procedures under the WTO Agreements.¹⁴⁶ The flexibility may be specific in nature¹⁴⁷ or of general nature by providing for a further extension of an initial transition period under certain conditions.¹⁴⁸ Further, developing and LDCs Members may be granted ‘specific, time-limited exceptions in whole or in part’ from the obligations, provided that meeting these obligations is considered as inappropriate to their development, financial and trade needs (SPS and TBT) or to their administrative or financial capacities (customs Valuation).¹⁴⁹

Some of the provisions which provides flexibility in action or use of policy instruments for LDCs are found in GATT 1994 (Articles XXXVI.8, XVIII.7(a), XVIII.8, XVIII.13); Understanding on Balance-of-Payments (Paragraph 8); the Agreement on Agriculture (Article 15.2); TRIPS (Preamble; and Article 66.1); GATS (Article XIX: 3); Decision on Measures in Favour of Least-Developed Countries (paragraph 1); Decision on LDCs Obligations Under Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products (Paragraphs 1 and 2);¹⁵⁰ Decisions in Favour of LDCs-Annex F Hong Kong Ministerial Declaration (Paragraphs 84 and 88).¹⁵¹

145 *Implementation of Special and Differential Treatment* WT/COMTD/W/77, supra n 136, p. 5; See also AALCO (2003), supra n. 72, p.25

146 Ibid

147 Like in the Agreement on Agriculture and Agreement on Subsidies and Countervailing Measures.

148 Like in TRIMs.

149 AALCO (2003), supra n 72, p.25

150 See LDCs Obligations Under Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products Decision of 8 July 2002 (WT/L/478)

151 See Hong Kong Declaration WT/MIN(05)/DEC (2005), supra n 123, Annex F

2.5.4. Provisions Allowing Longer Transitional Periods

These provisions intend to give the LDCs Members time bound exceptions from implementing their commitments, which are generally applicable to all WTO Members.¹⁵² The transition time periods are designed to provide developing and LDC Members with a period of time that is adequate to carry out institutional changes and adjustments that may be necessary for them to address their supply side and other resource constraints, to achieve a level of socio-economic development commensurate with obligations, and to attain socio economic growth and development rates that will sustainably ensure continuous improvement in living conditions.¹⁵³ The length of the time bound exception varies considerably from agreement to agreement.¹⁵⁴

There are about 19 provisions in different WTO agreements which inculcates for transitional periods.¹⁵⁵ Most of the transitions time period in the various agreements have already elapsed. Some provisions which provides transitional time periods for LDCs are: Agreement on Agriculture (Article 15.2); Technical Barriers to Trade (Article 12.8); Agreement on TRIMS (Articles 5.1; 5.2; and 5.3); TRIPS (66.1); and Subsidies and Countervailing Measures (Article 27.3¹⁵⁶). The Decision in favour of LDCs on Annex F Hong Kong Ministerial Declaration¹⁵⁷ also incorporated a transitional period for LDCs. Moreover, the Decision on the Implementation of Preferential Treatment in Favour of Services and Service Suppliers of LDCs and Increasing LDC Participation in Services Trade extended the LDCs' Services waiver until 31 December 2030.¹⁵⁸

Further, with a view to implementing paragraph 7 of the Doha Declaration on the TRIPS Agreement and Public Health, and based on earlier decisions to that extent, the TRIPS Council adopted a Decision on 6 November 2015 by which the transition period under Article 66.1 for

152 AALCO (2003), supra n 72, p.26

153 Ibid

154 For instance, the length of an initial period of transition may be 2 years in SPS and Import Licensing; 5 years in TRIMS, Customs Valuation and TRIPS; 10 years in Agreement on Agriculture and an undermined time in the case of GATS.

155 These provisions are mostly provided in Agreement on Agriculture, Application of SPS Measures, Technical Barriers to Trade, TRIMs, Implementation of Article VII of GATT 1994, Import Licensing Procedure, Subsidies and Countervailing Measures, and Safeguards. See World Trade Organization: Committee on Trade and Development, *Special and Differential Treatment Provisions in WTO Agreements and Decisions: Note by Secretariat*, TN/CTD/W/33 (8 June, 2010)

156 This provision has already expired. See Ibid TN/CTD/W/33, p. 155

157 The Annex F of Hong Kong Declaration (WT/MIN(05)/DEC), supra n 123, para. 84

158 Implementation of Preferential Treatment (WT/MIN(15)/48 — WT/L/982), supra n 132, para. 1.1

LDC Members with respect to the protection and enforcement of patents and undisclosed information was extended until 1 January 2033.¹⁵⁹ This was completed by a Decision of the General Council of 30 November 2015, which waived the obligations of LDC Members under Article 70.8 regarding the possibility to file patent applications, as well as under Article 70.9 with respect to exclusive marketing rights for pharmaceutical products subject of a patent application until 1 January 2033.¹⁶⁰

2.5.5. Provisions Relating to Technical Assistance

The main aim of TA or capacity building provisions in the WTO Agreement is to help the LDCs Members to participate in the WTO process and to integrate more easily in to the mainstream of the MTS.¹⁶¹ These provisions provides for TRTA by developed Members to LDCs Members, either on a bilateral basis or through the WTO or other international organizations.¹⁶²

In addition to the TA provided by the WTO, LDCs benefit from the Integrated Framework (IF). The IF is a partnership initiative among the LDCs, multilateral agencies¹⁶³ and bilateral donors aimed at assisting the LDCs to increase their participation in the multilateral trading system and global economy.¹⁶⁴ It seeks to integrate trade priorities into LDCs' national development plans and poverty reduction strategies and to assist in the coordinated delivery of trade related technical assistance.¹⁶⁵ Currently, more than 30 out of the 48 LDCs are beneficiaries.

Some provisions which incorporate TA for LDCs are: Agreement on TBT (Articles 11.1; 11.2; 11.3; 11.4; 11.5; 11.6; 11.7; 11.8; and 12.7); TRIPS (Article 67); Plurilateral Agreements (Article V:13).

In addition to the above WTO specific provisions, it can be said that the TA for LDCs is incorporated in all WTO decisions.

159 Committee on Trade and Development- Note by the Secretariat WT/COMTD/W/219, supra n 135, p. 76

160 Ibid

161 AALCO (2003), supra n. 72, p.27

162 Some examples are the joint WTO/WIPO programme for technical cooperation in the field of intellectual property issues, technical assistance in customs valuation and technical assistance in accession process. See Ibid

163 These agencies are ITC, IMF, UNCTAD, UNDP, World Bank, and the WTO.

164 See WT/COMTD/W/135 (2004), supra n 107, para. 17.

165 Ibid

CHAPTER THREE
THE POTENTIAL IMPLICATION OF WTO SPECIAL AND DIFFERENTIAL
TREATMENT SCHEMES FOR LDCs'

3.1. Introduction

As discussed under chapter two, providing SDT to LDCs throughout the multilateral trading system is a cornerstone of the WTO's operations. Recognizing the special status of LDCs and granting them SDT in different WTO Agreements and Decisions has been brought many changes and benefits to them in the MTS. First, it is used as an incentive to accede and participate in the international trading system. Second, many LDCs, especially the East Asian one, accelerated their development objectives by utilizing effectively the preferences accorded to them in the international trade.

However, the current SDT scheme in WTO system is strongly criticized for its failures to integrate the majority of LDCs in to the MTS and fulfilling their development objectives as it was first intended. The sharpest of the criticisms of SDT came from a former World Bank economist Michael Finger, who described its operationalization in the MTS as '*heartfelt but ill-defined and ultimately fruitless*'.¹⁶⁶ Despite the existence of over 100 SDT provisions in the WTO Agreements and Decisions, and progress made at Doha Round to agree on modalities for the revision of SDT, LDCs as a group have not benefited very much from MTS since its creation about seventy years ago.¹⁶⁷ An assessment of SDT provisions by UNCTAD concluded that it was doubtful that current provisions and decisions were sufficient to enable the LDCs to actively promote their economic development and reduce their international economic marginalization.¹⁶⁸ The major beneficiaries have largely been the East Asian Countries and some Latin American Countries,¹⁶⁹ whereas the least-developed ones have seen their share in MTS stagnant or

166 See Mitchell, D and Voon, T 'Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over,' 15 *Global Governance* 343 (2009), p. 344. See also Sibanda, S, 'Towards a Revised GATT/WTO Special and Differential Treatment Regime for Least Developed and Developing Countries,' *Foreign Trade Review* 50(1) 31-40, Indian Institute of Foreign Trade SAGE Publications (2015), p. 36

167 Ibid

168 See UNCTAD, 'The Least Developed Countries Report 2004, Linking International Trade with Poverty Reduction' UNCTAD/LDC/2004, Geneva (2004), p. 242

169 See, generally, WTO Secretariat, *Participation of Developing Countries in World Trade: Recent Developments, and Trade of Least-Developed Countries*, WT/COM.TD/W/65 of 15 February 2000

decline.¹⁷⁰ Similarly, as evidenced by UN CDP Secretariat and UNCTAD, although the 47 LDCs comprise 13% of the world's population, trade per capita remains very low.¹⁷¹ Moreover, according to the WTO Secretariat, the share of the forty-seven countries making up this group in world trade has continuously declined over the years to 0.91 percent confirming their marginalization from the MTS.¹⁷²

In this chapter the author examines the potential implications of SDT provisions contained in WTO Agreements for LDCs. In particular, the legal status and foundation of SDT, the concept of development in the SDT, market access for LDCs, safeguarding the interest of LDCs, the technical assistance for LDCs, the rules on flexibility, the transitional period, and the relationship between the dispute settlement system and SDT, in relation to integrating them in to MTS and fulfilling their development objectives will be analyzed in the coming sections.

3.2. The Implication of Market Access for Least Developed Countries

Many developed country members developed their own non-reciprocal trade preferences schemes (for instance, EU's EBA and Cotonue Agreement, and US's AGOA) under the GSP system to boost the export of LDCs.¹⁷³ Specifically, the WTO DFQF decision was a major achievement for the LDCs in terms of market access in developed countries.¹⁷⁴ For instance, preferential market access and related initiatives have played a significant role in Bangladesh's export performance over the years.¹⁷⁵ Reduced-duty or duty-free entry to foreign markets has enhanced the competitiveness of Bangladesh's apparels sector to varying degrees in different

170 See Bermann, G and Mavroidis, P *WTO Law and Developing Countries*, (2007) as cited in Caroline-Antonia Goerl, *Special and differential treatment of developing countries in the World Trade Organization*, *Economie Internationale*, 5 May 2009, p. 1

171 See Gay, D 'Rethinking International Support Measures for Least Developed Countries,' Committee for Development Policy Secretariat, UN, March 1, 2018, Available at: <https://www.un.org/ldcportal/rethinking-support-measures-for-the-least-developed-countries/>, Visited on 18/05/2018

172 Ibid, p. 3

173 See *Rahman, M* 'Trade Benefits for Least Developed Countries: the Bangladesh Case,' United Nations, Department of Economic and Social Affairs, New York, CDP Background Paper No. 18, July 2014, p. 12; The European Union and the United States passed legislation establishing their General System of Preferences (GSP) regimes in 1971 and 1974, respectively. See Hoekman, B; Martin, J and Braga, P 'Preference Erosion: The Terms of the Debate,' World Bank, May 2006, p. 4

174 Ibid, p. 22

175 Ibid, p. 23

markets.¹⁷⁶ In the EU, for example, average tariffs on the apparels items exported by Bangladesh are over 12 per cent, so that the duty-free treatment that Bangladesh's exports receive under the EU's EBA Initiative gives it a substantial price advantage. This has contributed to the rapid growth of Bangladesh's Ready Made Garment exports to the EU since the early 1990s.¹⁷⁷ Apart from countries like Bangladesh, Lesotho possessed its ability to attract foreign investment and build new supply capacity as a result of the duty-free, quota-free market access provided by AGOA for textiles and clothing.¹⁷⁸

However, market access or trade opportunities under existing preferential schemes do not offer LDCs much possibility to change the composition of their exports, and integrate them in to the MTS as they envisaged, because of following reasons.

3.2.1. Implementation Problem

Non-binding measures are the most prevalent form in the SDT provisions of trade preferences for LDCs.¹⁷⁹ The main reason is that the formulation of the language of market access provisions in obligations of '*best endeavours*' under different WTO Agreements and Decisions. Provisions like GATT Part IV (Articles XXXVI–XXXVIII) are largely declaratory and are not really obligatory in the sense that a violation of these provisions does not entail any effective sanction.¹⁸⁰ For instance, tariff peaks¹⁸¹ and tariff escalations¹⁸² by developed countries show that those commitments, which should have prevented tariff peaks and tariff escalations that target

176 See Cortez, L, Kinniburgh, I and Mollerus, R 'Accelerating Development in the Least Developed Countries through International Support Measures: Findings from Country Case Studies,' United Nations, Department of Economic and Social Affairs, New York, CDP Background Paper No. 22, October 2014, p. 8.

177 Ibid

178 UNCTAD, Towards a New Trade "Marshall Plan" For Least Developed Countries: Trade, Poverty, and Cross cutting Development Issues, UNCTAD/DITC/TAB/POV/2005/1, Study Series No. 1, United Nations, New York and Geneva (2005), p. 22

179 See Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe, "Proposal for a Framework Agreement on Special and Differential Treatment", at. 39, as cited in Brennan, M 'The Special and Differential Treatment Mechanism and the WTO: Cultivating Trade Inequality for Developing Countries,' 14 *Trinity C.L. Rev.* 143 (2011), p. 157

180 See Lee, Sh 'Reclaiming Development in the World Trading System,' Cambridge University Press, New York (2006), p. 35

181 Tariff peaks impose higher tariff rates on selected imports mostly from developing countries such as textile, clothing, fish and fish products. See Ibid

182 Tariff escalations impose higher tariff rates on finished products and lower rates on raw materials. See Ibid

exports from the least developed ones are not quite enforceable in reality. Tariff peaks and tariff escalations have been reduced after the UR but still exist, hampering exports from LDCs.¹⁸³

Like Part IV of the GATT, the GSP is a non-mandatory scheme, which continued to be implemented on a voluntary basis by developed country members, since the Enabling Clause that accorded a permanent legal status for GSP did not create any binding norms on developed countries in their implementation of the GSP.¹⁸⁴ Likewise, the language used in the text of Hong Kong Declaration on DFQF market access is not binding.¹⁸⁵ Furthermore, the recent WTO Ministerial Decisions on Preferential Rules of Origin for LDCs adopted by WTO Ministerial Conference at the Ninth Conference in Bali, and which were further elaborated at the Tenth WTO Ministerial Conference in Nairobi in 2015 are based only on best-endeavours clauses, and thus not legally binding. For instance, the Bali Decision on Rules of Origin reads as:

*'With a view to facilitating market access for LDCs provided under non-reciprocal preferential trade arrangements for LDCs, Members should endeavour (emphasis added) to develop or build on their individual rules of origin arrangements applicable to imports from LDCs in accordance with the following guidelines. These guidelines do not stipulate a single set of rules of origin criteria. Rather, they provide elements upon which Members may wish (emphasis added) to draw for preferential rules of origin applicable to imports from LDCs under such arrangements.'*¹⁸⁶

The UNCTAD Least Developed Countries Report 2016 also confirmed the lessening of the value of market access committed in Hong Kong Decision on DFQF market access by the Bali Ministerial Declaration. The report concluded as:

183 Ibid

184 See Song, A 'The Adequacy of Special and Differential Treatment Provisions for Developing Countries in the WTO,' *GIMPA Law Review*, Volume 2, 2016, p. 105; See also Lee, Sh 'Beyond the Doha Round: Towards Development Facilitation in the World Trading System,' 40 *Denv. J. Int'l L. & Pol'y* 384 (2011), p. 388

185 For instance, the flexibility allowing members 'facing difficulties' to provide duty-free treatment to only 97 per cent of LDC exports at the product-line level and the wording 'declaring ... to do so' with regard to developing countries weakened the decision considerably and were serious disappointments for Bangladesh and other LDCs. See Hong Kong Declaration WT/MIN(05)/DEC, supra n. 123, annex F, 36 (a)(i) and (ii).

186 See Preferential Rules of Origin for Least developed countries, Ministerial Decision, WT/MIN(13)/42, WT/L/917, 11 December 2013, Par. 1.1

“WTO members have long struggled to achieve a satisfactory agreement on duty free quota-free (DFQF) market access, and the last Ministerial Declaration to address the subject — the Bali Ministerial Declaration (WTO, 2013) weakened previous commitments and also remained in non-binding language.”¹⁸⁷

Hence, there appears to be uncertainty in the legal status of above provision, since the language in which it is formulated is best-endeavour clauses and finally not legally-enforceable obligations. Therefore, either the GSP or the WTO Hong Kong Ministerial Decision on DFQF market access do not meet the longstanding demand of the LDCs for trade preferential market access, owing to their discretionary nature of unilateral preference schemes.

3.2.2. Uncertainty of Preferences

Since GSP programs are unilaterally granted, they can be unilaterally withdrawn, suspended or limited vis-à-vis countries and products, leading to uncertainty. Most of the time, market preferences are taken away at the discretion of the preference-provider by graduating the country or excluding specific products, once a country has specialized and successfully expanded the production of certain goods.¹⁸⁸ The most noticeable trade-related implication of LDC graduation is the loss of preferential market access under LDC specific schemes such as the EBA and AGOA.¹⁸⁹ The greatest adverse effects of loss of preferential market access through graduation would be on exports for which tariffs are generally highest for non-LDCs, namely agricultural commodities, textiles and apparel.¹⁹⁰ For instance, the analysis made by UNCTAD secretariat indicates that a potential effect on LDCs of losing LDC specific preferential treatment in the G20 countries is equivalent to a reduction of 3–4 per cent of their merchandise export revenues. If assigned to all 48 LDCs, this would amount to more than \$4.2 billion per year.¹⁹¹

187 See UNCTAD, The Least Developed Countries Report 2016, The path to graduation and beyond: Making the most of the process, UNCTAD/LDC/2016/Corr.1, UN, New York and Geneva, 9 June 2017, p. 100

188 See Keck, A and Low, P (2004),supra n 101, p. 12

189The Least Developed Countries Report 2016, supra n 187, p. 135

190 Ibid

191 Ibid

3.2.3. Tariff Barriers

Even though preferential market access is inculcated in different WTO Agreements and Decisions, most of the export products of LDCs are highly affected by tariff barriers in the preference giving countries due to the following reasons. Firstly, most of the LDCs' exports are affected by tariff peaks and tariff escalations.¹⁹² For instance, efforts by African countries to augment their exports of cotton to the US have been aggravated by the systematic high tariff in cotton which efficiently frustrates any attempts to expand their cotton industry.¹⁹³ Secondly, Tariff reductions on an MFN basis through multilateral negotiations or through the proliferation of free trade agreements lead to an erosion of the non reciprocal preferences enjoyed by LDCs.¹⁹⁴ The result is that LDCs have or will have very soon virtually the same market access conditions for their key export products as their biggest, more developed and efficient competitors.¹⁹⁵ In this regard, the preference margins enjoyed by LDCs in the EU and US markets are very small when compared with the effective tariff paid by competing sellers.¹⁹⁶ In the EU, the current adjusted preference margin is only around 3 per cent, and in the US it is negative.¹⁹⁷ For instance, while Nepalese exports are subject to a tariff rate of 11.3 per cent, on average, in the U.S. market, an analysis of the discriminatory tariff imposed by the U.S.¹⁹⁸ suggests that calculated duties as a percentage of U.S. customs value for woven Ready Made Garments in 2006 were 0.16 per cent, 0.07 and 0.41 per cent for Canada, Honduras and Jordan respectively. This indicates that the LDCs are actually discriminated against in the US for the main products they sell there because the US has free trade agreements with other trade partners.¹⁹⁹

192 Lee (2006), supra n 180, p. 35; see also foot notes 181 & 182 for more explanation.

193 Brennan (2011), supra n 246, p. 156

194 See Imboden, N 'Special and Differential Treatment: A New Approach May Be Required', WTO, Bridges Africa, Vol. 6-No. 8, 8 November 2017, available at:<https://www.ictsd.org/bridges-news/bridges-africa/news/special-and-differential-treatment-a-new-approach-may-be-required>, accessed on 12/05/2018

195 Ibid

196 See Carrere, C and de Melo, J 'The Doha Round and market access for LDCs: Scenarios for the EU and US markets' Discussion Paper Series No. 7313, Centre for Economic Policy Research, London, (2009) Cited in UNCTAD, The Least Developed Countries Report 10, United Nations, New York and Geneva, UNCTAD/LDC/2010 (2010), p. 63

197 Ibid

198 See Adhikari, R. and Yamamoto, Y "The Textiles and Clothing Industry: Adjusting to the Post Quota World" in *Industrial Development for the 21st Century: Sustainable Development Perspectives*. New York: United Nations Department of Economic and Social Affairs, (2007) p. 224

199 See UNCTAD (2010), supra n 196, p. 63

3.2.4. Limited Product Coverage

Although developed country members have provided market access under the GSP program, a generally recognized fault in this scheme is that most do not extend beneficial market access for products of greatest export importance and interest to LDCs.²⁰⁰ Under these preferential schemes, DFQF market access has been provided for LDCs exports by the majority of developed economies, as well as by some major developing countries, for a large number of products.²⁰¹ However, several products of export interest to LDCs were largely excluded from preferential treatment. For example, the US does not provide for the required 97 percent of DFQF coverage and, more importantly, does not cover certain products of important export interest to LDCs (textiles and apparel).²⁰² Due to the high concentration of LDCs' exports on a small number of products, even a 97 percent DFQF coverage may be meaningless if the most important export products are not included, which seems to be the case in the current situation.²⁰³ Similarly, live animals and products are excluded in the Canada's preferential scheme.²⁰⁴ Elliot concluded this problem as “...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.”²⁰⁵ Many empirical studies of how preferences work in practice²⁰⁶ also show that while market access preferences for LDCs play an important symbolic role in expressing solidarity with LDCs, their practical value for trade expansion has generally been very limited, owing to lack of full product coverage. LDCs thus get essentially no gain from 97 percent product coverage in DFQF access to developed country markets.

200 See Moon, G ‘Trade and Equality: A Relationship to Discover’ 12 *Journal of International Economic Law* 617, at 637 (2009), as cited in Brennan (2011), supra n. 179, p. 156

201 For instance, Australia, Canada, Chile, China, EU, Eurasian Economic Union, Iceland, India, Japan, Korea, New Zealand, Norway, Switzerland, Turkey, Chinese Taipei, Tajikistan, Thailand, and the USA

202 Imboden (2017), supra n 194

203 Ibid

204 See UNCTAD/DITC/TAB/POV/2005/1, supra n 178, p. 12

205 See Elliot, A Open markets for the poorest countries: Trade preferences that work. The CGD Working Group on Global Trade Preference Reform, Center for Global Development, Washington DC (2010), p. 8

206 See, for example, Francois, H and Manchin, 2005; Carrere C and de Melo J (2009); Elliot, A, ‘Opening markets for poor countries: Are we there yet?’ Working paper 184, Center for Global Development, Washington, DC (2009)

3.2.5. Non-Tariff Barriers

Despite the WTO's best-endeavour decisions to relieve LDCs from Non-tariff barriers (NTB) (which are currently the major impediment to market access than tariffs), there are practically no SDT commitments on this issue. Developed countries tend to provide preferential market access, but at the same time impose rigid rules of standard and regulatory requirements and take away the benefits.²⁰⁷ Currently, proliferation of ever more complex, rapidly changing, stringently applied, and hard to meet market entry conditions or non-tariff barriers such as TBT/ SPS measures continue to hamper exports from LDCs and are undermining existing preference schemes.²⁰⁸ Some of these measures are arbitrary or unjustifiably discriminatory and have been on the rise, gradually replacing the traditional barriers.²⁰⁹ The challenge involved in complying with such market entry conditions is ever greater for LDCs, whose physical infrastructure, skilled human resource, and financial and institutional resources put them at a disadvantage in the international trade arena. For instance, in the case of clothing, Bangladesh exporters are required to meet specified levels of domestic value-added at different "stages of production"²¹⁰ in order to qualify for duty-free treatment that finally resulted in the reduction of exports in this sector. These market access barriers also impeded the export growth and diversification of Nepal after acceding to WTO.²¹¹ Similarly, this problem is confirmed by Mr. Supachai Panitchpakdi, Secretary-General of UNCTAD in case of African LDCs as follows:

'African LDCs will be unable to make use of market access unless they possess the capacity to produce exports that meet the standards required by the advanced economies.'

207 See Adhikari, R, Dahal, N and Pradhananga, M "Ensuring Development-Supportive Accession of the Least Developed Countries to the WTO: Learning from Nepal" Research Report, Trade Knowledge Network, Winnipeg: International Institute for Sustainable Development,(2008), p. 14

208 See UNCTAD/DITC/TAB/POV/2005/1, supra n 178, p. 28

209 Adhikari, R Dahal, N and Pradhananga, M (2008), supra n 209, p. 14

210 There are four different phases in textiles production (cotton, yarn, fabrics and apparel) and therefore three possible stages of production (or transformation). In simplifying Rules of Origin, two stages are yarn to fabrics to apparel, while one stage is fabrics to apparel. See Cortez, L, Kinniburgh, I and Mollerus, R (2014), supra n 176, P. 8

211 Adhikari, R, Dahal, N and Pradhananga, M (2008), supra n 207, p. 5

*Many goods are currently not accepted because of trade barriers, sanitary standards, packaging requirements and so forth.*²¹²

The major fallout of rule of origin is that its requirement is very cumbersome, inefficient and resource demanding.²¹³ For instance, the administrative costs of certifying origin and providing documentary evidence to support the certificate of origin in the preference grantor like the EU is a major setback for LDCs.²¹⁴ In addition to administrative costs, LDC's complying with TBT measures that are related to process and production methods is severely complicated by the inadequate capacity of LDCs to participate effectively in the international standard-making process and by the disappointingly low level of technology transfer which is necessary for LDCs to improve product quality and standard in order to comply with the TBT requirements in major export markets.²¹⁵

In addition to the rule of origin requirements, the fast changing SPS standards in the major markets (the EU and the US) are also posing serious problems for the exports of agriculture, livestock, horticulture, and floriculture items from LDCs.²¹⁶ For instance, *Safety and quality standards*, pose significant challenges for Nepalese and Cambodian exporters, in particular in industrialized country markets, and increase their dependence on neighbouring markets, such as India, Thailand and Vietnam.²¹⁷

Non-trade related conditionalities (like environmental and labor standards, the fight against drugs, and political requirements) in the case of the GSP scheme of the US's of AGOA is also

212 See Address Made by Mr. Supachai Panitchpakdi, Secretary-General of UNCTAD in UNCTAD, 'Trade and Development for African LDCs' Prosperity: Actions and Directions', Report based on the High-Level Workshop in Preparation for UNCTAD XII, Izmir, Turkey, UNCTAD/ALDC/2008/2, 4-5 March 2008, p. 22

213 See UNCTAD, The Least Developed Countries Report 2016, supra n 187, p. 101

214 See Adhikari, R, Dahal, N and Pradhananga, M (2008), supra n. 207, p.14

215 See UNCTAD, The Challenge of Integrating LDCs into the Multilateral Trading System: Coordinating Workshop for Senior Advisors to Ministers of Trade in LDCs in preparation for the Third WTO Ministerial Conference *Sun City, South Africa: 21-25 June 1999*, UNCTAD/LDC/106, 6 October 1999, p. 8

216 See Adhikari, R. 2005, *Vulnerability, Trade Integration and Human Development*, Background paper for Asia Pacific Human Development Report 2006 titled *Trade on Human Terms*. Colombo: UNDP Asia Pacific Regional Centre, (2006) p. 27

217 See Baumüller, H, Adhikari, R and Dahal, N 'Making WTO Membership Work for Least-developed Countries: Lessons from Nepal and Cambodia,' International Institute for Sustainable Development (2008), p. 2

another problem which affected the trade preferences of LDCs.²¹⁸ Most recently, the European Union has introduced similar conditionalities under its own GSP scheme, which will be also applicable under the EBA amendment.²¹⁹

Generally, the NTBs pose a significant threat to LDCs exporters for two main reasons: First, these barriers increase the cost of exports, thus making LDCs uncompetitive in export markets, and second, due to the lack of capacity to regulate, monitor, and certify standards of their products, importing countries have a tendency to block the import of these LDC's product.²²⁰

3.2.6. Supply-side Constraints and Limited Competitive Ability

Adhikari defines supply-side constraints as “constraints on domestic productive capacity that limit the ability of a country to produce goods or services for supplying the international market in a competitive manner.”²²¹ The major supply side constraints of the LDCs are: lack of skilled human power, the lack of linkages within and between productive services and infrastructural sectors, limited access to finance, shortcomings in production technologies, and poor infrastructure.²²² Furthermore, “trade promotion and facilitation services such as access to business information (particularly on rules and procedure of the export markets), use of information technology, development of new products, advice on standards, packaging, quality control, marketing and distributional channels, and functioning of trade promotion organizations are virtually non-existent in LDCs.”²²³ Due to limited supply capacities, exporters in LDCs are unable to take full advantage of preferential market access.²²⁴ For instance, Nepal has not been

218 See World Trade Organization (WTO) The Generalized System of Preferences: A preliminary analysis of the GSP schemes in the Quad, WT/COMTD/W/93, Geneva, 5 October 2001 p. 5; See also Páez, L, Karingi, S, Kimenyi, M and Paulos, M ‘A Decade (2000-2010) of African-U.S. Trade Under the African Growth Opportunities Act (AGOA): Challenges, Opportunities and A Framework for Post AGOA Engagement,’ September 15, 2010, p. 16

219 Ibid

220 Adhikari, R, Dahal, N and Pradhananga, M (2008), supra n. 207, p.15

221 See Adhikari, R ‘Integration of Least Developed Countries into the South Asian Free Trade Agreement: A Human Development Perspective,’ UNDP, (2011), p. 37

222 Ibid

223 Ibid

224 Such access is only a hypothetical opportunity unless the commercial conditions for market entry can be achieved. As UNCTAD has stated: “Improved market access for LDCs is commercially meaningless if the LDCs cannot produce in the sectors in which they have preferential treatment and if they lack the marketing skills, information, and connections to convert market access to market entry; moreover, unless the new production stimulated by the preferences strengthens the development of national technological and entrepreneurial

able to take advantage of the incremental market access opportunities provided by WTO membership, due to several supply-side constraints.²²⁵

3.3. Safeguarding the Interest of Least-Developed Countries

Some LDCs are benefited from the SDT provisions safeguarding their interest. This applied, for example (with Bangladesh as the only LDC) to the opportunity to maintain import restrictions with reference to balance of payments problems.²²⁶

However, since most of them are formulated with the language of permissiveness, ambiguous, and conditionalities, it is difficult to enforce these provisions in the WTO Dispute Settlement Understanding (DSU). The main problems inherent in these provisions are identified as follows.

As discussed in chapter three, the main provision which safeguards the interest of the LDCs, especially in availing a policy space for their development objective is Article XVIII:A and Article XVIII:C GATT. In theory, both of these articles could afford LDCs significant power to protect their domestic industries while they are being established. However, a requirement to engage in time consuming negotiation with the interested members and payment of compensation has been also effectively discouraging LDCs from making full use of these provisions.²²⁷ Article XVIII: A has not been invoked since 1967, and as such, it appears to have little relevance to modern trade law.²²⁸ Similarly, art XVIII: C has little effect given that it has only been raised three times (each time unsuccessfully) since the establishment of the WTO.²²⁹ In response to these difficulties, developing countries, especially LDCs have requested that the articles become more lenient, as the requirement to pay full compensation is too onerous for their economies. It essentially prices

capabilities through learning by doing, the sustainability of the development process may be questionable.” See UNCTAD/LDC/2004, supra n 168, p. 250

225 See Adhikari, R, Dahal, N and Pradhananga, M (2008), supra n. 207, p.5

226 Vyllder (2007), supra n 156, p. 97

227 See *GATT 1994* art XVIII:A (7b); Panel Report, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* WT/DS90/R (6 April 1999) 209 reiterating that art XVIII:C necessitates compensation to be paid to effected industries; See also WTO Committee on Trade and Development, ‘Special and Differential Treatment Provisions’, A Joint Communication by the Least-Developed Countries, TN/CTD/W/4, 24 May 2002, paras. 19 & 21; Lee(2006), supra n. 247, p. 42; Lee(2011), supra n. 184, p. 387

228 Keck, A and Low, P (2004), supra n 101, p. 14.

229 See WT/COMTD/W/196 (2013), supra n 26, p. 8.

them out of any potential benefits that would otherwise be available.²³⁰ Thus, two of the SDT mechanisms contained in art XVIII of the *GATT 1994* have been unsuccessful in assisting LDCs to raise standards of living.

The implementation of the Agreement on the Application of SPS in safeguarding the interest of the LDCs is also remains futile owing to its non-binding nature. Since the Agreement contains “*shall*” formulations rather than “*should*” formulations, it is difficult to enforce through WTO dispute settlement mechanism.²³¹

Even though this provision is there, industrialized countries present a high obstacle of the health and hygiene standards for exporters from the developing and LDCs very often, their products are rejected at the border because of sanitary reasons.²³² Moreover, to enforce their rights, it is difficult especially for economically and technologically marginalized LDCs to prove non-compliance under the above article.²³³ Even if it is possible to prove the non-compliance, there is no mandatory mechanism by which developed and developing member countries are obliged to withdraw these measures. As Kessie explained, “*in case of a dispute the only decision open to the dispute settlement board might be to recommend the adjustment of the measure in such a way that it promotes development*”²³⁴ For instance, Argentina cited Article 10.1 of the SPS Agreement in the *EC-Approval and Marketing of Biotech Products Case*²³⁵ concerning a temporary prohibition on the approval of biotech products from Argentina by the EC, which Argentina claimed to have significant impacts on its economic development. In Argentina’s view the EC is compelled to abide by the binding provision and in failure to do so had impaired its development. But the Panel in this case was of the view that the obligation requires member

230 See Hart, N ‘Special And Differential Treatment At The World Trade Organization: A Case Of Limited Results And Misconstrued Arguments?’ *Western Australian Student Law Review* 4 (2018), p. 4, available at: <http://www5.austlii.edu.au/au/journals/WAStuLawRw/2018/1.html>, accessed on 12/05/2018

231 For example Article 10 paragraph 1 reads as:

“In the preparation and application of sanitary or Phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least developed country Members.”

232 See Fritz (2005), supra n 23 , pp. 18 & 31

233 See Kessie (2000), supra n 67, p. 968

234. Ibid, p. 969

235 See EC-Approval and Marketing of Biotech Products WT/DS291/R-WT/DS292/R-WT/DS293/R, 29 September 2006 (Panel Reports).

countries to merely consider the needs of developing countries and does not necessitate a positive action by the importing member.²³⁶

The above case proves the SPS Agreements only impose an obligation on developed member countries to consider what the impact of their measures would be on LDCs without specifying that developed members should refrain from implementing or withdraw their measures when it has been demonstrated by a LDC member that the measures would harm its trade interests.²³⁷

Moreover, the Agreement on TBT is another example which contains a similar clause. According to Article 12, paragraph 2, the Members “shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members”. Hence, similar to the SPS Agreement, the TBT Agreement contains merely the obligation to review the impact of relevant measures on LDCs.

Similarly, the Anti-dumping Agreement stipulates that prior to the application of anti-dumping measures the Members have to take into consideration the specific situation of developing countries and to explore “constructive remedies”.²³⁸ Since the article does not mention any development policy criteria on the basis of which either anti-dumping measures are to be withdrawn or certain “constructive remedies” have to be taken, it does not provide effective safeguarding.²³⁹ In addition, lack of resources and legal framework prevent LDCs from implementing anti-dumping measures against importers.²⁴⁰ Likewise, proofing that serious damage has been inflicted and that this damage was caused by the dumping practice is also a major obstacle for LDCs.²⁴¹

In general, those measures incorporated under the provisions for safeguarding the interest of LDCs are not formulated in clear and legally enforceable language, thus giving a wide discretion

236 See Wibowo, H ‘Improving the Effectiveness of Special and Differential Treatment of the World Trade Organization,’ Research Paper (2015), Victoria, University of Wellington, p. 17

237 Ibid

238 See Anti-dumping Agreement, Art. 15

239 Fritz (2005), *Supra* n 23, p. 19

240 Ibid

241 Ibid

to developed country members. Moreover, the multilateral control placed in the provisions diminishes their effectiveness in assisting their development need.

3.4. Technical Assistance

Technical assistance has had a direct relevance on LDC's ability to fulfill some of their commitments they entered into under the Protocol of Accession.²⁴² For example, Nepal was unique among acceding countries in securing an implicit pledge of external technical support in assisting it to implement the commitments that it had assumed during the negotiations, even though the promised assistance has not been fully forthcoming because of its internal political problems.²⁴³ Likewise, Cambodia, on the other hand, without any implicit pledge of TA during negotiations, has secured significant amounts of trade-related technical support since 2004.²⁴⁴

Though there is positive trend as to the implementation of TA commitment to LDCs, the effort is still not enough to redress the difficulties and concern faced by the LDCs owing to the following reasons.

Firstly, even though many TA provisions are seems binding, they tend to be difficult to implement because they require mutual agreement on the terms of the assistance provided.²⁴⁵ Most of TA provisions end up only with the obligation of '*mutually agreed terms and conditions*' on developed country members and other international agencies without any binding effect.²⁴⁶ Hence, it can be argued that the SDT provisions on TA do not create any legally binding obligations to act in a way that would advance the LDCs' integration in to MTS.

Secondly, the adequacy of the TA provided by WTO and other agencies for LDCs is currently disputed. Even though the assistance is increasing for LDCs, the inadequacies have been highlighted such as the insufficient amounts allocated, the capacity of the WTO secretariat to provide the required technical support, the absence of emphasis on practical and capacity

242 See Pandey, R, Adhikari, R and Waglé, S 'Nepal's accession to the World Trade Organization' Paper prepared for the Development Policy and Analysis Division of the United Nations Department of Economic and Social Affairs, CDP Background Paper No. 23, November 2014, p. 28, available from <http://www.un.org/ldcportal>

243 Ibid, pp. 27-28

244 Ibid, p. 28

245 Ibid

246 See for instance, Article 11 of the Agreement on Technical Barriers to Trade, Article 67 of the TRIPS Agreement

building issues, and lack of assistance to develop negotiating capacity.²⁴⁷ Most of the time, the TA provided for LDCs is highly focused on human resource development and insufficient assistance are provided for physical and institutional development.²⁴⁸ The use of other international support measures is based on what donors decide to make available, i.e., supply driven, and not determined by the specific needs of the individual LDCs, i.e., demand-driven.²⁴⁹ LDCs have not been given a chance to decide upon their development strategy, programmes and actions, identify the specific constraints which could be addressed by international assistance, and then ascertain what international support measures that are available to provide that assistance.²⁵⁰ According to United Nations Development Program (UNDP), the TA provided in the framework of the WTO agreements and decisions have failed to address the needs of LDCs for they were not designed to promote self-determined capacity building tailored to the needs of these countries.²⁵¹

Thirdly, even though the Doha Decision on SDT committed for the provision of TA to the LDCs, still no modalities for implementing the commitment or benchmarks for measuring expected results have been developed to monitor its implementation by WTO Members in each of the

247 See South Centre, *Special and Differential Treatment for Developing Countries in the WTO, Trade-Related Agenda Development and Trade Working Papers* (1999)

248 Ibid

249 See *Cortez, L, Kinniburgh, I and Mollerus, R (2014)*, supra n 176, p. 14

250 Ibid

251 See UNDP, *Making Global Trade Work for People*, United Nations Development Programme New York, Earth scan Publications Ltd, (2003), p. 336. The UNDP further identified four causes why so far the technical assistance measures have failed: i) They focus on the implementation of the agreements: The high costs of the implementation of the WTO agreements were not taken into consideration in the assistance measures; ii) They are dominated by donor interests: Technical assistance follows the priorities of the donors, not the requirements of the local beneficiaries. Thus it undermines the development of existing local capacities, prevents the possibility to set other priorities and from time to time erects unnecessary bureaucratic hurdles. Technical assistance replaces local institutional arrangements rather than promoting their transformation into development-promoting entities; iii) They are open-ended: Many WTO provisions on technical assistance require negotiations since they are granted only after “mutually agreed terms conditions” have been agreed upon. These negotiations are sometimes abused for inveighing concessions in an extended WTO agenda. The assistance measures themselves are often highly complex and require additional negotiation capacities on the part of the beneficiaries. And finally despite their binding character, there are hardly any mechanisms to guarantee implementation; and iv) They are based on inadequate provisions: The WTO provisions on technical assistance do not take into consideration the differences between the developing countries. The mostly know only two categories: Least Developed Countries and developing countries. And the WTO resources are inadequate to meet the demand for assistance. See Ibid, pp. 336-337

LDCs.²⁵² Hence, these new TA programmes in the context of WTO agreements do not appear to differ significantly from the old ones in their underlying assumptions or in their purpose.²⁵³

For instance, the Gambia's experience suggests that the provisions of the WTO Agreements regarding TA are difficult to operationalize.²⁵⁴ In spite of the recognition of the LDCs' need for TA in these Agreements, it provides no framework for action at the country level, nor any mechanism indicating where or how to acquire the necessary financial and technical resources.²⁵⁵ Furthermore, as it was seen in the case of Nepal and Cambodia, TA has been lacking to help address post WTO membership supply-side constraints that prevent the countries from benefiting from WTO membership. As a result, WTO membership has not helped achieve key policy objectives related to trade, i.e. trade diversification and expansion of these countries'.²⁵⁶

3.5. Transition Periods

LDCs have benefited from SDTs that grant them longer transition periods. Although extensions of transition periods have often been negotiated at the group level, there has been a situation in which individual LDCs requesting and being granted additional time to implement a particular WTO discipline.²⁵⁷ For instance, according to the results of the survey conducted by the CDP Secretariat, Bangladesh requested on phasing out quantitative restrictions on agricultural imports.²⁵⁸

However, the effectiveness and implementation of the transitional period provisions for LDCs are criticized due to the arbitrary determination of transition period of some years to comply with many of the WTO Agreements. For all LDCs, it can be said that the transition period is unrealistic given the heavy financial costs and administrative burdens needed to set up new institutions, regulatory framework, physical infrastructure, and training of human resources, in

252 The Decision reads as: "*Least-developed countries shall be accorded substantially increased technical assistance in the development, strengthening and diversification of their production and export bases including those of services as well as in trade promotion, to enable them to maximize the benefits to liberalized access to markets*", See WTO TN/CTD/W/4 (2002), Supra n. 227, para. 2(v) para. 28

253 See UNDP (2003), Supra n. 251, pp. 339-340

254 See Cortez, L, Kinniburgh, I and Mollerus, R (2014), supra n 176, P. 14

255 Ibid

256 See Baumüller, H, Adhikari, R and Dahal, N (2008), supra n 217, P. 10

257 Cortez, L 'Beyond market access: Trade-related measures for the least developed countries. What strategy?', DESA Working Paper No. 109, (2011), p. 7

258 Ibid

particular to implement the TRIPS, TRIMS and CV agreements.²⁵⁹ As Thomas Fritz stated, implementation of agreements such as TRIPS or SPS requires not only the drafting and adoption of new laws but also significant investments in education and infrastructure, as well as political adjustment costs.²⁶⁰ Fritz further argued that, ‘very often, they could not be maintained, be it due to the lack of capacities, lack of support, lack of political will or other policy options.’²⁶¹ The World Bank, for instance has argued that the long-term overall cost of adopting an Agreement in relation to customs valuation, may for a LDC be as high as its one-year’s development expenditure.²⁶² The transition period given has not been determined in a more systematic way by linking it to the capacity needs of LDCs and complemented with technical assistance.²⁶³ For instance, Nepal negotiated transition periods of 2 years and 9 months to fully implement agreements on CV, SPS and TRIPS but only 1 year and 9 months for the implementation of TBT.²⁶⁴ Despite the negotiated transition periods, the Government of Nepal has found it difficult to meet its implementation commitments, primarily due to lack of resources and expertise.²⁶⁵

3.6. Flexibility of Commitments, of Action, and Use of Policy Instruments

As it has been seen in chapter two, SDT provisions which provide flexibilities of commitments and policy space for LDC are incorporated in different WTO Agreements and Decisions. Many LDCs also benefited from the measures providing for greater flexibilities in commitments, action and use of policy instruments. Several countries indicated the use of flexibilities related to the implementation of certain provisions of the Custom Valuation Agreement.²⁶⁶

However, these rights are not automatically granted to LDCs and if given, the ability of LDCs to take advantage of these flexibilities is seriously constrained by their lack of financial

259 See Pangestu (2000), supra n 81, p. 1293; See also Michalopoulos (2000), supra n 3, p. 22

260 See Thomas Fritz (2005), supra n 23, p. 23

261 Ibid

262 See Statement by H. E. Ambassador D. Baichoo of the Republic of Mauritius at the Seminar on Special and Differential Treatment for Developing Countries, Geneva, 7 March 2000, Available at: https://www.wto.org/english/tratop_e/devel_e/sem01_e/sdtmus_e.htm, visited on 29/05/2018

263 Ibid

264 See Pandey, R, Adhikari, R and Waglé, S(2014), supra n 242, p. 26

265 Ibid, p. 22

266 Cortez (2011), supra n 257, p. 7

resources.²⁶⁷ For instance, Decision on Measures in Favour of Least-Developed Countries, Paragraph 1 reads:

*Least-developed country members, whilst reaffirming their commitment to the fundamental principles of the WTO and relevant provisions of GATT 1994, and while complying with the general rules set out in the aforesaid instruments, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, and their administrative and institutional capabilities. Should a least developed country Member find that it is not in a position to comply with a specific obligation or commitment on these grounds, it shall bring the matter to the attention of the General Council for examination and appropriate action.²⁶⁸ (**Emphasis added**)*

According to the above decision, LDCs will be allowed to deviate from the WTO obligations to the extent consistent with their development needs, but it will not be an automatic right. Whether a particular LDC Member can deviate from specific obligations will depend on a collective decision made by the General Council, which as a matter of fact requires all Members' consensus.²⁶⁹ The legal implication of this provision is to grant a veto to any Member that was adversely affected by a LDC Member's derogation from its specific obligations.²⁷⁰

The Accession Guidelines of LDCs also calls upon WTO Members to simplify and streamline the negotiating process by exercising restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs. However, the commitments made by acceded LDCs in the areas of special interest to them in maintaining policy space for their development objective like tariff commitments in goods and services, TRIPS, TRIMS and Subsidies shows a more stringent than those applicable to existing LDC members of the WTO.²⁷¹ In some cases

267 The Least Developed Countries Report 2016, supra n 187, p. 105

268 See Hong Kong Declaration (WT/MIN(05)/DEC), supra n. 123, Annex F

269 See Chang, W 'WTO for Trade and Development Post-Doha,' *Journal of International Economic Law* 10(3), 553-570, Vol. 10, No. 3, Oxford University Press, 26 July 2007, p. 563

270 Ibid

271 See Cortez, L, Kinniburgh, I and Mollerus, R (2014), supra n. 176, p. 10; See also UNCTAD/LDC/2004, supra n 168

they are asked to make concessions that are not only way beyond their capacities and state of development but also beyond WTO requirements.²⁷²

In the commitment of tariffs in goods, for instance, countries acceded after the 2012 Guidelines Lao P.D.R., Yemen, Liberia, and Afghanistan have ended up binding their tariff rates at very low levels compared to other LDCs and in some cases even developed countries at 18.8, 21.1, 26.7, and 13.5 average bound rates respectively.²⁷³ Moreover, countries like Nepal and Cambodia agreed to bind the vast majority of their tariff lines (99.4 per cent and 100 per cent respectively), while most developed countries have reserved the right to apply high tariffs on some products, such as the EU (264 per cent), U.S.A (350 per cent) and Japan (958 per cent).²⁷⁴

Regarding commitment of services, despite the GATS Agreement state that there should be “flexibility for developing countries to open fewer sectors, liberalize fewer types of transaction, progressively extending market access in line with economic development”²⁷⁵, acceding countries have been asked to make extensive commitments in various services sectors, much beyond what incumbent members have done. For instance, Viet Nam, Nepal and Cambodia made extensive commitments to liberalize the trade in services, opening up all of the 11 service sectors under the WTO classification, some fully and others partially and with transition periods (including 70 sub sectors in Nepal and 74 sub-sectors in Cambodia).²⁷⁶ On trade in services, commitments were made by Vanuatu in 10 of the 11 broad sectors under GATS and 39 sub-sectors at the two-digit level. This compares with an average of 6 broad sectors and 17 sub-sectors undertaken by existing WTO members, developed and developing countries included.²⁷⁷

Moreover, despite the LDCs have the right to impose export subsidies under a given transitional period, countries like Nepal, Vanuatu, and Cambodia were unable to obtain the right to introduce export subsidies for either agricultural or industrial products²⁷⁸ and they were also required to

272 See Adhikari, R, Dahal, N and Pradhananga, M (2008), supra n 209, p. 25

273 See Baumüller, H, Adhikari, R and Dahal, N (2008), supra n 217, p. 2

274 Ibid

275 See WT/COMTD/W/135 (2004), Supra n 107

276 See Baumüller, H, Adhikari, R and Dahal, N (2008), supra n 217, p. 2, see Oxfam International, *Joining the World Trade Organization: A non-government perspective on the accession process* (2007), p. 25

277 Ibid, P. 23

278 Ibid, P. 19

eliminate Other Duties and Charges at the time of accession.²⁷⁹ Similarly, Viet Nam was required to eliminate Other Duties and Charges at the time of accession.²⁸⁰

Furthermore, even though LDCs have given flexibilities in the implementation of TRIPS Agreements, most of the acceded countries agreed to a number of obligations that went beyond existing provisions in the TRIPS Agreement. For instance, , Despite the Agreement leaves it up to Members to decide how they would like to protect plant varieties, Vanuatu and Cambodia agreed to join the International Convention for the Protection of New Varieties of Plants (UPOV) as part of their action plan for implementing the TRIPS Agreement.²⁸¹ In the case of Nepal, this requirement was dropped at the last minute following intensive lobbying efforts by Nepalese civil society groups.²⁸² Furthermore, even though LDCs are normally not obliged to implement even TRIPS protections for pharmaceuticals until 2016, Cambodia's commitment on data protection is effective from the time of accession to the WTO and as such is WTO-plus.²⁸³ The main reason for imposing demands beyond what is required by WTO disciplines would appear to be that negotiating members are seeking to secure or protect their future own trade interests.²⁸⁴ Moreover, the existing members often appear reluctant to make any concessions that might establish a precedent for any other applicants, including non-LDCs, with a view to protecting their future position, even though the trade profile and development circumstances of such countries will probably differ very substantially from those of the LDC.²⁸⁵

3.7. SDT Considerations in the Dispute Settlement Proceedings

In the majority of cases, SDT provisions in WTO Agreements and Decisions have not been of much help to the developing countries that invoked it in the dispute (which may have similar implications for LDCs). Likewise, LDCs are almost completely absent from the dispute settlement process in the WTO.²⁸⁶ This is mainly because SDT provisions themselves are

279 Ibid

280 Ibid, P. 25

281 Baumüller, H, Adhikari, R and Dahal, N (2008), supra n 217, p. 2; See also Oxfam, Supra n 276, P. 24

282 Ibid

283 Oxfam (2007), supra n 276, Ibid, p. 17

284 Ibid

285 Ibid

286 See Gregorsson, L 'A Legal Analysis of the New WTO Agreement on Trade Facilitation- With a Focus on Developing Countries,' Un published Master's Thesis, Stockholm (2014), p. 28

ambiguous and do not clarify how, why, when, and against whom they should be used.²⁸⁷ The member countries are therefore simply indifferent if developed member countries fail to comply with the provision of the SDT provided for LDCs in different WTO Agreements and Decisions. For instance, in his Statement, H. E. Ambassador D. Baichoo of the Republic of Mauritius concluded the enforceability of the current SDT provisions as follows:

‘Under the present WTO system, with its present overtones for strict legal interpretation, developing and least developed countries, which consider that such and other provisions for S&D treatment have not been implemented, are left with no remedies against countries which fail to comply. They can of course raise these issues for discussion in the Agreement Committees. However, since the obligation is in most cases only to make “best endeavours” (or uses the term “should” rather than “shall”) the response on the part of the delegation of the country in breach is to assure the complaining country that the matter will be brought to the attention of his government. The matter is then forgotten and becomes a part of the reports of the committees.’²⁸⁸

Omphemetse S. Sibanda, Sr. is also argued that “SDT benefits in several WTO agreements have been cancelled out by the strict interpretation of the agreement by the Dispute Settlement Body (DSB), and that in a large number of cases, these interpretations have increased the obligations which are mostly those of LDCs and enhanced the rights which are mostly exercised by the developed countries.”²⁸⁹ To date, no African state has participated in the Dispute Settlement Mechanism (DSM) as a complainant. Hence, the ‘virtual lack of appearance of sub-Saharan African Members in WTO dispute settlement proceedings, other than as third-party interveners²⁹⁰, has deprived LDCs of the opportunity to truly test the implementation of SDT in the DSB.²⁹¹ This insignificant participation is not because they have never had occasion to want to enforce their rights, or the obligations of other Members, but due to the structural and other

287 Kishore (2014), supra n 68, p. 391

288 Statement by H. E. Ambassador D. Baichoo (2000), supra n 262

289 Sibanda(2015), supra n 166, p. 36

290 For instance, Benin and Chad decided to join Brazil-US Upland Cotton Case (WTO Document, WT/DS267/1 “Cotton Dispute”) – not as co-complainants – but as third parties fearing that its expected costs will be greater than its expected benefits. See Amanda Pamela Dakoure, Cotton-4 and the Cotton Subsidies Issue: A Litmus Test for the WTO’s Benefits to Least-Developed Countries, *The Journal of World Investment & Trade* 14 (2013) 852–88, Martinus Nijhoff Publishers (2013), p. 867

291 Sibanda(2015), supra n. 166, p. 36

difficulties that are posed by the system itself.²⁹² Amanda Pamela Dakoure identified five reasons why the DSM is not considered to be a system that is benefiting LDCs in enforcing their SDT schemes. These reasons are:²⁹³ i) cost of dispute settlement; ii) lack of WTO legal expertise; iii) lack of domestic mechanisms to identify and communicate trade barriers faced by WTO lawyers; iv) inability to enforce rulings through retaliation; and v) fear of political and economical reprisal.²⁹⁴ With those disadvantages, it is hard to envisage that LDCs could expect fruitful results through DSM.

In general, an analysis made by Mervyn Martin has indicated that there are a total of 167 provisions and related instruments on SDT provisions throughout the WTO Agreements and Decisions.²⁹⁵ According to this analysis, 78 of the 167 provisions (47% of total SDT provisions) have either expired, partially expired or become outdated or obsolete.²⁹⁶ Of the 78 provisions, 39 (23% of total SDT provisions) have expired and can no longer be referred to as capable of providing SDT for developing and LDCs.²⁹⁷ A further 35 provisions (21% of total SDT provisions) have partially expired and 4 provisions representing 2 % of total SDT provisions are either outdated or lapsed as their utility have become obsolete.²⁹⁸

Of the remaining 89 provisions representing 53% of total SDT provisions, 71 provisions representing 42% of total SDT provisions are for various reasons arising out of generalities, ambiguities, blatant non-application, counter productivity or contingency upon negotiated outcomes are incapable of creating enforceable rights or bringing about binding obligations.²⁹⁹ As such, they are not fit for purpose as they are unable to provide for effective SDT.³⁰⁰

292 See Ewelukwa, U 'African States, Aggressive Multilateralism and the WTO Dispute Settlement System- Politics, Process, Outcomes and Prospects,' (2005), p. 21

293 Dakoure, P (2013), supra n 290, p. 867

294 For instance, it is not in LDCs best interest to bring claims against powerful members of the WTO that provide them with preferential tariff benefits, development assistance or foreign aid; That probably explains why Senegal, Togo, and Ivory Coast, also cotton producers, did not join Cotton Dispute. See Ibid, p. 868

295 See Martin, M '*WTO Dispute Settlement Understanding and Development*,' Nijhoff International Trade Law Series, Martinus Nijhoff Publishers, 2013, Appendix 1, pp. 247 - 322

296 Ibid, P. 70

297 Ibid

298 Ibid

299 Ibid

300 Ibid, p. 71

The remaining 18 provisions (11% of total SDT provisions) have the capacity, though mitigated in many circumstances to provide for a degree of SDT. These provisions are mitigated in their overall effectiveness due to limited applications as they apply to developing countries, especially the LDCs, are temporary in their application, relate to compliance and not market access, have conditions attached to the SDT, weakly worded provisions, relate to technical assistance only or having unclear definitions or criteria. Therefore, by way of utility, only 11% of SDT treatment provisions and related instruments are capable of providing an avenue to counter the imbalance between developed and developing and LDC members in the WTO. Hence, it can be said that SDT in all WTO Agreements do not address the purpose of development. It would therefore be impossible to utilize the WTO DSU to pursue SDT treatment as no such rights exist due to the deficiencies within the SDT provisions. The end result is that *de jure* SDT provisions are *de facto* meaningless for development.³⁰¹

Even though one of the aims of the Doha Round is to make those provisions more “*precise, effective, and operational*”, for them to truly contribute to the development of LDCs, 17 years on since the launch of the Round and members have yet to agree and finalize the amendments to the relevant SDT provisions contained in the WTO Agreements.

The Doha negotiation is still going on without yielding a concrete result for the development needs of LDCs and integrating them in to multilateral trading system.

Yet what began as an ambitious agenda that seemed to favor, or at least acknowledge and account for LDC needs in the Doha mandate, has so far failed to fulfill most of its mandate.³⁰² Representatives of developing and LDC members generally concluded that their objectives remained largely unfulfilled; especially African nations were most disappointed of all.³⁰³ The reasons are manifold and complex, with some commentators believing that the concessions to LDC demands were ephemeral, illusive and doubtful from the beginning.³⁰⁴

301 See UNCTAD (2010), *supra* note 196, p. 65

302 See Haque, I ‘Doha Development Agenda: Recapturing the Momentum of Multilateralism and Developing Countries,’ 17 *AM. U. INT’L L. REV.* (2002), pp. 1122-23

303 *Ibid*

304 See, e.g., Subedi, P ‘The Road From Doha: The Issues for the Development Round of the WTO and the Future of International Trade,’ 52 *INT’L & COMP. L.Q.* (2003), p. 442; Panagariya, A ‘Developing Countries at Doha: A Political Economy Analysis,’ 25 *WORLD ECON.* (2002), p. 1205; Gerhart, M ‘Reflections on the WTO

CHAPTER FOUR
THE POTENTIAL IMPLICATION OF SPECIAL AND DIFFERENTIAL TREATMENT
FOR ETHIOPIAN WALK TO WTO ACCESSION

4.1. Introduction

Ethiopia applied for accession to WTO in January 2003 after staying as an observer status since 1997 and the WTO General Council established a Working Party in February 2003.³⁰⁵ The first Working Party meeting on the accession of Ethiopia was held in May 2008, as the country was not able to submit its Memorandum of Foreign Trade Regime before that year.³⁰⁶ Ethiopia has tabled its market access offers on goods in February 2012, but is yet to submit its offers on services (the hardest part of the negotiation, and which is also very continuous).³⁰⁷ The country was planning to submit its initial offers on services by September 2013, but the submission date was postponed further into the future.³⁰⁸ Even though, the justification given by the government for the postponement of the submission date relates to delays in finalizing and presenting the documents for review at different government levels and the private sector's late intervention³⁰⁹, the real reason behind the failure to submit the initial offers on services has to do with the country's reluctance to liberalize the financial and telecom sectors in particular than administrative issues.³¹⁰

SDT schemes are granted for LDCs like Ethiopia in the assumption that these disadvantaged countries could only reap the benefits from WTO accession through the scheme. Before the adoption of the LDC Accession Guidelines, countries were not entitled to any special and differential treatments under the terms of Article XII of the Marrakesh Agreement. However, the 2002 LDC Accession Guidelines (which later strengthened by the 2012 Guidelines) provide that “special and differential treatment, as set out in the Multilateral Trade Agreements, Ministerial

Doha Ministerial: Slow Transformations: The WTO as a Distributive Organization, 17 *AM. U. INT'L L. REV.* (2002), p. 1045.

305 See the WTO website: www.wto.org/english/thewto-e/acc-e/al-ethiopia-e.htm, Visited on 26/05/2018

306 Asmelash (2015), supra n 28, p. 325

307 See the WTO Website, supra n 305

308 Asmelash (2015), supra n 28, p. 327

309 The private sector presented a position paper to the government outlining its views on the liberalization of the services sector in July 2013. See Ibid.

310 Ibid

Decisions, and other relevant WTO legal instruments, shall be applicable to all acceding LDCs, from the date of entry into force of their respective Protocols of Accession.”³¹¹ Hence, as per the Guidelines, both acceding and acceded LDCs are eligible for special and differential treatments starting from date of their membership.

Ethiopia would have also started accession to WTO with the belief that WTO membership will yield a special status, and eases the accession process, as well as, fulfills the development objectives of the country by integrating in to the MTS by taking a free rider under SDT for a certain period. However, the negotiations in the WTO accession are dominated by large countries that usually do not hesitate to drive hard bargains, even when the acceding country is small or poor like Ethiopia.³¹² Moreover, The Quad and a few other developed countries will sometimes treat these accession negotiations in a regime context, meaning that the commitments sought from each acceding country are viewed not just as opportunities to address specific problems with the country in question but in the broader framework of the rules that they want to see applied uniformly to all WTO members.³¹³ As discussed under previous chapter, the experience of acceded LDCs is also not different from these facts.

In this chapter, the researcher examines the effectiveness of the current category of SDT provisions available to Ethiopia in different WTO Agreements and Decisions in accomplishing the objective of the country joining the WTO.

4.2. Examining the Implications of Special and Differential Treatment for Ethiopia’s Move to WTO Accession

4.2.1. Special and Differential Treatment Aimed at Securing Market Access

So far it has been discussed that LDCs are entitled special preferences to the market access of developed countries through SDT schemes like Part IV of the GATT and GSP. The rationale behind these market preferences was to encourage export-led growth and economic development of LDCs by providing these with more advantageous trading conditions, enabling them to

311 *Accession Guidelines*, WT/L/508 (2002), supra n 142

312 See Grassek, V ‘*The History and Future of the World Trade Organization*’ *World Trade Organization* and Cambridge University Press, 2013 - Volume 13 Issue 4, p. 129

313 Ibid

compete in international markets and to obtain greater export earnings.³¹⁴ However, as it was analyzed in chapter three, the preferential market access provided under those SDT scheme does not helped the LDCs in diversifying their exports and integrating them in to the MTS.

Currently, Ethiopia is also on the journey to acceding to WTO hoping that trade facilitation as an important part of development strategy and the relief of poverty through economic development as a priority.³¹⁵ However, the market access or trade opportunity provisions and decisions under existing preferential schemes have a limited meaningful in offering Ethiopia much possibility to change the composition of its exports, and integrating the country in to the MTS as envisaged above. In similar fashion with other LDC, Ethiopia would inevitably finds it difficult to realize the full potential of the various preferential market access schemes for LDCs for the following reasons:

4.2.1.1. Lack of Predictability and Security in the Preferences

Though LDCs are granted security of market access under the WTO's SDT, the preferences are mostly remains under-utilized by these countries owing to the nature of lack of predictability and security in the preferences. One of the main causes for the unpredictability and insecurity of the preferences as it has been seen in the preceding chapter is their non-binding nature. The WTO provisions Part IV of the GATT (Articles XXXVI–XXXVIII) entitled “Trade and Development” that can accelerate the economic growth and development of Ethiopia as envisaged above by integrating its economy into the multilateral trading system is a good example of this kind. The utility of this provision for Ethiopia is questionable given its non-binding nature. For instance, in

314 Páez, L et al (2010) supra n 218, p. 15

315 This fact also confirmed at the General Council meeting, in which the representative of Ethiopia outlined "some of the reasons which had led the Government to decide to start the WTO accession process and to be part of the multilateral trading system" as follows:

[the Government] was fully convinced that the best way to accelerate economic growth and development was to integrate its economy into the multilateral trading system. To be a Member of the WTO was to be part of the rules-based multilateral trading system, and this would create confidence for investors and serve as an instrument to attract foreign direct investment for diversifying the production base and expanding the supply capacity of the country. It would also help to secure predictable and transparent market access. The effective participation of the least developed countries in the decision-making process of the multilateral trading system would encourage them that the speed, nature and direction of globalization would be compatible with their developmental needs. See WTO doc. WT/GC/M/78, 7 March 2003, cited in Desta, G 'Ethiopia's Reluctant Move to Join the WTO: A Preliminary Look at Legal and Institutional Implications of Accession,' 22 J. Ethiopian L. 21 (2008), p. 36

the Article XXXVII which states that “*The developed countries shall, to the fullest extent possible, ... accord a high priority to the reduction or removal of barriers to products of interest to less-developed contracting parties ...*”³¹⁶, the phrases “*Shall*” and “*the fullest extent possible*” seems contradictory, and their usage at the same time proves the non-binding nature of the provision. This shows that a case cannot be brought before the WTO Dispute Settlement Body (DSB) in case of non-compliance with these provisions.³¹⁷ Therefore, it do not offer any legal security to Ethiopia and will not likely have any serious effect on the conduct of developed countries in their trade relations vis a vis Ethiopia upon her accession to WTO since the country cannot insist on its implementation.

The other set of provision will tend to grant preferential market access for Ethiopia upon her accession to WTO is the Enabling Clause, which provided a permanent legal status for GSP. The legal status of the GSP is also not clear, since the language of the Enabling Clause is formulated in a best-endeavour clauses and finally not legally-enforceable obligations.³¹⁸ When it comes to Ethiopia, the GSP scheme will seems also to be implemented on a voluntary basis by preference grantors, since they have the freedom to unilaterally modify, eliminate or extend preferences given to the country. Similarly, though universal DFQF market access is provided on a lasting basis by the WTO Ministerial Decisions at the Bali and Nairobi Conferences, for all products originating from all LDCs ... [or] at least 97 per cent of products originating from LDCs, the non-binding nature of DFQF³¹⁹ have a great impact in weakening Ethiopia’s bargaining position in its efforts to obtain such facilities from the developed countries.³²⁰ In other ways, the flexibility allowing members ‘*facing difficulties*’ to provide duty-free treatment to only 97 per cent of LDC exports at the product-line level and the wording ‘*declaring ... to do so*’ with regard to developing countries weakened the decision considerably and is a serious disappointments for Ethiopia. Hence, the provisions and decisions which could grants the preferential market access

316 See GATT, art. XXXVII: 1(a).

317 For instance in case of trade barriers like tariff peaks and tariff escalations created by developed countries to hamper exports from Ethiopia

318 Song (2016), supra n 184, p. 105; see also Lee(2011), supra n. 184, p. 388

319 The actual language is as follows: “Developed Members, and developing country Members in a position to do so, should provide duty-free and quota-free market access for products originating from least-developed countries.” See The WTO July Framework, WT/L/579, 2 August 2004, par. 45 of Annex A

320 See Ratnakar Adhikari (2005), supra n 216, p. 29

for Ethiopia do not seem to provide any effective sanction against a violation of these commitments therein.

Currently, exporters from Ethiopia have access to developed countries markets through preferential markets like AGOA and EBA. However, since it is unilateral preferences, it can be withdrawn at any time if Ethiopia fails to comply with these conditions as it was recently seen in many African states.³²¹ Therefore, the discourse of inclusion and exclusion to be an AGOA member will create a beneficiary-dilemma on Ethiopia than granting a preferential market access for the country. Moreover, since the eligibility and graduation criteria, as well as product coverage and the type of preferences are left to donor countries to determine unilaterally, it will be disadvantageous for Ethiopia too. One of the key features of the US GSP program is that a specific country *may* lose eligibility for a specific product if its exports exceed a certain "competitive need limit," currently \$110 million per tariff line.³²² If the country in question has a market share larger than 50% of total U.S. imports in that category, it may also lose the GSP eligibility.³²³ GSP eligibility can be removed at the country, product, or country product level. The problem is since the criteria for evaluating the competitiveness of products are defined by the preferences grantors and are subjective, their competitive products are excluded from preferential treatment by the preference grantors through graduation.³²⁴ Likewise, once Ethiopia has specialized and successfully expanded the production of certain goods, market preferences could be withdrawn at the discretion of the preference-provider by graduating the country or excluding specific products. Therefore, the current preferential market access commitments in the MTS may not ensure enhanced market access on secured and sustainable basis for Ethiopia owing to the above stated problems.

321 For instance, in the case of AGOA the Central African Republic and Eritrea were removed from the list of eligible on January 1, 2004; Côte d'Ivoire was removed on January 1, 2005; Mauritania removed from the list of eligibility on January 1, 2006 and was again designated as AGOA eligible on December 23, 2009; Guinea, Madagascar and Niger were removed from the list on December 23, 2009; the DRC lost their eligibility on January 1, 2011; and the US-president restored eligibility to Cote d'Ivoire, Guinea and Niger on in October 2011. See Aschale, A 'AGOA's "Success" Story in Africa, Ethiopia: A Critical Discourse Analysis,' Addis Ababa, Ethiopia; 2014, p. 4; See also Páez, L et al (2010) supra n 218, p. 5

322 Hoekman, B; Martin, J and Braga, P (2006), supra n 173, p. 5

323 Ibid

324 Páez, L et al (2010), supra n 218, p. 5

4.2.1.2. Tariff Barriers

Even though developed countries have provided preferential market access for the products originating from LDCs, most of the export products from these marginalized groups of countries are still highly affected by tariff barriers in the preference giving countries. For instance, efforts by African countries to increase their exports of cotton to the United States have been aggravated by the systematic high tariff in cotton which efficiently frustrates any attempts to expand their cotton industry.³²⁵ This kind of systematic increments of tariff could also inevitable for Ethiopia once the country joins the WTO.

Tariff reductions on an MFN basis through multilateral negotiations or through the proliferation of free trade agreements is also another problem which lead to an erosion of the non reciprocal preferences enjoyed by LDCs.³²⁶ The consequence of this kind of tariff reduction is that it will make Ethiopia to have virtually the same market access conditions for its key export products as its biggest, more developed and efficient competitors and finally eliminate the country from international market. From the beginning, the preference margins enjoyed by LDCs in the big markets like EU and United States are very small when compared with the effective tariff paid by competing sellers.³²⁷ Due to this Ethiopia will not able to maintain its competitive ability in these markets with those emerging East Asian and Latin American countries.

4.2.1.3. Non-Tariff Barriers

As discussed under chapter three, the main cause for the underutilization of market preferences given for LDCs, is non-tariff barriers. To that effect, the implication rules of origin and regulatory barriers as parts of non- tariff barriers, on the preferential market access of Ethiopia as a LDC upon its accession to WTO will be presented as follows.

325 Brennan (2011), supra n 179, p. 156

326 Imboden (2017), supra n 194

327 Carrere and de Melo (2009), supra n 196, p. 63

4.2.1.3.1. Rule of Origin

It is truism that developed countries tend to provide preferential market access, albeit their imposition rigid rules of origin requirements and profiteering interest. The major adverse effect of this requirement is the administrative cost of certifying origin, and providing other subsidiary document buttressing origin, which is very cumbersome, inefficient, and resource demanding. Despite a set of guidelines for preferential rules of origin for LDCs that was agreed at the Bali Conference in 2013³²⁸, and further elaborated at the Nairobi Conference in 2015³²⁹, the guidelines are based only on best-endeavours clauses, and thus not legally binding. Likewise, even though, the potential of key Ethiopia's exports like agricultural products and textiles could be significantly enhanced through DFQF market access provided for LDCs, their effectiveness will remain a matter of speculation for the country owing to the non-binding nature of rules of origin. In other ways, the current rules of origin for market access under the DFQF are not flexible and Ethiopia-friendly. Hence, the country could not enjoy duty free access because of non-compliance with the rules of origin requirements.

4.2.1.3.2. Regulatory Barriers

The rapid increase of market entry conditions or NTB such as TBT/ SPS measures, custom rules and procedures, competition-related restrictions, import licensing and subsidies are continuing to curtail exports from LDCs and are eroding existing preference schemes.³³⁰ Likewise, the mere granting of tariff preferences or duty-free market access to exports originating in Ethiopia upon accession to WTO does not automatically ensure that the trade preferences are effectively utilized by a country. This can be witnessed from what happened in the case of Bangladesh, Nepal³³¹, and Viet Nam,³³² whereby the challenge involved in complying with such market entry

328 Ministerial Decision, WT/MIN(13)/42, WT/L/917 (2013), supra n 186

329 Ministerial Decision, WT/MIN(15)/47–WT/L/917 (2015), supra n 143

330 UNCTAD (2005), supra n 178, p. 28; See also UNCTAD, The Least Developed Countries Report 2016, supra n 187, p. 101

331 For instance, in the case of clothing, Bangladesh exporters are required to meet specified levels of domestic value added at different “stages of production” in order to qualify for duty-free treatment that finally resulted in the reduction of exports in this sector. See Adhikari, Dahal, and Pradhananga, (2008), supra n 207, p. 5; Nepalese exporters also prevented from exporting honey to Norway, for the reason that the country does not have a control system on the use of drugs in bees and its official veterinary services lack inspection and certification systems for honey. See Adhikari, R (2011), supra n 221, p. 38

conditions is ever greater for Ethiopia, whose physical infrastructure, skilled human resource, and financial and institutional resources are not well sophisticated. Moreover, since the regulatory standards was created a significant challenges for Nepalese and Cambodian exporters, particularly in industrialized country markets,³³³ the fast changing SPS standards in the developed member countries could poses serious problems for the export items from Ethiopia. For instance, since 2016, hot pepper powder worth ten million USD has been returned to Ethiopia from European markets because of unsafe levels of Aflatoxins and Ochratoxins.³³⁴ On December 21, 2016 the EU issued a statement imposing special conditions governing the import of spices from Ethiopia which states that “In order to protect human and animal health in the Union, it is necessary to provide for additional guarantees in relation to spices from Ethiopia.”³³⁵ Pepper exporters have been dramatically affected and they have lost a lot of money because of this issue.³³⁶ Similarly, the Government of Pakistan has blocked all shipments of red kidney beans imported from Ethiopia, due to a cause of concern over a “serious, destructive and virulent quarantine disease”, widely known as ‘Fusarium chlamydosporum’.³³⁷ The Ethiopian beans are believed to carry high levels of phytohemagglutinin, potentially making them vulnerable to

332 For instance, seafood and agricultural products are in the top declined exports, especially by Japan, the US and Europe due to SPS and TBT regulations. According to SPS office of Viet Nam, the major constraints that the country is facing today regarding SPS compliance are (i) a lack of financial resources to support testing facilities (indeed, no new testing laboratory has been implemented since WTO accession) and (ii) a lack of capacity for the Government of Vietnam to challenge new standards and reach out for WTO dispute settlement (expensive and time consuming). See UNIDO, Viet Nam in Post-WTO: Current Situation and Future Challenges for the Agro-industry Sector, August 2014, p. 20

333 For instance, despite the fact that certain types of azo-dyes are still sold in Germany as well as in the EU and exported world-wide to the leather industry, a woolen carpets using azo-dyes in the Nepal was banned in the EU (German) market which forced Nepalese carpet exporters to switch to another dye which apparently did not pose a threat to the health of European consumers. Since the non-azo dyes for the carpet industry were not available in Nepal, the ban on azo-dyes resulted in higher costs of production. Similarly, Nepal’s honey was banned from the Norwegian market after the Department of Food Technology and Quality Control failed to submit the Pesticide Residue Control Plan that EU regulations require. Since Nepal does not have a control system on the use of drugs in bees, as well as inspection and certification systems for honey by official veterinary services, Nepalese exporters could not export honey to Norway. Moreover, Nepalese agricultural exports have often been subjected to NTBs in India. For example, exports of Nepalese agricultural products from the eastern hilly district of Ilam to India ceased in July 2007 after the latter made quarantine checks compulsory for the export of these products. See Adhikari, Dahal and Pradhananga (2008), supra n 209, p. 15; See also Adhikari (2005), supra n 216, p. 27

334 See Capital Ethiopia, at: <http://capitalethiopia.com/2017/05/08/eu-rejects-ethiopian-red-pepper-unsafe-levels-toxins/>, Visited on 29/05/2018

335 Ibid

336 Ibid

337 See The Reporter Ethiopia at: <https://www.thereporterethiopia.com/content/pakistan-bans-import-red-kidney-beans-ethiopia/>, Visited on 29/05/2018

turning toxic.³³⁸ Furthermore, the Japanese Government banned temporarily the export of coffee from Ethiopia in 2008, after the Japanese regulatory bodies found out that globally prohibited agricultural pesticides residues found in the coffee.³³⁹

Therefore, despite the offer of predictable market access by WTO membership, the Ethiopia's exports might be confronted with aforementioned NTB, especially SPS and TBT measures. Since Ethiopia obliged to comply with international product standards, the country will be forced to set up a system which would require resources that are often beyond the means of the country. Hence, the researcher argues that unless meaningful support towards capacity-building in SPS and TBT and technology transfer is provided for Ethiopia, the current international support measures could not enable the country to improve its compliance capacities with regard to various obligations and demands in these areas for the effective utilization of preferential market access granted to LDCs under WTO SDT schemes.

4.2.1.4. The Limited Product Coverage of the Preferences

A number of studies show that the 97 per cent of DFQF market access could not meet the longstanding demand of the LDCs for secured preferential market access.³⁴⁰ Their concern was that the list of the 'excluded' 3 per cent could include most of the tariff lines in apparels and a carefully crafted list of even only one per cent of tariff lines could exclude almost all product exports to the developed countries from preferential duty free treatment.³⁴¹ Furthermore, the US (and other) preference programs, including the AGOA exclude sensitive agricultural products that are restricted under tariff rate quotas, including meat, dairy, peanuts, sugar, tobacco, and cotton, as well as sugar and dairy containing items such as chocolate.³⁴² The researcher argues that those excluded products will highly affects Ethiopia's access to preferential market, since the country is currently striving primarily in the production and exports of many of these products to other markets, including the US and EU.

338 Ibid

339 See Addis Standard at: <http://addisstandard.com/news-japan-provides-project-analyze-pesticide-residue-coffee-ethiopia/>, Visited on: 29/05/2018

340 See Elliott, A *'Trade Preferences for the Least Developed Countries: Opportunities Not Panaceas.'* E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, (2015), p. 3; Rahman(2014) supra n 173, p. 23

341 Ibid

342 Elliott Ibid, p. 4

4.2.1.5. Trade-Related Supply-side Constraints and Limited Competitive Ability

Although LDCs are granted a special treatment under WTO system to access the market of member countries for their export products, supply side constraints are the main reasons for their poor productive capacities and competitiveness in the MTS. The main concern of these supply-side constraints is they do not allow realization of the SDT and preferential market access that is, in principle, available to LDCs.³⁴³ Especially, lack of capacity in the LDCs in areas of export diversification has been a longstanding problem.³⁴⁴

Coming to Ethiopia, it is the most affected country by supply side constraints that could undermine its effective utilization of preferential market access provided under SDT scheme. For instance, Ethiopia ranks 126 out of 160 countries on the World Bank *2016 Logistics Performance Index*, indicating the need for further improvements in trade logistics.³⁴⁵ Hence, Ethiopia's cross-border trade and logistics indicators are among the lowest in sub-Saharan Africa ranking 167 out of 190 countries on trading across borders and it takes 148 and 246 hours to export and import goods, respectively.³⁴⁶ Moreover, Ethiopia's Human Development Index value for 2015 is 0.448 which put the country in the low human development category positioning it at 174 out of 188 countries and territories as noted in the 2016 UNDP *Human Development Report*.³⁴⁷

In relation to market competition, like most LDCs, Ethiopia relies heavily on a few primary export commodities like coffee (the principal export products), oilseeds, khat, leather and leather products, pulses, cut flower, fruits and vegetables and live animals, exposing its economy to volatility of international markets and declining terms of trade.³⁴⁸ In spite of the continued effort to diversify export basis, Ethiopia has not yet tapped into its competitive advantage in textile and

343 Rahman(2014) supra n 173, p. 27

344 Ibid

345 See World Bank, *Connecting to Compete 2016: Trade Logistics in the Global Economy*, The Logistics Performance Index and Its Indicators, Washington DC

346 See World Bank, *Doing Business 2017*, Comparing Business Regulation for Domestic Firms in 190 Economies, 14th Edition, Washington DC, p. 206

347 See UNDP, *Human Development Report 2016: Human Development for Everyone*, New York, p. 200

348 See Shiferaw, A 'Productive Capacity and Economic Growth in Ethiopia,' UN, CDP Background Paper No. 34, ST/ESA/2017/CDP/34, April 2017, p. 10

garments, which at the moment are contributing very little to total exports.³⁴⁹ Given such characteristics, the gains from WTO membership seem to be small if they are assessed only in terms of improved market access for the traditional exports, for the reason that raw materials mostly enjoy low or zero tariffs in developed countries and the poor nations are typically not price setters in the world markets of individual raw materials.³⁵⁰ Above all, producing exportable goods in which the country has comparative advantage: textile, leather, and other agricultural products, with the required quality and quantity, as well as, meeting SPS and other standards are the major challenge for Ethiopia. Therefore, the benefits deriving from WTO membership in terms of improved market accesses for traditional exports are likely to be limited, given the reliance on a small number of exports goods, large economic vulnerability, and lack of market-oriented capacities.³⁵¹ Moreover, even though the largest markets in the world like AGOA, EBA, India, and China are pretty much open to Ethiopian exports even without the nation's entry into the WTO, the country hasn't been able to use these market opportunities. Hence, Ethiopia's challenges are no market access but shortages from the supply side - being unable to produce the required quality and quantity of goods and services to be marketed.

Therefore, the mere granting of preferential market access could not help Ethiopia to integrate in to multilateral trading system, unless the SDT provided for the country upon her accession to the WTO is emphasized primarily on addressing the supply side constraints the country experienced with. Unfortunately, this kind of support is very limited and insufficient owing to the non-binding and ambiguous nature of SDT provisions. In most cases, the technical assistance is focused practically on the implementation of WTO Agreements than supporting the export productive capacity and building up the necessary supply-side capabilities of acceding LDCs. For example, in Bangladesh, the use of preferential market access offered under the Declaration on TRIPS and Public Health was largely remained underutilized, owing to supply-side constraints, particularly lack of capacity to undertake reverse engineering.³⁵² Furthermore, even though Bangladesh received DFQF market access for thousands of tariff lines, her exports other than apparels remain limited owing to supply-side constraints.³⁵³ Similarly, unless greater

349 Ibid

350 Ibid

351 Ibid

352 Rahman(2014) supra n 173, p. 26

353 Ibid, p. 27

international support in building supply-side capacities towards export diversification is given for Ethiopia in her accession to WTO, realizing the potential benefits of preferential market access in the MTS will remain futile.

4.2.2. Special and Differential Treatment in Safeguarding the Interest of Least Developed Countries

One of the primary provisions assisting development/trade dimension in the WTO Agreement is Article XVIII of the GATT, entitled as “Government Assistance to Economic Development”. However, the utilization of this article requires the requirement of consultations and negotiations with concerned member countries, as well as, payment of compensation. Even though LDCs are allowed to take trade measures necessary for the promotion of an infant industry, including tariff increases under Article XVIII, poor countries like Ethiopia could not effectively utilize this provision since the requirement of consultations and negotiations placed in the Article can be lengthy, and not allow the country to adopt the necessary measures in time, or may never be concluded successfully with the interested parties. Similarly, payment of burdensome compensations may not allow Ethiopia to adjust its tariff bindings for the purpose of economic development in time due to limited economic resources of the country.

4.2.3. Special and Differential Treatment in Technical Assistance and Aid for Trade

Most WTO agreements contain provisions for TA to be provided to developing and least developed country members. Unfortunately, the experience of existing members is that the amount of assistance actually provided is very small, and what is provided is often donor-driven rather than recipient-driven. Despite the positive impact of these initiatives, they have made only a limited contribution to achieving the overall objectives for which they were originally designed, which is to help developing countries, in particular LDCs, to better integrate their economies into the MTS.³⁵⁴ In particular, trade related TA has been lacking to help address post-WTO membership supply-side constraints that prevent the countries from benefiting from WTO

354 The reasons are: unsystematic or incomplete needs assessment by donors, weak project management and project governance structures, fragmented donor interventions with insufficient synergies to broader development assistance programmes, a weak explicit linkage to poverty reduction, insufficient donor coordination and complementarity between the headquarters and field levels, and inadequate internal communication and donor expertise on trade-related matters. Ibid, p. 6

membership. As a result, WTO membership was not help the LDCs to achieve key policy objectives related to trade, i.e. trade diversification and expansion.³⁵⁵

Coming to the situation of Ethiopia, the need for TA and aid for trade is critical during pre-accession and post-WTO Accession. The Ethiopian Government representative has also described how the country does not even have the resources to take full advantage of the capacity-building and awareness-raising opportunities offered by the WTO as “It does not have the ability to pay for members of its trade staff to attend Working Party meetings in order to increase their understanding of the issues and the process, or to pay the local cost of WTO events, for example national workshops or seminars.”³⁵⁶

In addition to the TA provided for accession negotiations, poor countries like Ethiopia urgently need money to alleviate trade related supply-side constraints and strengthen their ability to trade effectively. Unfortunately, since the TA given under SDT is formulated in a non-binding nature and yet there are no binding commitments for donors to provide such funding under the IF, the successfulness of Ethiopia in this area could also remain in absurd. For instance, recognizing the potential financial burden of implementation at an early stage in the accession negotiations, Sok Siphana, Secretary of State for the Cambodian Ministry for Commerce, had tried to get binding commitments from WTO member countries for TA for the implementation of TRIPS, CV, TBT, and SPS included in its accession package.³⁵⁷ However, he dropped the request when the WTO Secretariat told him that this was impossible since the US was absolutely against establishing such linkages.³⁵⁸ Moreover, the experience of acceded LDCs suggests that the respective undertakings by the acceding LDC and by members should be equally binding, with implementation of the LDC’s commitments being made conditional on the receipt of timely and effective TA from partners.³⁵⁹ Likewise, Ethiopia could not able to rely on TA and aid for trade SDT provisions and decisions as of right. The reason is that, even though these Agreements recognize the LDCs’ need for TA, it does not provide a framework for action at the country

355 See Baumüller, Adhikari and Dahal (2008), supra n 217, p. 2

356 See Seifu. O ‘Experiences from Ethiopia’ in “Accession to the WTO: Country Experiences and Technical Assistance’, report of joint BMZ, BMWA, GTZ, World Bank conference, Berlin, 17-19 November 2004.

357 Oxfam (2007), supra n 276, p. 32

358 Ibid

359 Cortez, Kinniburgh, and Mollerus, (2014), supra n 176, p. 12, 14

level, nor any mechanism indicating where or how to acquire the necessary financial and technical resources.

Furthermore, though TA may be given for Ethiopia in the accession to WTO, the experience of acceded countries unveiled that those TA are insufficient to enable LDC to pour the benefits of accession and integrating to the MTS. For instance, in the case of Nepal, except the support provided in the software department and for accession to the WTO, for complying with commitments made at the WTO, including drafting of legislation and regulations, other trade related TA have not shown any discernible impact on the ground.³⁶⁰ Hence, the analysis made on the effectiveness of Aid for Trade in the areas of increasing competitiveness of Nepali exporters, creating a more empowered and engaged private sector, enhancing the rigour of analysis underpinning Nepali trade policy, and fostering human development-friendly investment climate shows a partially achieved results.³⁶¹ Furthermore, the failure to access the promised TA prevented the government of Nepal from upgrading the infrastructure required to comply with, among others, the implementation of the SPS and TBT agreements. As a result, Nepal found it difficult to achieve one of its main objectives in seeking WTO membership, namely, to diversify its trade and to narrow its trade deficit.³⁶²

Hence, as the experience of the acceded LDCs show, the researcher argues that the trade related capacity building and TA available in the WTO system for LDCs may not be sufficient for Ethiopia to reap the benefit acquired from WTO membership.

4.2.4. Special and Differential Treatment Provisions Related to Transitional Periods

It is truism that WTO agreements contain various provisions establishing grace periods or extended timeframes for LDCs to undertake specified obligations. According to the Accession Guidelines "...Transitional periods/transitional arrangements foreseen under specific WTO Agreements, to enable acceding LDCs to effectively implement commitments and obligations, shall be granted in accession negotiations taking into account individual development, financial

360 Adhikari, Ratnakar; Paras Kharel; and Chandan Sapkota; *Evaluating Aid for Trade on the Ground: Lessons from Nepal*; Aid for Trade Series; Issue Paper No. 23; International Centre for Trade and Sustainable Development, Geneva, Switzerland (2011), pp. 8-9

361 Ibid, p. 62

362 Ibid

and trade needs.”³⁶³ However, the major problems related with SDT provisions of transitional period have to do with the realism of the time extensions called for in various aspects of the agreements in reference to the actual time and cost it takes to build the institutional capacity needed for full implementation of the obligations undertaken in the agreements.³⁶⁴ In some cases the time limits for the extensions have already passed and there is little evidence that countries have made sufficient progress in institution building to permit them to implement their obligations fully.³⁶⁵

As the experience of acceded LDCs suggests, WTO members argued that transition periods could not be allowed automatically and asked them for justification for transition periods.³⁶⁶ Because of this, in each case, LDCs were required to provide information on the current status of legislative work and a detailed action plan for completing implementation within the timeframe of the transition period.³⁶⁷ For instance, transitional period negotiated by Cambodia is “five years for customs valuation, four years for SPS, three years for TBT and TRIPS, while Nepal negotiated a 2 years and 9 months transitional period for CV, SPS, TBT, and TRIPS, and 1 year and 9 months for the implementation of TBT.”³⁶⁸ In the case of the TRIMs, even though existing WTO LDC members were given a seven-year transition period to implement the TRIMS agreement, Nepal and Cambodia was denied a transition period altogether and expected to be compliant from the time of accession.³⁶⁹ Likewise, transition periods normally given to WTO LDC members for compliance with the SPS, TBT, CV and TRIMs agreements were not granted for Vanuatu.³⁷⁰ This shows transition periods as a SDT have been negotiated from the perspective that acceding LDCs are not necessarily legally entitled to the same rules as the original 1994 members. Rather, it is what is negotiated in the accession process that binds them.

Coming to Ethiopia, since granting the transitional period is not automatic, it will be difficult for the country to secure the longer period inculcated in different WTO Agreements. Besides, what

363 2002 *Accession Guidelines* WT/L/508, supra n 142

364 Michalopoulos (2000), supra n 3, p. 22

365 Ibid

366 For instance, this issue was raised in the case of Nepal accession. See Pandey, Adhikari and Waglé (2014), supra n 242, p. 14

367 Ibid

368 Ibid, p. 26

369 Ibid, p. 16 & 19

370 Oxfam (2007), supra n 276, p. 23

determines Ethiopia's entitlement to the transitional period is not the duration of time stipulated in the WTO system, rather the justification specified for the transition period and a detailed action plan for completing implementation within the timeframe of that period. The problem of non-automatic granting transitional period would have great adverse effects on Ethiopia especially on the implementation of accession commitments. For instance, even though Cambodia committed to pass no less than 47 laws and regulations, and Nepal signed up to enact 10 new laws and regulations and amend 25 existing laws and regulations by 2007, both countries fell far short of fulfilling these requirements. By the end of 2007, Cambodia had adopted just 24 of the 47 laws and regulations while Nepal had enacted three of the 10 new laws and adopted eight of the 25 amendments. Similarly, even though Cape Verde agreed to enact legislation on customs valuation prior to its accession to the WTO, it could not fully implement this commitment within the transition period agreed (2.5 years) and forced to renegotiate with members and the Secretariat in which it was granted a waiver for a year.³⁷¹

Therefore, due to the trend of arbitrary determination of transition period of some years developed through practice in the WTO accession, the researcher strongly argued that the transition period that would be given for Ethiopia could be unrealistic given the heavy financial costs and administrative burdens needed to set up new institutions, regulatory framework, physical infrastructure, and training of human resources, in particular to implement the TRIPS, TRIMS and Customs Valuation agreements.

4.2.5. Flexibility of Commitments, of Action, and Use of Policy Instruments

The Flexibility of Commitments of action and Use of Policy Instruments is another concern. These measures are very crucial in the accession process of WTO for maintaining the development policy space of LDCs. However, because of the problems related in the formulation of the provisions and as the experience of the acceded LDCs also shows as well, the chance of Ethiopia in maintaining the flexibility granted for LDCs is minimal in accession of WTO. The researcher highlights these problems in the following main areas of policy space.

371 See Bienen, D 'What Can LDCs Acceding to the WTO Learn from other Acceded Countries?' (BKP Development research and consulting discussion paper no. 01/2014. Munich), p. 33

4.2.5.1. Tariff commitments in trade in goods

Pursuant to the 2012 accession guidelines, acceding LDCs shall bind: (i) all of their agricultural tariff lines at an overall average rate of 50 per cent;³⁷² and (ii) 95 per cent of their non-agricultural tariff lines at an overall average rate of 35 per cent;³⁷³ or (iii) more than 95 per cent of their non-agricultural tariff lines with proportionately higher than 35 per cent overall average rates and transition periods of up to 10 years for up to 10 per cent of their non-agricultural tariff lines.³⁷⁴

Even though the 2012 guidelines establish principles and benchmarks for LDCs' market access commitments on goods³⁷⁵ and services³⁷⁶, in practice acceding countries are still required to make concessions that are not only way beyond their capacities and state of development but also beyond WTO requirements³⁷⁷, and they often complain that they are obliged to give up much of their "policy space" in the WTO, with their commitments leaving them with little room to innovate or adjust.³⁷⁸ For instance, despite an assurance by the WTO membership to exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs,³⁷⁹ both Cambodia and Nepal ended up binding their tariff rates at very low levels at 26 and 19 per cent respectively. Countries acceded after the 2012 Guidelines Lao P.D.R., Yemen, Liberia, and Afghanistan have 18.8, 21.1, 26.7, and 13.5 average bound rates respectively. Similarly, Cambodia's maximum duty of 60 per cent is one of the lowest among the LDCs. Even most developed countries have reserved the right to apply high tariffs on some products, such as the EU (264 per cent), U.S.A (350 per cent) and Japan (958 per cent). Moreover, in line with

372 2012 WTO Accession Guidelines, supra n 127, para.5.

373 Ibid, Para.7 (i)

374 Ibid, para.7 (ii)

375 For goods commitments, they state that "some flexibility should be provided" and negotiations "should ensure the appropriate balance between predictability of tariff concessions of acceding LDCs and their need to address specific constraints or difficulties as well as to pursue their legitimate development objectives," while also "recognizing that each accession is unique" and tariff concessions "could vary depending on [the LDCs'] individual/particular circumstances."

376 On services commitments, the guidelines recognize "the serious difficulty of acceding LDCs in undertaking commitments, in view of their special economic situation and their individual development, financial and trade needs," and provide for "flexibility for acceding LDCs for opening fewer sectors, liberalizing fewer types of transactions and progressively extending market access in line with their development situation."

377 See Adhikari, Dahal and Pradhananga (2008), supra n 209, p. 25

378 Ibid

379 2002 *Accession Guidelines* WT/L/508, supra n 142, Section I

other recently acceded Members, Nepal and Cambodia agreed to bind the vast majority of their tariff lines (99.4 per cent and 100 per cent respectively).

Coming to Ethiopia, on the basis aforementioned experiences of LDC, even if the benchmark is higher than the current tariff levels of the country (for example, both the maximum and average applied agricultural tariff rates of the country at 35% and 22.4%.), the benchmark would not be a guarantee to the country at least for keeping its current tariff levels, since Ethiopia had to bind her agricultural tariffs below 20 per cent. Moreover, the benchmarks tend to limit Ethiopia's chance of binding its tariff at any level above the benchmarks for the reason that the guideline fall short of establishing measurable/enforceable benchmarks.

Therefore, the researcher have the argument that Ethiopia's WTO negotiators would be unsuccessful in obtaining accession terms that they believed to be reflective of the Ethiopia's LDC status. It is expected that the package of concessions and commitments that Ethiopia has to accept undoubtedly goes far beyond what is commensurate with the level of development of a country.

4.2.5.2. Trade in Service Commitments

Even though GATS is in favour of “flexibility for LDCs to open fewer sectors, liberalize fewer types of transaction, progressively extending market access in line with economic development”³⁸⁰, acceding LDCs have been asked to make extensive commitments in various services sectors, much beyond what original members have done.³⁸¹ For instance, the countries like Cape Verde, Liberia, and Afghanistan data's (making commitments of 103, 102, and 104 services sub-sectors respectively) showed that acceding LDCs tended to make commitments on more than 100 sectors at the three-digit level irrespective of their income level, whereas the original WTO members made smaller numbers of commitments that generally rose with their levels of income.³⁸² Moreover, LDCs like Vanuatu, Vietnam, Nepal and Cambodia were made

380 WT/COMTD/W/135 (2004), supra n 107

381 Ibid, p. 10

382 Ibid, p. 131

extensive commitments to liberalize the trade in services, opening up all of their service sectors under the WTO classification, some fully and others partially and with transition periods³⁸³

Based on the above experience of acceded LDCs, the new guidelines offer almost no help for Ethiopia in this regard. Even though the guidelines provide that acceding LDCs shall undertake commitments in fewer sectors, this does not necessarily mean that Ethiopia can refuse to undertake commitments in a particular sector. The benchmarks in service liberalization could also limit Ethiopia's chance of since no agreement on average number of service sectors and sub-sectors is indicated by the guideline. In general, there is high probability that Ethiopia will commit on its financial service sector though it cannot yet be decided on what types of financial services and in what modes.

4.2.5.3. Subsidies

The agreement of subsidies for poor countries like Ethiopia whose economic development is in the early stage is very crucial. With regard to industrial subsidies, Article 27.3 of the Agreement on Subsidies and Countervailing Measures provides LDCs have given a transition period of eight years to abolish subsidies contingent upon local content requirements.³⁸⁴ Moreover, LDCs are not required to undertake any reduction commitments under the WTO Agreement on Agriculture.³⁸⁵ Despite the presence of the above agreements, Ethiopia could not able to maintain its right to export subsidies. This can be surmised from the experience of the acceded LDCs. For instance, Nepal and Vanuatu were unable to obtain the right to introduce export subsidies for either agricultural or industrial products and they were also required to eliminate Other Duties and Charges at the time of accession, despite the fact that Article II: 1 (b) of the General Agreement on Tariffs and Trade allows all member countries to maintain Other Duties and Charges.³⁸⁶ Similarly, Cambodia was asked to bind its agricultural export subsidies at zero – a

383 See Baumüller, Adhikari and Dahal (2008), supra n 217, p. 2; See also Oxfam (2007), supra n 276, pp. 23 & 25

384 See The SCA Agreement, art. 27.2(a); This preference ceases to apply to any of these LDC Members when it reaches 1,000 USD GNP per capita. Annex VII. *Id*; Ethiopia is also one of the LDC who categorized in this group since its GNP is \$644. See UN, Least Developed Country Category: Ethiopian Profile, Data from the 2018 Triennial Review, Available at: <https://www.un.org/development/desa/dpad/least-developed-country-category-ethiopia.html>, Visited on 30/05/2018

385 See Agreement on Agriculture, Marrakesh Agreement Establishing the World Trade Organization (1994), Annex 1A, Legal Instruments–Results of the Uruguay Round, 33 I.L.M. 1125, Art. 15 (2).

386 See Oxfam, supra n 276, p. 19

commitment that no original LDC has been required to make and it was unable to retain the right to introduce export subsidies for agricultural products after accession.³⁸⁷ Therefore, it is inevitable for Ethiopia to be required by Working Party to eliminate all its export subsidies despite the above presence agreements.

4.2.5.4. Trade Related Intellectual Property Rights

Even though, the LDCs are not forced to accept a commitment beyond their individual development, the experience of acceded countries shows they agreed to a number of obligations that went beyond existing provisions in the TRIPS Agreement. The above TRIPS-plus commitments taken by acceded LDCs would be an inevitable for Ethiopia at the final stage of accession. The reason is that the SDT provisions and decisions for LDCs relating to TRIPS Agreement still remains without any binding force.

For instance, as part of its action plan for implementing the TRIPS Agreement, Cambodia agreed to join the International Convention for the UPOV,³⁸⁸ while in the case of Nepal, this requirement was dropped at the last minute following intensive lobbying efforts by Nepalese civil society groups.³⁸⁹ Similarly, Vanuatu agreed to several of the TRIPS-plus commitments like the five-year protection period for clinical test data from the point of accession, and adoption of the UPOV 1991 convention.³⁹⁰ This international framework law on plant-variety protection prohibits farmers from selling or exchanging protected seeds, thus threatening food security as well as biodiversity.³⁹¹

The Doha Declaration on the TRIPS Agreement and Public Health states that least developed countries (such as Ethiopia) need not apply intellectual property protection for pharmaceuticals before 2016. While this provision would appear to take care of Ethiopia's production plans (for instance, generic medicines for the treatment HIV/AIDS), it is significant that Cambodia was

387 See Baumüller, Adhikari and Dahal (2008), supra n 217, p. 2

388 The Agreement leaves it up to Members to decide how they would like to protect plant varieties, be it through patents, a *sui generis* system (which could, but does not necessarily have to be UPOV) or a combination of both. See TRIPS Agreement Article 27.3b

389 See Baumüller, Adhikari and Dahal (2008), supra n 217, p. 2

390 See Oxfam, supra n 276, p. 24

391 Ibid

pressured during its accession negotiations into applying intellectual property protection on pharmaceuticals as early as 2007.

In general, SDT provisions in the implementation of TRIPS Agreement could not assure Ethiopia, not to accept the TRIPS-plus commitments in the country's accession to WTO.

4.2.6. Special and Differential Treatment in Dispute Settlement Proceedings

Upon accession to WTO, Ethiopia could have the advantage of accessing to the binding dispute settlement mechanism whose decisions have a chance of being enforced. The dispute settlement system plays a central role in ensuring the security and predictability of the country's trading system in international trade. However, like other LDC members, because of the non-binding nature of SDT provisions in the DSU, the enormous financial requirements needed for litigation; the small stakes due to small economy and trade; the lengthy process and fear of economic and political implications, such as trade preferences and foreign aid, taking advantages of WTO dispute settlement system will be a major setback for Ethiopia. The best indication of this fact is that no LDCs have fought any case at the WTO dispute settlement court so far, except Bangladesh.³⁹² Of the total of 58 countries that were had used DSB either as a complainant or defendant so far, 23 countries are developed, 34 developing economies and one LDC.³⁹³ Furthermore, the dispute case record between 1995 and 2010 shows that 40.4 per cent of complaints were filed by the US and the European Communities and they also appeared as defendants in 43.5 per cent of cases.³⁹⁴ This problem would be destructive for the hope of Ethiopia to be part of the rules-based multilateral trading system and to create confidence for investors and serve as an instrument to attract foreign direct investment through becoming a member of WTO.

392 See Wangdi, K 'To Join or Not to Join WTO: A Study on its Negative Impacts,' *Journal of Bhutan Studies*, (2010), p. 85

393 Ibid

394 Ibid, p. 86

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

The fundamental rationale for the development of SDT in different WTO Agreements, the Ministerial Declarations and Decisions for developing and least developing countries is for the purpose of aiding their economic development and integration into the international trade regime. All these provisions tend to provide LDC Members more favourable treatment than other WTO Members as well as they give LDC Members special rights to deviate from their obligations. These SDT provisions for LDCs include: measures to increase trading opportunities, provisions requiring all WTO members to safeguard the trade interest of LDCs, provisions related to flexibility of commitments, provisions providing longer time periods for implementing WTO Agreements and commitments, and the provision of technical assistance. Notwithstanding the substantial number of SDT provisions, their overall impact is very limited in improving the terms of LDC integration into the global market decisively.

In relation to the preferential market access, the SDT provisions are formulated in vague principles or “best-endeavours” language, so that their practical effect depends on the goodwill of other WTO members, rendering their implementation unreliable and unpredictable. The decision of whether or not to grant trade preferences as well as decisions on the characteristics of a preference scheme such as product coverage or preference margins is entirely at the discretion of the developed countries and considerably weakened the instrument. As soon as beneficiary countries are able to significantly increase their export volumes, developed countries are likely to withdraw the preferences from them and LDCs cannot challenge this decision before the DSB because of the financial and the required expert constraints. Moreover, when the market preferences are granted, the preference schedules become useless with restrictions, product exclusions and administrative rules in the form of documentary requirements.

The special provisions to safeguard the interests of LDCs as they are, for example, contained in the SPS, TBT or the Anti-dumping Agreement turned are inefficient since they are not enforceable in the dispute settlement procedure. They are mostly limited to the obligation to assess possible impact on the LDCs but do not prescribe development policy criteria with which

to determine prohibited measures. The provisions do not oblige them to change those measures even if there is the probability that they may negatively impact on the interests of LDCs. In addition, there are resource and capacity-related limitations which render many LDCs unable to use these agreements to their advantage.

Regarding flexibility of commitments, despite the presence of SDT provisions, experience has shown that acceding LDCs continue to be subject to requests to accept excessive liberalization and other reform commitments. In practice, acceded LDCs have not only accepted commitments which cannot reasonably be considered commensurate with their level of development and their special trade, but commitments that go beyond the level of concessions and commitments undertaken by existing LDC Members. Furthermore, the right of recourse to SDT provisions is subject to negotiations, on a case-by-case basis, and acceding LDCs are often obliged to forgo their rights to utilize some of the SDT and other developmental provisions which are automatically available to existing WTO Members. Even when granted, they have been made less powerful and do not meet their intended objectives. This implies that the rights of newly acceded WTO Members are diminished, with the consequence that WTO Members with similar levels of development assume different levels of rights and obligations under WTO, thereby leading to multi-tiered system of rights and obligations among Members. There is thus a risk that newly acceded LDCs could find themselves further marginalized in the MTS.

Regarding the transitional period of SDT provisions, in spite of the introduction of transition periods in different WTO Agreements and Decisions, the widespread implementation problems of acceded LDCs, however, illustrate the inadequacy of both the transition periods and of the agreements themselves with regard to a wide range of development priorities. Furthermore, the given transition periods in no way reflect the implementation capacity of the acceded countries. In most provisions, LDCs have not given the chance to extend the given period, but their problems continuous after the expiration of that period.

Technical assistance granted in the context of SDT suffers from the fact that it focuses on the implementation of partially inadequate WTO agreements and that real adjustment costs are not reflected in the appropriate budgets. Moreover, TA tends to be donor-dominated and thus undermines local priorities and institutional arrangements. Granting of TA is often abused as a negotiation made it smaller and weaker and the measures are sometimes overly complex. The

result is the fact that they neither improve participation of financially weak LDCs nor contribute to self-determined capacity building.

In the Doha Declaration, member governments agreed that all SDT provisions are an integral part of the WTO agreements, and that these provisions should be reviewed with a view to making them more effective and operational. However, the negotiations on SDT issue in the Doha Round indicate that above all the EU and the USA are blocking any modification to the agreements as could be seen in the debate surrounding the monitoring mechanism. Therefore, it is difficult for the moment, that the problems related with the operationalization of SDT schemes for LDCs could be resolved as soon as possible as it was expected.

In general, it can be argued that a lot of the SDT provisions in WTO system do not create any legally binding obligations to act in a way that would advance the DCs' integration into global trade. Moreover, the conditions attached to these schemes and the capacity constraints inherent in LDCs do not make these marginalized countries to effectively utilize the schemes.

Given the WTO accession and SDT experiences of LDCs so far, it is likely that Ethiopia will face the following problems:

1. The adequacy of the GSP as a tool for economic development and integration into international trade presents problems for the country due to its non-binding nature. In the future, even greater insecurity is to be expected due to the voluntary withdrawal of the schemes and the general erosion of preferences following lowering of the tariffs. Quite apart from the non-mandatory manner of its application, Ethiopia will also face a serious challenge in meeting technological, technical and financial requirements for maintaining SPS quality control infrastructures and programmes. Moreover, preference erosion due to multilateral and regional trade liberalization can limit the benefits of preferential market access regimes for Ethiopia. The benefit of the preferential market access available under WTO may be further limited because of Ethiopia's weak production capacity and undiversified export products. Hence, to depend solely on preferential market access as a tool for economic development and integration into international trade thus means that, the policy choices of Ethiopia become dependent on the uncertain GSP policies instituted by developed countries.

2. Based on the experiences of acceded LDCs, the new guidelines offer almost no help for Ethiopia in flexibility of commitments. The room accorded by flexibility provisions for Ethiopia is too small to ensure the application of policy instrument on the national level which allows targeted protection and promotion measures for LDCs. The challenge for Ethiopia in the negotiations will be to make the terms and conditions of accession compatible with its national development goals, taking into account the country's desire for policy space and its institutional and infrastructure capacity. Therefore, it is expected that the package of concessions and commitments that Ethiopia has to accept undoubtedly goes far beyond what is commensurate with the level of development of a country.
3. In relation to transitional period provisions, the paper argues that the grace period that would be given for Ethiopia could be unrealistic due to the trend of arbitrary determination of transition period of some years developed through practice in the WTO accession. The problems in the sufficiency of the given transitional period would be exacerbated for Ethiopia given the heavy financial costs and administrative burdens needed to set up new institutions, regulatory framework, physical infrastructure, and training of human resources, in particular to implement the TRIPS, TRIMS and CV agreements.
4. Likewise, the TA provided for Ethiopia in the accession to WTO could be insufficient in pouring the benefits of accession and integrating the country to the MTS, as it can be seen from the experience of acceded countries. As most of the TA given for acceding countries is focused on the preparation of accession documents and training than on the alleviating post accession capacity constraints, the researcher argues that the TA provided for Ethiopia will not be able to integrate the country into MTS. Moreover, since provisions on TA are not binding commitments under the WTO agreements, it does not appear that a sufficient amount of additional funds is forthcoming voluntarily for the country.

Hence, it can be concluded that SDT schemes are unlikely to assure Ethiopia's integration into international trade and neither can it be relied on as a development tool when the key decisions relating to its implementation are left to developed countries and most of the provisions are left without enforcement mechanisms owing to their non-binding nature.

5.2. Recommendations

In this study, the implications of SDT schemes for Ethiopia's WTO accession have been scrutinized. It is unlikely that the different SDT provisions in the WTO system will enable Ethiopia to maintain its development interests. Based on the findings, the author recommends the following:

- As the experiences of acceded LDCs shows, the Working Party members intensify the pressure and increase the vulnerability of a country to agreeing to potentially harmful concessions, despite the preferential treatment accorded to them. To minimize this problem, the government of Ethiopia should take the time to negotiate carefully on the substance of each issue, rather than feel pressured to rush ahead with negotiations to meet a deadline regardless of the consequences. It had to negotiate minute details of the agreement as tactfully as possible, enabled by the availability of technical assistance, in-country expertise and a relatively open consultation process with stakeholders. In addition, it is also advisable for Ethiopia to develop or build credible allies within the Working Party group in order to soften the potentially damaging demands made by some members.
- In order to realize the potential of preferential market access, it is plausible for Ethiopia to enhance its supply-side capacities, and ability to comply with sanitary SPS and TBT requirements side by side negotiating the SDT available in the area. To this end, the country would need to identify, prioritize and invest in trade facilitating infrastructure, formulate development-oriented trade policies, give priority for export product diversification and quality assurances, and build technological capabilities and SPS laboratories.
- Regarding transitional period, automatic granting of the periods enshrined in WTO is not possible as the experience of the acceded LDCs shows. Therefore, to exploit the maximum transition periods as much as possible, Ethiopia should provide persuasive justification and information in each case, with a detailed action plan for completing implementation within the timeframe of the transition period. For instance, a precise outline of the steps the country plans to take to adopt various key legislations and regulations, the duration and financial resources required to develop appropriate

international standards before which the provisions of the SPS and TBT Agreements applied are crucial for reaping longer transition period. Above all, the government must be mindful that the implementation periods and the ability of a country to implement commitments within the given periods must be realistic should such targets need to be met given the resources the country have.

- Besides the TA available from WTO, the government of Ethiopia should give priority for acquiring a well-organized and coordinated institutional mechanisms that can provide negotiating experience, technical expertise (both on the issues and on negotiating tactics), policy research and analytical preparation and support, and the physical and financial infrastructure necessary to ensure that the country's negotiators have sufficient information (about their negotiating counterparts' positions and interests), technical resources, and actual physical negotiating presence, enable negotiators to effectively develop and carry out their negotiating strategy. Likewise, the government should give due emphasis for those TA used to address post accession supply-side constraints which could prevent the countries from benefiting from WTO membership.
- Since FDI can serve to integrate national markets into the world economy far more effectively than could have been achieved by traditional trade flows alone, Ethiopia should pursue cultivating a hospitable environment for FDI. In this environment, FDI can play a key role in improving the capacity of Ethiopia to respond to the opportunities offered by global economic integration, a goal increasingly recognized as one of the key aims of any development strategy for WTO accession.

In general, the country must specifically make sure that it is in a position to exploit the opportunities rather than pay undue price by joining earlier and unprepared. Hence, the country should pursue relying on a realistic and self-supportive, not necessarily on the ineffective SDT schemes given for LDCs under WTO system.

Bibliography

I. International Instruments

1. *Accession of Least-Developed Countries: Decision of 10 December 2002*, WTO doc. WT/L/508
2. *Accession of Least-Developed Countries: Decision of 25 July 2012*, WTO doc. WT/L/508/Add.1, 30 July 2012
3. Decision on measures in favour of least developed countries (Uruguay Round Decision). 15 December 1993)
4. Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries. Decision of 28 November 1979 (Enabling Clause - L/4903)
5. *Doha Ministerial Declaration*, adopted on 14 November 2001, WT/MIN(01)/DEC/W/1, available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm
6. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194
7. GATT *Part IV Trade and Development*, (1964) available at: http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm
8. Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade (WT/MIN(15)/48 — WT/L/982) (2015)
9. LDCs Obligations Under Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products Decision of 8 July 2002 (WT/L/478)
10. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1167 (1994)
11. *Ministerial Declaration, Adopted on 20 May 1998*, WT/MIN (98)/DEC/1, available at: <http://www.jus.uio.no/lm/wto.ministerial.declaration.geneva.1998/landscape.pdf>
12. Ministerial Declaration, Doha Work Programme, Hong Kong, WT/MIN(05)/DEC, adopted 18 December 2005
13. Other decisions in favour of least developed countries: Annex F Hong Kong Ministerial Declaration adopted on 18 December 2005 (WT/MIN(05)/DEC)
14. Preferential Treatment Services and Service Suppliers of Least-Developed Countries, Decision of 17 December 2012, WT/L/847

15. Preferential Rules of Origin for Least Developed Countries. Ministerial Decision adopted on 7 December 2013 (WT/MIN(13)/42 or WT/L/917)
16. Preferential Rules of Origin for Least Developed Countries (WT/MIN(15)/47 — WT/L/917/Add.1) (2015)
17. *Singapore Ministerial Declaration Adopted on 13 December 1996*, WT/MIN(96)/DEC
18. *Waiver for Generalized System of Preferences*, Decision of 25 June 1971, GATT Doc. L/3545
19. *WTO Work Programme for the Least Developed Countries (LDCs) Adopted by the Sub-Committee on Least-Developed Countries*, Sub-Committee on Least Developed Countries, WT/COMTD/LDC/11, 13 February 2002

II. Case Laws

1. Brazil-US Upland Cotton Case (WTO Document, WT/DS267/1 “Cotton Dispute”)
2. EC-Approval and Marketing of Biotech Products WT/DS291/R-WT/DS292/R-WT/DS293/R, 29 September 2006 (Panel Reports)

III. Other WTO Documents

1. World Trade Organization (WTO). The Generalized System of Preferences: A preliminary analysis of the GSP schemes in the Quad, WT/COMTD/W/93, Geneva, 5 October (2001)
2. World Trade Organization: Committee on Trade and Development, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decision: Note by Secretariat*, WT/COMTD/W/77 (Oct. 25, 2000) available at: http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm
3. WTO Secretariat, *Participation of Developing Countries in World Trade: Recent Developments*, and *Trade of Least-Developed Countries*, WT/COM.TD/W/65 of 15 February 2000
4. WTO Committee on Trade and Development, ‘Special and Differential Treatment Provisions’, A Joint Communication by the Least-Developed Countries, TN/CTD/W/4, 24 May 2002
5. World Trade Organization: Committee on Trade and Development, *Special and Differential Treatment for Least- Developed Countries*, Note by Secretariat, WT/COMTD/W/135 (2004)

6. The WTO July Framework, WT/L/579, 2 August 2004
7. World Trade Organization: Committee on Trade and Development, *Special and Differential Treatment Provisions in WTO Agreements and Decisions: Note by Secretariat*, TN/CTD/W/33 (8 June, 2010)
8. *World Trade Organization Committee on Trade and Development*, Note by the Secretariat, 14 June 2013, WT/COMTD/W/196
9. WTO, Committee on Trade and Development (CTD), ‘Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat’ (22 September 2016) WT/COMTD/W/219

IV. Books

1. Grasstek, V *The History and Future of the World Trade Organization World Trade Organization* and Cambridge University Press, 2013 - Volume 13 Issue 4
2. Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures (2015), Second Edition, , United Nations publication, New York
3. Hawthorne, H ‘Least Developed Countries and the WTO: Special Treatment in Trade’ (2013), Palgrave Macmillan, UK
4. Lee, Sh *Reclaiming Development in the World Trading System* (2006), Cambridge University Press, New York
5. Martin, M *WTO Dispute Settlement Understanding and Development* (2013), Martinus Nijhoff Publishers, Leiden. Boston
6. Stefan V, ‘The Least Developed Countries and World Trade’ (2007), Second Edition, Sida Publication Service, Sweden
7. UNDP, *Making Global Trade Work for People* (2003) Earth scan Publications Ltd, New York,

V. Journal Articles

1. Asmelash, B ‘Ethiopia's Long Walk to WTO Membership: Exploring the Implications of the 2012 WTO Accession Guidelines for Least Developing Countries,’ 12 *Manchester J. Int'l Econ. L.* 318 (2015), 318-343
2. Bhandari, S ‘Doha Round Negotiations: Problems, Potential Outcomes, and Possible Implications,’ 4 *Trade L. & Dev.* 353 (2012), 353-384

3. Brennan, M 'The Special and Differential Treatment Mechanism and the WTO: Cultivating Trade Inequality for Developing Countries,' 14 *Trinity C.L. Rev.* 143 (2011), 143-160
4. Chang, W 'WTO for Trade and Development Post-Doha,' *Journal of International Economic Law* 10(3), Vol. 10, No. 3, (2007), 553-570
5. Dakoure, P 'Cotton-4 and the Cotton Subsidies Issue: A Litmus Test for the WTO's Benefits to Least-Developed Countries,' *The Journal of World Investment & Trade* 14 (2013), 852-888
6. Desta, G 'Ethiopia's Reluctant Move to Join the WTO: A Preliminary Look at Legal and Institutional Implications of Accession,' 22 *J. Ethiopian L.* 21 (2008), 21-48
7. Ewelukwa, U 'Special and differential treatment in the international trade law: A concept in search of content,' 79 *N.D. L. Rev.* 831 (2003), 831-878
8. Gerhart, M '*Reflections on the WTO Doha Ministerial: Slow Transformations: The WTO as a Distributive Organization*,' 17 *AM. U. INT'L L. REV* 1045 (2002), 1045-1076
9. Gordon, R 'Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime,' 8 *Berkeley J. Afr.-Am. L. & Pol'y* 79 (2006), 79-121
10. Hart, N 'Special and Differential Treatment At The World Trade Organization: A Case Of Limited Results And Misconstrued Arguments?' *WAStuLawRw I*; (2018) , Available at: <http://www5.austlii.edu.au/au/journals/WAStuLawRw/2018/1.html>
11. Haque, I '*Doha Development Agenda: Recapturing the Momentum of Multilateralism and Developing Countries*,' 17 *AM. U. INT'L L. REV.* (2002), 1097-1130
12. Islam, R and Zaman, K 'Market Access for LDCs under the Hong Kong Ministerial of the WTO - Outcomes for Bangladesh,' 7 *J. World Investment & Trade* 383 (2006), 3083-406
13. Jensen, F 'African Demands for Special and Differential Treatment in the Doha Round : An Assessment and Analysis' *Development Policy Review*, 25 (1), (2007), 91-112
14. Kassahun, E 'Ethiopia's WTO Accession and Financial Services Liberalization: Striking the Balance between Trade Liberalization and Domestic Policy Space' *Mizan Law*, Vol. 6 No.2 *Review* (2012), 201-240

15. Kessie, E ‘Enforceability of the Legal Provisions Relating to the Special and Differential Treatment Under the WTO Agreements,’ *Journal of World Intellectual Property* (2000), 956-975
16. Kishore, P ‘Special and Differential Treatment in the Multilateral Trading System’, *Chinese Journal of International Law* (2014), 363-394
17. Lichtenbaum, P “Special Treatment” vs. “Equal Participation:” *Striking a Balance in the Doha Negotiations*, 17 *AM. U. INT’L L. REV.* 1003, (2002), 1003-1043
18. Meyer, M & Lunenborg, P, ‘The Evolution of Special and Differential Treatment and Aid for Trade’, *Research Gate* (2012), 1-56
19. Mitchell, D and Voon, T ‘Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over,’ 15 *Global Governance* 343 (2009), 343-357
20. Moon, G ‘Trade and Equality: A Relationship to Discover’ 12 *Journal of International Economic Law* 617(2009), 617-642
21. Nicolas Imboden, ‘Special and Differential Treatment: A New Approach May Be Required’, WTO, *Bridges Africa*, Vol. 6-No. 8, (2017), available at: <https://www.ictsd.org/bridges-news/bridges-africa/news/special-and-differential-treatment-a-new-approach-may-be-required>
22. Panagariya, A ‘Developing Countries at Doha: A Political Economy Analysis,’ 25 *WORLD ECON* (2002), 1205-1233
23. Pangestu, M ‘Special and Differential Treatment in the Millennium: For Whom and How Different?’, *Oxford OX4 IJF* (2000), 1285-1302
24. Sibanda, S ‘Towards a Revised GATT/WTO Special and Differential Treatment Regime for Least Developed and Developing Countries,’ *Foreign Trade Review* 50(1) (2015), 31–40
25. Song, A ‘The Adequacy of Special and Differential Treatment Provisions for Developing Countries in the WTO,’ *GIMPA Law Review*, Volume 2 (2016), 91-115
26. Stebek, N ‘WTO Accession in the Ethiopian Context: A Bittersweet Paradox’ *MIZAN LAW REVIEW* Vol. 1 No. 1 (2007), 91-118
27. Subedi, P ‘The Road From Doha: The Issues for the Development Round of the WTO and the Future of International Trade,’ 52 *INT’L & COMP. L.Q.* (2003),

28. Tura, 'Ethiopia's Accession to the World Trade Organization: Lessons from Acceded Least Developed Countries', *Oromia Law Journal*, Vol.4, No.1, (2015),125-152
29. Wangdi, K 'To Join or Not to Join WTO: A Study on its Negative Impacts,' *Journal of Bhutan Studies* (2010), 55-117
30. Whalley, J 'Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries,' *The Economic Journal*, Vol. 100, No. 403 (1990), 1318-1328

VI. Working Papers

1. AALCO, A Study on Special and Differential Treatment in WTO Agreements, Center for Research and Training AALCO Secretariat, New Delhi India (2003)
2. Adhikari, R 'Integration of Least Developed Countries into the South Asian Free Trade Agreement: A Human Development Perspective,' UNDP, (2011)
3. Adhikari, R. 2005, *Vulnerability, Trade Integration and Human Development*, Background paper for Asia Pacific Human Development Report 2006 titled *Trade on Human Terms*. Colombo: UNDP Asia Pacific Regional Centre, (2006)
4. Adhikari, R, Dahal, N and Pradhananga, M 'Ensuring Development-Supportive Accession of the Least Developed Countries to the WTO: Learning from Nepal 'Research Report, Trade Knowledge Network, Winnipeg: International Institute for Sustainable Development (2008)
5. Adhikari, Ratnakar; Paras Kharel; and Chandan Sapkota; *Evaluating Aid for Trade on the Ground: Lessons from Nepal*; Aid for Trade Series; Issue Paper No. 23; International Centre for Trade and Sustainable Development, Geneva, Switzerland (2011)
6. Adhikari, R. and Yamamoto, Y "The Textiles and Clothing Industry: Adjusting to the Post Quota World" in *Industrial Development for the 21st Century: Sustainable Development Perspectives*. New York: United Nations Department of Economic and Social Affairs, (2007)
7. Alonso, A, Cortez, L and Klasen, S'LDC and other country groupings: How useful are current approaches to classify countries in a more heterogeneous developing world?', United Nations Department of Economic and Social Affairs, CDP Background Paper No. 21 (2014)

8. Aschale, A 'AGOA's "Success" Story in Africa, Ethiopia: A Critical Discourse Analysis,' Addis Ababa, Ethiopia; 2014
9. Baumüller, H, Adhikari R and Dahal, N 'Making WTO Membership Work for Least-developed Countries: Lessons from Nepal and Cambodia,' International Institute for Sustainable Development (2008)
10. Bienen, D '*What Can LDCs Acceding to the WTO Learn from other Acceded Countries?*' (BKP Development research and consulting discussion paper no. 01/2014. Munich)
11. Carrere, C and Melo, J 'The Doha Round and market access for LDCs: Scenarios for the EU and US markets' Discussion Paper Series No. 7313, Centre for Economic Policy Research, London (2009)
12. Cortez, L 'Beyond market access: Trade-related measures for the least developed countries. What strategy?', DESA Working Paper No. 109, (2011)
13. Cortez, L, Kinniburgh, I and Mollerus, R 'Accelerating Development in the Least Developed Countries through International Support Measures: Findings from Country Case Studies,' United Nations, Department of Economic and Social Affairs, New York, CDP Background Paper No. 22, October 2014
14. Elliott, A 'Opening markets for poor countries: Are we there yet?' Working paper 184, Center for Global Development, Washington, DC (2009)
15. _____ 'Open markets for the poorest countries: Trade preferences that work' The CGD Working Group on Global Trade Preference Reform, Center for Global Development, Washington DC (2010)
16. _____ '*Trade Preferences for the Least Developed Countries: Opportunities Not Panaceas*' E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, (2015)
17. Ewelukwa, U 'African States, Aggressive Multilateralism and the WTO Dispute Settlement System-Politics, Process, Outcomes and Prospects,' (2005)
18. Fergusson, F 'World Trade Organization Negotiations: The Doha Development Agenda,' CRS Report for the Congress, Order Code RL32060 (2008)
19. Fritz, T 'Special and Differential Treatment for Developing Countries', Global Issue Paper, No. 18 (2005)

20. Fukasaku, K ‘Special and Differential Treatment for Developing Countries: Does It Help Those Who Help Themselves, Working Papers No. 197 (2000)
21. Gibbs, M ‘Special and Differential Treatment in the Context of Globalization’ in Fritz, Thomas: Special and Differential Treatment for Developing Countries, Global Issue Paper, No. 18 (2005)
22. Hoekman, B, Martin, J and Braga, P ‘Preference Erosion: The Terms of the Debate,’ World Bank, Geneva, May 2006
23. Keck, A and Low, P ‘*Special and Differential Treatment in the WTO: Why, When and How?*’ (WTO Staff Working Paper 2004)
24. Michalopoulos, C ‘The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization’, Policy Research Working Paper, No 2388, World Bank, Washington D.C., 2000
25. Oyejide, A ‘Costs and Benefits of “Special and Differential” Treatment for Developing Countries in GATT/WTO: An African Perspective’, Collaborative Research Project on Africa and the World Trading System (1998)
26. Oxfam International, Joining the World Trade Organization: A non-government perspective on the accession process (2007)
27. Páez, L et al ‘A Decade (2000-2010) of African-U.S. Trade Under the African Growth Opportunities Act (AGOA): Challenges, Opportunities and A Framework for Post AGOA Engagement,’ September 15, 2010
28. Page. Sh & Kleen. P, ‘Special and Differential Treatment of Developing Countries in the World Trade Organization’ Global Development Studies, EGDI Secretariat, Ministry for Foreign Affairs, Sweden, Global Development Studies No. 2 (2005)
29. Pandey, R, Adhikari, R and Waglé, S ‘Nepal’s accession to the World Trade Organization. Paper prepared for the Development Policy and Analysis Division of the United Nations Department of Economic and Social Affairs, CDP Background Paper No. 23, November 2014
30. *Rahman, M* ‘Trade Benefits for Least Developed Countries: the Bangladesh Case,’ United Nations, Department of Economic and Social Affairs, New York, CDP Background Paper No. 18, July 2014

31. *Secretariat of the Committee for Development Policy (CDP): Strengthening Smooth Transition from the Least Developed Country Category*, CDP Background Paper No. 14 (2012)
32. Shiferaw, A 'Productive Capacity and Economic Growth in Ethiopia,' UN, CDP Background Paper No. 34, ST/ESA/2017/CDP/34, April 2017
33. South Centre, *Special and Differential Treatment for Developing Countries in the WTO*, Trade-Related Agenda Development and Trade Working Papers (1999)
34. The Danish Institute for International Studies & The Food and Resource Economics Institute, 'Special and Differential Treatment and Differentiation between Developing Countries in the WTO', (2005) available at: <http://curis.ku.dk/ws/files/8065189/SDTpolicystudy.pdf>
35. Tortora, M 'Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet', UNCTAD, Geneva, WEB/CDP/BKGD/16, (2003) available at http://unctad.org/sections/comdip/docs/webcdpbkgd16_en.pdf
36. UNCTAD, *The Challenge of Integrating LDCs into the Multilateral Trading System: Coordinating Workshop for Senior Advisors to Ministers of Trade in LDCs in preparation for the Third WTO Ministerial Conference Sun City, South Africa: 21-25 June 1999*, UNCTAD/LDC/106, 6 October 1999
37. _____ 'A Positive Agenda For Developing Countries' (2000) UNCTAD/ITC 1
38. _____ *Towards a New Trade "Marshall Plan" For Least Developed Countries: Trade, Poverty, and Cross cutting Development Issues*, UNCTAD/DITC/TAB/POV/2005/1, Study Series No. 1, United Nations, New York and Geneva (2005)
39. UNIDO, *Viet Nam in Post-WTO: Current Situation and Future Challenges for the Agro-industry Sector*, August 2014
40. Whalley, J 'Special and Differential Treatment in the Millennium Round,' Stanford Center for International Development, CSGR Working Paper No. 30/99 (1999)
41. Yanai, A 'Rethinking Special and Differential Treatment in the WTO' Institute of Developing Economics, IDE Discussion Paper No. 435 (2013)

VII. Reports

1. Committee for Development Policy Report on the twentieth session, United Nations • New York, E/2018/33, (2018)
2. *Participation of Developing Countries in World Trade: Recent Developments*, and Trade of *least-Developed Countries*, WTO Secretariat, WT/CoM.TD/W/65 of 15 February 2000
3. Seifu, O ‘Experiences from Ethiopia’ in “Accession to the WTO: Country Experiences and Technical Assistance’, 2005, report of joint BMZ, BMWA, GTZ, World Bank conference, Berlin, 17-19 November 2004
4. Report of the High-Level International Workshop on “The WTO Agreements on Trade Facilitation: Implication for LLDCs” (2014)
5. *Trends in International Trade: A report by a Panel of Experts*, GATT: Geneva, October 1958
6. UNCTAD, The Least Developed Countries Report 2004, Linking International Trade with Poverty Reduction, UNCTAD/LDC/2004, Geneva (2004)
7. UNCTAD, ‘Trade and Development for African LDCs’ Prosperity: Actions and Directions’, Report based on the High-Level Workshop in Preparation for UNCTAD XII, Izmir, Turkey, UNCTAD/ALDC/2008/2, 4-5 March 2008
8. UNCTAD, The Least Developed Countries Report 10, United Nations, New York and Geneva, UNCTAD/LDC/2010 (2010)
9. UNCTAD, The Least Developed Countries Report 2016, The path to graduation and beyond: Making the most of the process, UNCTAD/LDC/2016/Corr.1, Sales No. E.16.II.D.9, UN, New York and Geneva, 9 June 2017
10. UNDP, Human Development Report 2016: Human Development for Everyone, New York
11. World Bank, Connecting to Compete 2016: Trade Logistics in the Global Economy, The Logistics Performance Index and Its Indicators ,Washington DC (2016)
12. _____Doing Business 2017, Comparing Business Regulation for Domestic Firms in 190 Economies, 14th Edition, Washington DC (2017)
13. World Trade Organization (WTO), *World Trade Report 2007*, Geneva
14. 2018 Triennial Review Report of the Committee for Development Policy (CDP)

15. 2018 Triennial Review Report of the Committee for Development Policy (CDP), Country Profile: Ethiopia

VIII. Unpublished Thesis

1. Adugna, B ‘Ethiopia’s Accession to the WTO with Emphasis on Foreign Market Access’ (2006), A Master’s Thesis in Science of Economics at Addis Ababa University
2. Gregorsson, L ‘A Legal Analysis of the New WTO Agreement on Trade Facilitation- With a Focus on Developing Countries’ (2014), A Master’s Thesis in International Law at Stockholm University
3. Keating, W ‘The Doha Round and Globalization: A Failure of World Economic Development?’ (2015). *CUNY Academic Works*, A Master’s Thesis in Geography at Hunter College The City University of New York
4. Wibowo, H ‘Improving the Effectiveness of Special and Differential Treatment of the World Trade Organization,’ (2015), Master’s Thesis Victoria, University of Wellington

IX. Internet Sources

1. Addis Standard November 10, 2016, Japan Provides A Project to Analyze Pesticide Residue in Coffee to Ethiopia at: <http://addisstandard.com/news-japan-provides-project-analyze-pesticide-residue-coffee-ethiopia/>
2. *Bruckner, M* ‘WTO Ministerial concludes – Anything to cheer for LDCs?’ December 18, 2017, Available at: <https://www.un.org/ldcportal/wto-ministerial-concludes-anything-to-cheer-for-ldcs/>
1. Capital Ethiopia, May 8, 2017, EU Rejects Ethiopian Red Pepper for Unsafe Levels of Toxins, at: <http://capitalethiopia.com/2017/05/08/eu-rejects-ethiopian-red-pepper-unsafe-levels-toxins/>
2. Daniel Gay, Rethinking International Support Measures for Least Developed Countries, Committee for Development Policy Secretariat, UN, March 1, 2018, Available at: <https://www.un.org/ldcportal/rethinking-support-measures-for-the-least-developed-countries/>
3. Ethiopia Accession Portal at WTO website: www.wto.org/english/thewto-e/acc-e/al-ethiopia-e.htm, Visited on 26/05/2018

4. Inclusion Into The LDC Category and Graduation From The LDC Category of Least Developed Countries, Available at: <https://www.un.org/development/desa/dpad/theme/least-developed-countries-category/>
5. Statement by H. E. Ambassador D. Baichoo of the Republic of Mauritius at the Seminar on Special and Differential Treatment for Developing Countries, Geneva, 7 March 2000, Available at: https://www.wto.org/english/tratop_e/devel_e/sem01_e/sdtmus_e.htm
6. The Least Developed Countries Information Portal at: (<http://www.un.org/ldcportal>)
7. The Reporter Ethiopia, 1 April 2017, Pakistan Bans Import of Red Kidney Beans from Ethiopia, at: <https://www.thereporterethiopia.com/content/pakistan-bans-import-red-kidney-beans-ethiopia/>
8. UN, Least Developed Country Category: Ethiopian Profile, Data from the 2018 Triennial Review, Available at: <https://www.un.org/development/desa/dpad/least-developed-country-category-ethiopia.html>
9. UN Committee for Development Policy- Development Policy and Analysis Division Department of Economic and Social Affairs, available at https://www.un.org/development/desa/dpad/wpcontent/uploads/sites/45/publication/ldc_list.pdf
10. Understanding the WTO: The Organization, Least-Developed Countries, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm