THE CRISIS OF SPECIAL AND DIFFERENTIAL TREATMENT IN THE INTERNATIONAL TRADE OF GOODS: A CRITICAL APPROACH TO THE PRESENT AND FUTURE OF THE SYSTEM.

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Abstract

Special and Differential Treatment (S&DT) within the WTO aims to promote an active participation of its developing and least-developed Members in the multilateral trading system, by differing their obligations from those of developed countries. The purpose of this study is to expose the lack of effectiveness of the current system. Through an assessment of its history and the examination of the relevant provisions and case law on the matter, the paper analyses the main benefits and flaws of S&DT in the trade of goods. Finally, it provides a critical perspective of the future and challenges that lie ahead for S&DT.

Resumen

El Trato Especial y Diferenciado (TEYD) dentro de la OMC, busca promover la participación activa de los miembros en vía desarrollo y no desarrollados en el sistema multilateral de comercio, mediante la diferenciación entre las obligaciones de estos países y los desarrollados. El propósito del presente trabajo es exponer la falta de efectividad del sistema actual. A partir del estudio de su historia, su regulación y su jurisprudencia, esta monografía analiza los principales beneficios y fallas del TEYD en el comercio de bienes. Finalmente, plantea una perspectiva crítica sobre el futuro y los retos de la OMC frente al TEYD.

Key Words: Special and Differential Treatment, Developing and Least-Developed Countries, International Trade of Goods, Principle of Non-Discrimination.

Palabras Clave: Trato Especial y Diferenciado, Países en Vía de Desarrollo y No Desarrollados, Comercio Internacional de Bienes, Principio de No Discriminación.

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TABLA CONTENIDOS

1. INTRODUCTION

Since its incorporation within the General Agreement on Tariffs and Trade (GATT), Special and Differential Treatment (S&DT) has attempted to increase the developing and least-developed countries' (LDCs) participation within the international trading system, by differing their obligations from those of developed countries. However, the question of the effectiveness and utility of the S&DT within the WTO system remains unresolved.

This paper makes and overall assessment of that question, specifically focusing on those S&DT provisions that relate to the trade of goods in the GATT. In doing so, it describes (1) the evolution of the concept of S&DT since the creation of the GATT in 1947; (2) the content and extent of the legal provisions that regulate the trade of goods under the GATT, and (3) the way these provisions have been discussed in GATT/WTO case law. Finally, it recognizes the main flaws and benefits of the current system, in order to address some of the most relevant perspectives regarding S&DT, especially in light of the approval of the Bali Package in 2013 and the upcoming Ministerial Conference, to be held in Nairobi in December 2015.

Through this assessment it will be demonstrated that the future of the multilateral trading system of the WTO is bleak, given the unwillingness of the Member States to compromise on the most relevant issues, the lack of effective tools in the system for the enforcement of S&DT provisions and the proliferation of Regional Trade Agreements (RTAs).

1.1. DEFINITION OF SPECIAL AND DIFFERENTIAL TREATMENT

Differential Treatment in International Law refers to situations where the principle of sovereign equality is sidelined, in order to attend greater concerns of the international community, such as differences in levels of economic development[1]. According to Professor Philippe Cullet, differential treatment, as a longstanding concern for the international community, aims for more equitable and effective results within the existing legal system, rather than to promote disparities and inequalities between nations[2]. For instance, the deviations from sovereign equality refer to non-reciprocal arrangements given to a group of countries that traditionally have been considered as developing countries and LDCs[4]. Regarding the first group, there is no consensus within the international community about what constitutes a developing country. Furthermore, the WTO does not establish any criteria to make such determination. For that reason, this status is acquired through self-declaration. Regarding the second group, the WTO recognizes the list assembled by the United Nations (UN) to determine what countries are considered as Least-Developed. Using three different criteria (per capita income, human assets and economic vulnerability), the United Nations Economic and Social Council currently recognizes 48 countries as LDCs[5].

The WTO's system is an example of the application of differential treatment as an instrument to defeat economic development disparities among its Member States, within the framework of the principle of sovereign equality. As follows, the GATT's

[1] Philippe Cullet. *Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations.* European Journal of International Law. 1999. At. 549
[2] Ibid.
[4] Ibid.
[5] See http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-recognition-of-LDCs.aspx. 2015.

basic foundation, which is the principle of non-discrimination enshrined in Articles I.1 (Most Favoured Nation) and III.4 (National Treatment), can be excluded by the application of S&DT. Therefore, as described by Professor Pallavi Kishore, S&DT includes reduced obligations or exemptions from obligations, and/ or preferential market access, that aim to encourage developing countries and LDCs to increase their participation in the multilateral trading system[6]. The purpose of S&DT is to diminish inequalities in development between Member States, by giving them differential treatment in their trading relations[7].

The concept of S&DT has evolved through the different phases of the international trading system, due to the shifting interests of the Member States in the different Negotiation Rounds, and the changes in the institutional context of world trade[8]. As such, this concept has been included through various provisions of the WTO Agreements [9] and Decisions, for LDCs and developing countries to receive a differentiated treatment, in accordance with their conditions on a given period of time, in the diverse areas of trade[10].

[6] Pallavi Kishore. *Special and Differential Treatment in the Multilateral Trading System.* Chinese Journal of International Law. July, 2014. At 367.
[7] David Roch. *Le príncipe du Respect de la situation partucilère des pays en dèveloppement et de lássistance ay dèveloppment.* Revue internationale de droit économique. 2003. At. 374-375.
[8] Hunter Nottage. *Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment.* Journal of International Economic Law. March 2003. At. 33.
[9] Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, General Agreement on Tariffs and Trade 1994, Understanding of Balance on Payments, Agreement on the Implementation of Article VI of GATT 1994, Agreement on the Implementation of Article VII of GATT 1994, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures, Agreement on Safeguards, General Agreement on Trade in Services, Agreement on Trade-Related Aspects of Intellectual Property Rights, Understanding on Rules and Procedures Governing the Settlement of Disputes, Agreement on Government Procurement.
[10] Committee on Trade and Development. *Special and Differential Treatment Provisions in WTO Agreements.* World Trade Organization. Note By Secretariat. WT/COMTD/W/196. June 14, 2013.

1.2. HISTORY

In 2004 Keck and Low, as members of the Economic Research and Statistics Division of the WTO, suggested that the evolution of the S&DT within the multilateral trading system should be divided in four phases[11]. The following section takes that timeline as a basis, but introduces modifications regarding the fourth phase and incorporates an additional one. As such, the first phase starts with the incorporation of the GATT (1948) and ends with the beginning of the Tokyo Round (1973). The second phase comprises the period between the beginning and the end of the Tokyo Round (1973-1979). The third phase begins with the conclusion of the Tokyo Round (1979) and ends with the finalization of the Uruguay Round (1995). The fourth phase goes from the end of the Uruguay Round (1995) to the Bali Ministerial Declaration (2013). And finally, the fifth phase starts with the end of the Bali Ministerial Declaration (2013) until present day.

1.2.1. GATT 1947

The first phase (1948-1973), starts with the incorporation of the General Agreement on Tariffs and Trade (GATT). As drafted in its original version of October 1947, the Agreement did not recognize the special situation of developing countries[12]. The system was structured by the principles of non-discrimination, reciprocity in trade relations and uniformity. Rights and obligations were the same for all Contracting Parties, even when some of its original signatory states lacked the economical and trade capacity of the

[11] Alexander Keck & Patrick Low. Special and differential treatment in the wto: why when and how. P. 3. Economic Research and Statistics Division, WTO. (2004).
[12] Uché Ewelukua. *Special and differential treatment in international trade law: A conception in search of content.* North Dakota Law Review. 2003. At. 843

more powerful economies.[14]. Until the 1954-1955 Session of the GATT Contracting Parties, all its signatories were considered equals. But during the aforementioned session, Article XVIII of the GATT[15], relating to government assistance to economic development and reconstruction, was revised[16]. Also Article XXVIII, which states that tariff negotiations should take into account the needs of each contracting party and of each industry, was adopted in this session. The aforementioned provisions focused on the prevention of balance of payments risks and on the protection of domestic industries[17].

1.2.2. UNCTAD

Several factors contributed to the creation of a new scenario regarding international trade, where developing countries applied an increasing pressure for the recognition of their rights. Some of those were the birth of the United Nations Conference on Trade and Development (UNCTAD) in the early 60s; the increasing number of independent countries due to decolonization; the Cold War, and other factors defining new demands for economic development[18]. Following these new demands, the Contracting Parties of the GATT 1947 established three (3) committees to encourage expansion of international trade, the third of which focused on barriers to exports created by developed countries. This committee created a plan of action that later became part of the Kennedy Round (1964-1967), but it was not implemented. The Kennedy Round

[14] Carl Beverly. *Trade and the Developing World in the 21st Century.* P. 83. Transnational Publishers. (2001).
[15] See section 2.1.2.
[16] Development Division, WTO. *Developing Countries and the Multilateral Trading System: Past and Present.* P. 11. High Level Symposium on Trade and Development. March, 1999.
[17] Thomas Fritz. *Special and Differential Treatment for Developing Countries.* P. 7. The Heinrich Boll Foundation. Global Issue Papers. (2005).
[18] Philippe Cullet. *Differential Treatment in International Law: Towards a New Paradigm Inter-state Relations.* European Journal of International Law. 1999. At. 566.

concluded with the adoption of part IV of the GATT[19], which, aimed to provide a solid foundation on which developing countries could base their claims for S&DT [20].

Finally, during this period the GATT Contracting Parties approved the Generalized System of Preferences (GSP) by the Geneva Protocol. This scheme operated as a waiver that allowed developed countries to grant more favourable treatment to the exports of LDCs and developing countries, without violating the MFN principle of Article I.1 of the GATT. According to Robert Read:

> *This agreed a general extension of the existing Article I ('grandfather') waiver for trade preferences for former colonies for an initial period of ten years. Under the new GATT waiver, all developing countries benefited from the GSP framework but it allowed the industrialised countries to determine both the magnitude and applicability of their trade preferences. The GSP also included provisions on trade between developing countries, the Global System of Trade Preferences (GSTP)."*[21]

1.2.3. The Tokyo Round

The second phase of the S&DT, started in 1973 with the beginning of the Tokyo Round. At this time, as Keck and Low state, the debate towards trade policy incentives implied opening to import competition. This meant focusing increasingly on the developing

[19] Part IV of the GATT, regarding Trade and Development, which comprises Articles XXXVI, XXXVII,XXXVIII.
[20] Pallavi Kishore. *Special and Differential Treatment in the Multilateral Trading System.* Chinese Journal of International Law. July, 2014. At 371.
[21] Robert Read. *The Generalised System of Preferences and Special & Differential Treatment for Developing Countries in the GATT and WTO.* Handbook of Trade Policy. 2004. At. 462.

countries' own trade policies, as well as market access for their exports, rather than import substitution[22]. The end of this round arrived with the official introduction of the S&DT for developing countries in 1979, with the adoption of the Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause)[23]. According to Professor Thomas Fritz, the Enabling Clause included the following:

> *"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). As a concrete measure the Enabling Clause provided that GSP and the preferential agreement between developing countries be exempt from Article I of GATT (Most-Favoured-Nation Treatment). That means, the time limitation of the Most-Favoured-Nation exemption for the GSP was withdrawn and thus the exemption became permanent."*[24]

1.2.4. The Uruguay Round

The Uruguay Round of negotiations, which concluded with the establishment of the WTO, was also a turning point in the conception of S&DT for developing countries.

[22] Alexander Keck & Patrick Low. Special and differential treatment in the wto: why when and how. P. 8. Economic Research and Statistics Division, WTO. (2004).
[23] See section 2.1.4.
[24] Thomas Fritz. *Special and Differential Treatment for Developing Countries.* P. 8. The Heinrich Boll Foundation. Global Issue Papers. (2005).

The shift of the developing economies towards foreign-trade integration into the world market and trade liberalization in the late 70s and 80s, would play a key element in these negotiations. Although at this point several S&DT provisions such as the Enabling Clause and the GSP scheme had been introduced in the covered agreements, S&DT as a whole was proving to be rather inefficient, as it was evidenced in the study conducted by Thomas Fritz in 2005 regarding the real impact of this trade policy instrument:

> *"…the concessions granted so far in the framework of the multilateral trade systems had had much less impact than had been hoped for. Agriculture had remained outside of GATT giving industrialized countries the possibility to maintain import barriers and subsidise their exports in a trade-distorting way. Tariff escalation, that is the fact that tariffs rise with each degree of processing, prevented emerging economies from moving from one value-added step to the next higher one (…) and the success of the GSPs remained modest. In the first ten years, that is between 1968 and 1978, less than 11 percent of the eligible tariffed exports benefited from preferential treatment due to the exclusion of many products, the concentration of very few beneficiaries, restrictive rules of origin and restrictive application of safety provisions."*[25]

The modest success of these provisions so far led the developing countries to shift their goals in the Uruguay Round from demanding liberties and waivers for themselves, to bargaining for new multilateral trade rules that would weaken the protectionist measures adopted by developed countries in the past[26]. In a paper published by the North-South

[25] Thomas Fritz. *Special and Differential Treatment for Developing Countries.* P. 9. The Heinrich Boll Foundation. Global Issue Papers. (2005).
[26] Ibid, Pp. 9-10.

Institute, Chantal Blouin explains the effects of these new objectives in the final outcome of the negotiations:

> *"The Uruguay Round was supposed to be a great "North-South bargain"(Ostry2000). Industrial countries were to decrease their barriers to exports from the South, especially in the most important sectors (i.e., in textiles and clothing and in agriculture). In exchange for better market access, developing countries would agree to several new trade agreements which would mainly benefit industrial countries. The most important ones are the agreements on intellectual property and on services."*[27]

In this round of negotiations there was a very active participation from developing countries, individually, as a group, and in alliance with developed countries. This was evidenced in the number of developing countries that took part in the negotiations, which increased from 25 in the Kennedy Round to 76 in the Uruguay Round. Part of the growing concern of developing countries in participating actively was that whereas in the past they were able to choose which agreements they would sign, the Single-Undertaking principle bound them on almost every item of the negotiation, given the fact that it was all part of an indivisible package that had to be agreed upon completely, or not at all.[28]

However, as it would be evidenced in the years that followed the implementation of the Marrakesh Agreement, the outcome of the Uruguay Round would remain an uneven

[27]Chantal Blouin. *The Reality of Trade: The WTO and Developing Countries.* P. 7. The North-South Institute. (2002).
[28] https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm

deal in detriment of developing countries. The North-South Institute, in its analysis of the reality of trade and the WTO, concluded in 2002 regarding this issue that:

> "*the poor countries have still not been able to penetrate the markets of developed countries. Many tariff bindings are at levels much higher than the applied tariffs, creating a degree of uncertainty for exporters wishing to access these markets. While the overall use of non-tariff measures has declined, the use of certain trade remedy measures such as anti-dumping and countervailing measures is on the rise*".[29]

In conclusion, this phase brought major changes to substantive provisions of the GATT dealing with S&DT [30]. The major trait of this round was the adoption of identical commitments for all members irrespective of their level of development, commitments that could not be excluded due to the introduction of the Single Undertaking principle. Thus, unlike the former period, when the developing countries´ main concern was securing access to the markets of the developed countries, their new additional objective was to liberalize and open up their markets, competing with global economic actors[31].

But, regardless of the positive or negative outcomes of the Uruguay Round, by the year 2000 there were 145 S&DT provisions spread across the various agreements of the WTO. Of these 145 provisions, 107 were adopted at the conclusion of the Uruguay Round. These 145 provisions were classified into six (6) different typologies by the

[29] Nizar Assanie ET AL.*The Reality of Trade: The WTO and Developing Countries*. P. 9. The North-South Institute. (2002).
[30] Hesham Youssef. *Special and Differential Treatment for Developing Countries in the WTO.* P.3. Trade-Related Agenda, Development and Equity Working Papers, WTO. (1999).
[31] Ibid.

Committee on Trade and Development in the year 2000: (1) provisions aimed at increasing the trade opportunities of developing country Members; (2) provisions under which WTO Members should safeguard the interests of developing country Members; (3) flexibility of commitments, of action, and use of policy instruments; (4) transitional time periods; (5) technical assistance; and (6) provisions relating to LDC Members.[32]

1.2.5. The Doha Round

By the end of the millennium it was evident that the outcome of the Uruguay Round was not the one expected and the fact *"that many of the new regulations were not adequate to the legal, institutional and economic capacities of the developing countries led to the fact that in 1999, even prior to the WTO Ministerial Conference in Seattle, several governments presented a number of suggestions regarding "implementation issues"".*[33] After the failure of the Ministerial Conference in Seattle, these issues remained unresolved and thus, they were again introduced in November 2001 in Doha, as a part of the commonly known Doha Development Agenda.

Paragraph 44 of the Ministerial Declaration of Doha is a cornerstone provision of development as it recognizes the importance of S&DT and thus, the Member States commit to review all S&DT provisions *"with a view to strengthening them and making them more precise, effective and operational".* The Declaration as a whole introduced several issues to be tackled in the negotiations, such as agriculture, non-agricultural

[32] Committee on Trade and Development. *Implementation Of Special And Differential Treatment Provisions In WTO Agreements And Decisions.* World Trade Organization. Note By Secretariat. WT/COMTD/W/77. October 25, 2000.
[33] Thomas Fritz. *Special and Differential Treatment for Developing Countries.* P. 26. The Heinrich Boll Foundation. Global Issue Papers. (2005).

market access (NAMA), services, intellectual property, trade and environment, and S&DT among others.

However, the results of these negotiations have been unsatisfactory. The major concerns of developing countries in key issues such as agriculture are yet to be resolved, as it was evidenced in the failure of the Cancun conference in 2003 and the suspension of the Doha Round in 2006. Until 2013, there was a deadlock in issues such as the monitoring mechanism, the graduation system for classifying countries and the non-binding nature of some provisions, which still remain unsolved, as it will be developed in section 3.2 of this paper.

1.2.6. The Bali Package

The Bali Package was adopted through the Bali Ministerial Declaration on December 7, 2013. After several failures during the Doha Round, this declaration constitutes a beacon of hope towards the future of these negotiations. The package envisages agreements on three different issues: (1) Trade Facilitation; (2) Agriculture and (3) Development and LDC issues.

The Trade Facilitation Agreement (TFA) is perhaps the greatest accomplishment of these negotiations. It contains two different sections: the first, *"sets forth a series of measures for expeditiously moving goods across borders inspired by the best practices from around the world"*[34]. The second contains S&DT clauses for developing countries in the implementation of the different provisions and in the technical assistance required

[34] *Easing the Flow of Goods Across the Borders: Trade Facilitation Agreement.* World Trade Organization. 2015. See more: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm

for such implementation. The potential economical benefits of implementing the TFA for developing countries and LDCs, as well as for the world economy, will be huge, as it will be explained in section 2.1.5 of this paper.

Also relevant to this paper are the agreements on development and LDC issues. However, as it has been acknowledged by Christophe Bellman,

> *"the set of ministerial decisions dealing with development and LDCs' issues is without doubt the weakest component of the Bali package. Most of the texts had already been "stabilised" in Geneva and the limited amount of discussions that took place at MC9 on those issues hardly made any change to what had been agreed. The package essentially consists of a series of political statements, non-binding commitments, and procedural decisions with very few tangible and immediate benefits for developing countries."*[36]

Despite its shortcomings, this set of Ministerial Decisions regarding S&DT finally introduce a Monitoring Mechanism, which was first proposed by the African Group in 2002. However, sub-paragraph 5 of the Bali Monitoring Mechanism states that it does not have the faculty to alter or affect in any way the Members' rights and obligations, and that it only has the capacity to make recommendations to the relevant WTO bodies. Still, the Mechanism is the first step towards fulfilling the mandate of paragraph 44 of the Doha Declaration.

Finally, the last phase starts from the Bali Ministerial Declaration until present time.

[36]Christophe Bellman**.** *The Bali Agreement: Implications for Development and the WTO*. International Development Policy | Revue internationale de politique de développement. May, 2014. At. Para. 34.

This last period is one of great uncertainty with regard to the success of the Doha Round. Although some consensus was reached in 2013 with the Bali Ministerial Declaration, the larger issues that have been discussed since the beginning of the Doha Round in 2001, are yet to be resolved, such as agriculture, trade in services and industrial goods. Bellman explains that:

> *"Building on the success of Bali, members are now set to revisit the rest of the Doha trade talks. In addition to a rather narrowly defined work programme, under the Committee on Agriculture, to find a permanent solution to the controversy surrounding public food stock-holding, members have given themselves twelve months to design a "clearly defined" work programme on the remaining Doha Development Agenda issues."*[37]

The Bali Package has been agreed upon but many challenges lie ahead:

> *"In trade facilitation, for example, a preparatory committee will have to draft a protocol of amendments to include the agreement under the WTO framework. Members will have to ratify it and notify their commitments under Category A, B, or C. Developing countries and LDCs will also need to identify their respective needs for technical assistance and capacity building. In agriculture, countries wanting to use the peace clause will have to notify their respective programmes."*[38]

[37] Christophe Bellman**.** *The Bali Agreement: Implications for Development and the WTO*. International Development Policy | Revue internationale de politique de développement. May, 2014. At. Para. 57.
[38] Ibid. At. Para. 51.

But other than these procedural issues, the WTO focus now centers on the 10th Ministerial Conference (MC10), where some of the unresolved matters mentioned in this paper will be addressed.

1.2.7. Nairobi Ministerial Conference

In a speech delivered by Director-General Roberto Azevedo, it was anticipated that the MC10 to be held in December 2015 in Nairobi, will focus on tackling some of the issues that are more likely to be agreed upon and that are part of the Doha Declaration. The three main issues to be discussed are: (1) development issues with a particular focus on LDCs; (2) export competition in agriculture; and (3) a set of possible outcomes to improve transparency in a number of areas[39].

MC10 will also analyze the results achieved already by the Bali Package and the progress of its implementation. As such, the Nairobi Ministerial Conference is expected to shed light on the future of the WTO, and specifically as it concerns this paper, on the issues related to S&DT in the GATT.[40]

2. SPECIAL AND DIFFERENTIAL TREATMENT IN THE INTERNATIONAL TRADE OF GOODS (GATT).

For the purpose of this paper, this chapter will analyze the main provisions that regulate S&DT in the international trade of goods, and its analysis and interpretation by the

[39] Roberto Azevedo. *Report by the Chairman of the Trade Negotiations Committee.* October 8-9 2015. https://www.wto.org/english/news_e/news15_e/gc_rpt_08oct15_e.htm
[40] See section 3.3.4.

adjudicating bodies of the GATT/WTO, as a basis for the assessment of the benefits and flaws of S&DT within the WTO system.

2.1. LEGAL PROVISIONS:

2.1.1. The Marrakesh Agreement and the "mandate"

The two cornerstone provisions regarding S&DT in the WTO are contained within the Marrakesh Agreement´s preamble and paragraph 44 of the 2001 Declaration of the 4th Ministerial Conference held in Doha.

The first, recognizes the "*need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development*"[41], foundational principle for all S&DT provisions that acknowledges the direct relation between trade and economic development.

The second, commonly known as "the mandate", recognizes that all S&DT provisions are an integral part of the WTO Agreements and as such, they must be revised to strengthen them and make them more effective and operational [42]. This second provision, according to its own content, must be read in conjunction with the Decision on Implementation-Related Issues and Concerns, that instructs the Committee on Trade and Development to assess (1) the binding or non-binding nature of S&DT provisions

[41] Marrakesh Agreement Establishing the World Trade Organization. Second recital of the Preamble. April 15, 1994.

[42] *"(…)We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns."* Doha Ministerial Declaration. Paragraph 44. 2001.

and its implications[43]; (2) the possible solutions for more effective and impactful S&DT provisions; and (3) how to incorporate S&DT provisions into WTO law[44]. Based on that assessment, the Committee must issue recommendations to the General Council on those matters.[45]

2.1.2. Article XVIII of the GATT

Article XVIII of the GATT titled "Governmental Assistance to Economic Development" authorizes LDCs and developing countries to implement several exceptional trade measures in order to build or strengthen their internal industries.

These measures are based on the idea that it would be more difficult for these countries *"having limited resources at their disposal and depending on primary production to rely exclusively on measures consistent with the General Agreement in order to solve the transitional problems which may arise from the implementation of programmes of economic development"*[46].

Towards that purpose, paragraph 3 of the abovementioned article mandates that States that can only support a low standard of living, and that are at early stages of development;

[43] See section 3.2.2.
[44] *"to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules."*. Decision on Implementation-Related Issues and Concerns. Article 12, para. (iii).
[45] Decision on Implementation-Related Issues and Concerns. 4th Ministerial Conference. November, 2001.
[46] *Report of the Review Working Party on Quantitative Restrictions*. L/332/Add. 1. (1955).

"should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development"*[47]

This provision aims to promote the economic development of LDCs and developing countries, by authorizing them to implement measures that restrict imports, in order to protect their infant industries and for balance-of payment purposes. These provisions, following the six-fold typology developed by the Secretariat, primarily provide flexibility of commitments, of action, and use of policy instruments to the States that meet the criteria set out before[48].

However, those measures aimed at promoting import substitution as a means of creating an economy that is *"sufficiently flexible, diversified, and responsive that it can weather shocks, can respond to and indeed create opportunities for growth, and can, on its own, generate continually increasing welfare for its people"*[49], have been widely criticized and replaced by free-trade solutions. A free competition-oriented policy has been the general rule in present times, explaining why it is *"not surprising that even developing countries themselves have shown little interest in negotiating a possible revival of Article XVIII throughout the Doha negotiation round. The hidden truth is that no S&DT*

[47] General Agreement on Tariffs and Trade. Article XVIII. April 14, 1994.
[48] Committee on Trade and Development. *Special and Differential Treatment Provisions in WTO Agreements and Decisions.* World Trade Organization. Note By Secretariat. WT/COMTD/W/196. June 14, 2013.
[49] Henry Bruton. *Import Substitution.* Handbook of Development Economics, Volume II. Elseviere Science Publishers B.V. 1989. At. 1602-1603.

provision in the WTO legal system can slow down a preferred transition from import-substituting to import liberalizing policies of its constituting Members"[50]. Article XVIII, although still applicable, pursues a trade policy that is no longer the main concern of developing countries, as it focuses on protecting an internal market rather than promoting the participation of these countries within the international trading system.

2.1.3. Part IV of the GATT

After the UNCTAD was held in Geneva in 1964, Part IV was added to the General Agreement, to ease the growing concern of LDCs and developing countries regarding their participation in international trade. Within it, several objectives and principles were traced in favor of these countries, such as increased access to the international market, non-reciprocity of the benefits received and diversification to avoid dependence on primary products[51].

Part IV of the GATT entered into force on June 27, 1966 and contains three articles: the first includes all the principles and objectives set by the Member States to promote trade and development; the second lays down the commitments agreed upon to achieve them; and the third, calls for joint action between the Parties to further on these objectives.[52] More thoroughly explained, the structure of Part IV of the GATT is as follows:

[50] Juan He. *The WTO and Infant Industry Promotion in Developing Countries: Perspectives on the Chinese Large Civil Aircraft Industry.* P. 98. Ed. Routledge. (2014).
[51] General Agreement on Tariffs and Trade. Article XXXVI. April 14, 1994.
[52] Second Special Session. Summary Record of the Fifth Meeting. February 19, 1965.

> *"Part IV comprises three articles: Article XXXVI expresses the principle that development should be an objective of the trade system and includes non-reciprocity as a step toward that goal; Article XXXVII lays out some ways in which developed countries can assist developing countries; and Article XXXVIII provides for "joint action" to deal with development issues. In spite of its symbolic significance, Part IV did not change the legal obligations of either developed or developing countries in the GATT"*[53]

Although Part IV is one of the most extensive and comprehensive regulations regarding S&DT in WTO law, most of its dispositions are declaratory and do not create enforceable obligations. [55]. In fact, as professor J. Linarelli explains, *"Part IV of the GATT is said to be largely unhelpful to poor countries and ineffective since it requires poor nations to renegotiate their commitments themselves: while the requirements for exercising the BOP exception (…) are simply too difficult to fulfill".*[56] Furthermore, Article XXXVII allows countries to excuse themselves from honoring their commitments under that provision, when "compelling reasons" bind them to do so. For these considerations, there is serious doubt about the real positive outcome of these provisions and the effect they've had on the way developed countries shape their own policies[58].

[53] Tim Josling. *Special and Differential Treatment for Developing Countries.* Agricultural Trade Reform and the Doha Development Agenda. World Bank & Palgrave Mcmillan. 2006. At. 63-78.
[55] See section 3.2.2.
[56] John Linarelli. *Research Handbook on Global Justice and International Economic Law*. P. 100. Edward Elgar Publishers. (2013).
[58] Yong-Shik Lee. *Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in the WTO.* Asper Review of International Business and Trade Law. June 2007. At. 6.

2.1.4. The Enabling Clause

In 1971, the Contracting Parties of GATT 1947 adopted two different waivers to grant preferences to LDCs and developing countries. One was an exception from the MFN rule in the form of preferential tariff schemes for developing countries and LDCs, known as the GSP. The other allowed developing countries to enter into global and regional arrangements to reduce or eliminate tariff and non-tariff barriers between themselves[59]. In 1979, the "Enabling Clause", was adopted, as a permanent provision that comprised the two waivers that until this point were merely transitory.

After the Uruguay Round, the Enabling Clause was effectively incorporated into GATT 1994 as a permanent exception to the MFN obligation in favor of LDCs and developing countries[60]. Paragraph 2(a) of that instrument recognized the GSP, according to which a developed country was allowed to grant preferential tariff treatment to the products originating in developing countries and LDCs. The GSP was conceived, since 1971, as a *"system of 'generalized, non-reciprocal and non-discriminatory preferences beneficial to developing countries'"*.[61]

This provision also includes in paragraph 2(c) the waiver set back in 1971, that allows developing countries to enter into regional and global trading arrangements:

[59] Md. R. Islam & Shawkat Alam. *Preferential Trade Agreements and the Scope of GATT Article XXIV, GATS Article V and the Enabling Clause: An Appraisal of GATT/WTO Jurisprudence.* Netherlands International Law Review. Vol 56, 2009. At. 20.
[60] Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries. Paragraph 1. 1979.
[61] Michael Mckenzie. *Case Note: European Communities- Conditions for the Granting of Tariff Preferences to Developing Countries.* Melbourne Journal of International Law. Vol. 6, May 2005. At 4.

"The wording used in 2(c) of the Enabling Clause also seems to enable developing countries and least developed countries to enter into PTAs without eliminating internal trade barriers entirely, and without substantially covering all sectors of trade unlike the stricter 'substantially all trade' stipulation of the GATT Article XXIV. Moreover, this clause uses more general language to refer to PTAs (i.e., regional and global arrangements) than Article XXIV' specific reference to CUs, FTAs or interim agreements leading to CUs or FTAs."[62]

This waiver is exclusively designed for developing countries and LDCs and as such, no developed country can benefit from such arrangements under the conditions of the Enabling Clause. Furthermore, that same paragraph is the basis for the Global System of Trade Preferences among Developing Countries (GSTP), that was established in 1988 for the cooperation between the Group of 77[63], to promote the continued development and trade of developing countries[64].

2.1.5. Trade Facilitation Agreement- Section II

The TFA is one of the three agreements reached during the Bali Ministerial Conference, commonly known as the "Bali Package". It is perhaps the greatest achievement of the Bali Ministerial Declaration, as it sets a series of measures, based on the best practices around the world, to expeditiously move goods between countries. Among other

[62] Md. R. Islam & Shawkat Alam. *Preferential Trade Agreements and the Scope of GATT Article XXIV, GATS Article V and the Enabling Clause: An Appraisal of GATT/WTO Jurisprudence.* Netherlands International Law Review. Vol 56, 2009. At. 22.
[63] The G77 is the largest intergovernmental organization of developing countries in the United Nations, established in 1964 after the first session of the UNCTAD, through the "Joint Declaration of the Seventy-Seven Developing Countries".
[64] Agreement on the Global System of Trade and Preferences among Developing Countries. Sub-paragraphs 1 and 2 of the Preamble. April 13, 1988.

objectives, it includes provisions aimed at improving transparency and impartiality, expedite procedures for the release and shipment of goods, freedom of transit, and customs cooperation.

The second part of this agreement contains S&DT provisions to allow developing countries and LDCs to implement the aforementioned measures within their own capacities. Following the mandates of the Decision adopted by the General Council on August 2004, in Annex D[65], this chapter acknowledges the different implementation capacities of the LDCs and developing countries, and thus, creates a mechanism by which each Member structures its own implementation plan, based on its capabilities. The TFA allows LDCs and developing countries to classify the technical provisions of Chapter I into the following three categories:

- Category A: provisions that a Member designates for implementation upon entry into force of the Agreement, or in the case of LDCs, within one year after entry into force.
- Category B: provisions that a Member designates for implementation on a date after a transitional period of time following the entry into force of the Agreement.
- Category C: provisions that a Member designates for implementation on a date after a transitional period of time following the entry into force of the Agreement, and requiring the acquisition of implementation capacity through

[65] Article 2: "*The results of the negotiations shall take fully into account the principle of special and differential treatment for developing and least-developed countries. Members recognize that this principle should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members"*

the provision of assistance and support for capacity building[66].

Category C is of special relevance in the S&DT analysis as it furthers in the mandates of Annex D of the 2004 Decision, by recognizing that it is not sufficient to grant longer implementation periods for these countries, but that it is necessary to provide *"technical assistance and support for capacity building (…) to enable them to fully participate in and benefit from the negotiations."*[67]

For the International Chamber of Commerce, the potential benefits of the implementation of the TFA are enormous, especially for developing countries since it will *"enable them to increase their national competitiveness and consequently their share of international trade"*[69]. According to the World Trade Report released by the WTO on October 26, 2015, these are some of the main potential benefits of the TFA:

- Overall boost to world export growth per annum estimated at up to 2.7 per cent.
- Overall boost to global GDP growth per annum estimated at 0.5 per cent.
- Global merchandise exports estimated to increase by between $750 billion and $1 trillion per annum.
- Developing countries' exports estimated to increase by between $170 billion and $730 billion per annum.

[66] Trade Facilitation Agreement. Article 14. July 15, 2014.
[67] Doha Work Programme, Decision Adopted by the General Council. Article 5, Annex D. August 1, 2004. WT/L/579.
[69] http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/customs-and-trade-facilitation/wto-trade-facilitation-agreement-%28tfa%29/

- Developed economies' exports estimated to increase by between $310 billion and $580 billion per annum.
- Full implementation of the TFA could reduce trade costs of members by an average of 14.5%
- Developing countries could increase the number of new products exported by as much as 20 per cent with LDCs likely to see a much bigger increase of up to 35 per cent. Developing countries are expected to enter an additional 30 per cent more foreign markets and LDCs a further 60 per cent more[70].

Regarding the costs of implementation, Cristophe Bellman brings up a study conducted by the Organization for Economic Co-operation and Development (OECD) to conclude the following:

> *"A recent OECD study (Moïsé, 2013), based on nine developing countries and LDCs, estimates that the costs of putting in place trade facilitation reforms would range from EUR 3.5 million to EUR 19 million in capital expenditure, and less than EUR 2.5 million in annual operating costs. While these figures can represent an important amount for smaller countries, overall they look relatively small in the light of available resources provided by the donor community and the potentially large efficiency gains resulting from the implementation of trade facilitation reforms."*[71]

[70] Press Release. *Full and swift implementation of the WTO Trade Facilitation Agreement can deliver large trade dividends to developing and least-developed countries.* WTO. Press/755. See https://www.wto.org/english/news_e/pres15_e/pr755_e.htm

[71] Christophe Bellman**.** *The Bali Agreement: Implications for Development and the WTO*. International Development Policy | Revue internationale de politique de développement. May, 2014. At. Para. 19.

An overall assessment of the TFA reveals a promising opportunity for the WTO membership, but especially for LDCs and developing countries, to implement the best practices worldwide for the trade in goods, in order to reduce transaction costs, create job opportunities, increase their participation in international trade, and experience future growths in their GDP.

The TFA will enter into force once two-thirds of WTO Members accept the Agreement. To date 53 Member States have ratified it, being Guyana the last of them[72]. Several of the key players within the WTO such as the United States, China and the EC have ratified it, but there's still a long way, considering the fact that the WTO currently has 162 Members.

2.1.6. Bali Monitoring Mechanism

On December 7, 2013 the Ministerial Decision of Bali was adopted, establishing a Monitoring Mechanism for all S&DT provisions contained in the covered agreements and the Ministerial and Council Decisions. Following the mandate of paragraph 44 of the Doha Declaration, this Mechanism is intended *"as a focal point within the WTO to analyze and review the implementation of S&D provisions"*[73]. The system is operated by the Committee on Trade and Development in dedicated sessions at least twice a year, where they review the submissions made by the Members in order to assess problems with the provisions or their implementation[74].

[72] https://www.wto.org/english/news_e/news15_e/fac_30nov15_e.htm
[73] Monitoring Mechanism on Special and Differential Treatment. Ministerial Decision. 9th Ministerial Conference. December 11, 2013.
[74] Ibid., Arts. 4, 9 and 10.

The Mechanism has no real power over the modification and strengthening of the S&DT provisions as it (1) only reviews provisions based on submissions made by the Member States and (2*) "will not alter, or in any manner affect, Members' rights and obligations under WTO Agreements, Ministerial or General Council Decisions, or interpret their legal nature."*[75]. In fact, the Monitoring Mechanism can only issue non-binding recommendations to the relevant bodies of the WTO and these recommendations don´t even have to be reviewed by these bodies, as the text of the Decision leaves it entirely to their discretion[76].

Furthermore, the WTO already envisaged a system for the purpose of reviewing the implementation of S&DT provisions, through the Committee on Trade and Development mandate. In fact, the South Centre, in a study conducted in 2013, concluded that this process of review was better than the Monitoring Mechanism, as it reviewed provisions periodically " '*in consultation as appropriate with the relevant bodies of the WTO' and report to the General Council. (…) In contrast, no negotiations are envisaged in the MM. It can only 'make recommendations' to other bodies to look into S&D provision- to improve its implementation or to initiate negotiations to improve it*"[77].

It is no surprise that in an assessment of the Bali Outcomes in July 2015, the Chairman stated that "*three meetings of the Dedicated Session have been held since Bali. However, no written submissions from the Members have yet been received."*[78]. This,

[75] Ibid., Art. 5.
[76] Ibid., Arts. 7 and 8.
[77] *WTO's MC9: Analysis of the Text on the Monitoring Mechanism*. South Centre. November 2013. P. 4.
[78] Statement by the Chairman. *Agenda Item 4: Implementation of the Bali Outcomes*. JOB/GC/82. July 29, 2015.

despite the known fact that there is a great number of issues regarding S&DT to be discussed and resolved in the WTO.

2.2. CASE LAW:

As the implementation of S&DT provisions of the GATT and the Enabling Clause among WTO Members has been limited[80], few disputes regarding this issue have been resolved[81]. Nonetheless, this chapter recounts GATT and WTO reports that have referred to this subject, as follows:

2.2.1. GATT CASE LAW

In very few disputes under GATT 1947, the complainant parties invoked the violation of S&DT provisions under this Agreement, by measures adopted by other Member States[82]. Furthermore, none of the panels resolving those disputes made an extensive analysis of the meaning and content of Articles XVIII, XXXVI, XXXVII, and XXXVIII of the GATT, nor of the Enabling Clause. However, the following section aims to describe and further analyze any reference to those provisions under GATT case law.

EC- Export Subsidies on Sugar:

[80] Akiko Yanai. *Rethinking Special and Differential Treatment in the WTO.* IDE Discussion Paper No. 435. Institute of Developing Economies. December 2013. At. 6.
[81] WTO Analyitical Index. GATT 1994. For more information visit https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_06_e.htm#fnt1056
[82] See GATT, Report of the Panel. EC- Refunds on Sugar ((November 10,1980); GATT, Report of the Panel. EEC- Apples (Chile I). (November 10,1980); GATT, Report of the Panel. EEC- Dessert Apples. para 2.11 (June 22, 1989).

This dispute started with Brazil's request for the conformation of a panel on the 10th of November, 1978. It claimed that the sharp increase in the European Communities' (EC) exports on refined sugar had been possible by the use of substantial subsidies, which had exceeded the prices of this product in the international market[83]. In doing so, the EC had gained a more than equitable share of the market by harming the interests of other Members that exported sugar. For that reason, Brazil argued that with the implementation of those subsidies, the EC had violated Articles XVI.3 and XVI.1 of the GATT. Moreover, Brazil claimed that that the EC had contravened the objectives of the General Agreement under Part IV, in terms of Article XIII.

On the other hand, the EC contended that "*the provisions of Article XXXVI constituted principles and objectives and could not be understood to establish precise, specific obligations. It was therefore not possible by definition to ascertain that these principles had been infringed through the application of any specific measure.*"[84]. The same assessment was made for Article XXXVIII of Part IV of the GATT.

As follows, the Panel analyzed the content of Articles XXXVI and XXXVIII, and its applicability to the case at matter, in the following terms:

> *"The Panel noted the principles and objectives stipulated in Article XXXVI and the guidelines for joint action given in Article XXXVIII to further the objectives set forth in Article XXXVI, and that Brazil being a developing country could expect to enjoy benefits in accordance with these provisions. In this connection, the Panel also noted that the European Communities has made considerable*

[83] GATT, Report of the Panel. EC- Refunds on Sugar. Para 2.1. (November 10,1980).
[84] Ibid. Para 2.28.

exports in favour of a number of developing countries and had pursued an active and constructive policy towards the setting-up of international agreements."[85].

Consequently, it determined that the EC had made efforts to comply with the provisions of Part IV, regardless of the fact that the use of subsidies reduced the developing countries' participation in the sugar market. For this reason, even though in the particular situation the EC had not collaborated to further the principles and objectives set forth in Article XXXVI, the Panel could not conclude that the subsidies were in breach of this provision[86].

European Economic Community- Restriction on Imports of Apples from Chile Dispute:

In this case, Chile requested the GATT Council for the establishment of a panel on July 25, 1979, for it to find that the restrictive licensing applied to imports of apples from Chile by the European Economic Communities (EEC), was in breach of several GATT provisions, including Part IV of this Agreement [88].

With respect to Part IV of the General Agreement, Chile stated that the measures at issue did not comply with its objectives, principles and commitments, as the EEC did not grant possibilities for constructive remedies, nor avoiding discriminatory actions against Chile, as a LDC. Moreover, it considered that Part IV of the GATT "*constituted*

[85] Ibid. Para 4.30.
[86] Ibid. Para V(h).
[88] GATT, Report of the Panel. EEC- Apples (Chile I). Para 3.9 (November 10,1980)

legal obligations contracting parties had accepted"[89]. However, the EEC made no reference to the nature of those provisions, but rather argued that "*it had done all it reasonably have done to avoid suspending imports from Chile in 1979.*"[90].

The Panel´s analysis of this particular allegation was very limited. It concluded that the import restrictions at issue were not in breach of the EEC's obligations under Part IV, but made no reference to Chile´s statement that part IV of the GATT contained legal obligations for Member States[92].

2.2.2. European Economic Community- Restriction on Imports of Dessert Apples

On February 3rd, 1988 the EEC introduced a system of surveillance through import licensing of apple imports from outside the community that was suspended for apples originating in Chile[93]. Thus, Chile requested for the establishment of a panel, as it complained that the measures at issue constituted a violation of Article XI of the GATT, and that, in any case, it could not be justified under article XI.2 c(i) or (ii). Furthermore, that the measure was inconsistent with several Articles of the GATT, including part IV.

Chile argued that with the restricting measure on the import of apples from Chile, the EEC had ignored its commitments of Part IV of the GATT. However, the complainant only referred to the factual aspects of the case, but made no analysis of the legal basis of those provisions. The same did the EEC, by submitting that it did take seriously the

[89] Ibid. Para 3.29.
[90] Ibid. Para. 3.36.
[92] Ibid. Para 4.22
93 GATT, Report of the Panel. EEC- Dessert Apples. Para 2.11. (June 22, 1989)

commitments set forth under Part IV of the GATT, making an effort to take restrictive measures against any developing country[94].

Again, the Panel did not examine the meaning and extent of Part IV of the aforementioned agreement. It only concluded that the EEC´s import measure on dessert apples did affect a product of particular export interest of a less-developed Member, as it saw no efforts from the EEC to avoid taking protective measures on apples originating from Chile[95].

From the lecture of these GATT reports, it can be concluded that the Enabling Clause was not invoked under GATT 1947, nor analyzed by any Panel. Also, that the doubt regarding the enforceability of S&DT provisions of the GATT has been present since the beginning of the multilateral trading system, and remains unresolved, given that neither the Panels under GATT 1947 nor the adjudicating bodies under the WTO addressed this concern.

2.2.3. India- Quantitive Restrictions Dispute:

On October 6, 1997 the United States requested for a panel to examine the consistency of India´s balance-of-payments restrictions, regarding quantitative limitations on the importation of a number of agricultural, textile, and industrial products. As such, the United States claimed that India´s measures were in breach of its obligations under Articles XI.1 and XIII.11 of the GATT, and Article 4.2 of the Agreement on Agriculture. Consequently, India invoked the balance-of-payments justification under

[94] Ibid. Para 8.5.
[95] Ibid. Para 12.31.

Article XVIII.B of the GATT, and notified the quantitative restrictions to the Committee on Balance-of-Payments Restrictions (the BOP Committee)[96].

The Panel first determined that the measures at issue were quantitative restrictions within the meaning of Article XI.1[97]. Afterwards, it examined the United State´s claim of violation of Article XVIII.11, and India´s defense under Article XVIII.B of the GATT. With regard to the defendant party´s arguments, the Panel analyzed the concept of S&DT in relation to Article XVIII.B of the GATT. By explaining the function of Article XVIII.B within the GATT framework, the Panel concluded:

> *" It is clear from these provisions that Article XVIII, which allows developing countries to maintain, under certain conditions, temporary import restrictions for balance-of-payments purposes, is premised on the assumption that it "may be necessary" for them to adopt such measures in order to implement economic development programmes. It allows them to "deviate temporarily from the provisions of the other Articles" of GATT 1994, as provided for in, inter alia, Section B.* ***These provisions reflect an acknowledgement of the specific needs of developing countries in relation to measures taken for balance-of-payments purposes. Article XVIII:B of GATT 1994 thus embodies the special and differential treatment foreseen for developing countries with regard to such measures****.*[98].

[96] WTO, Panel Report. India- Quantitive Restrictions. Para. 2.1-2.7. (April 6,199).
[97] Ibid, para 5.142
[98] Ibid, para 5.155.

Regardless of its explanation of Article XVIII as having the nature of an affirmative defense, the Panel found that the measures at hand violated Articles XI.1 and XVIII of the GATT. Also, that they were not justified under Article XVIII.B. Furthermore, that they were inconsistent with Article 4.2 of the Agreement on Agriculture. Nevertheless, within its suggestions for implementation of its decision, the Panel recalled that the Preamble of the WTO Agreement recognizes the "*need for positive efforts designed to ensure that developing countries secure a share in international trade commensurate with the needs of their economic development*"[99]. Hence, it recalls that the WTO rules aim for trade liberalization, but "*recognize the need for specific exceptions from the general rules to address special concerns, including those of developing countries*"[100].

Subsequently, India appealed the decision, but the Appellate Body upheld the Panel´s findings[101]. India argued that the Panel had no jurisdiction to examine Member´s justifications of BOP restrictions, according to footnote 1 to the Understanding of Balance-of-Payments provision of the GATT. The Appellate Body countered that the provision invoked by India for its defense, evidenced that the dispute settlement procedures under Article XXIII are available for disputes relating to any matters concerning BOP restrictions. As such, in light of footnote 1 to the BOP understanding, a panel may question the justification of any restriction[102].

From the Panel and Appellate Body´s findings on this case, it can be concluded that Art. XVIII is recognized as an important expression of the principle of S&DT in the GATT, as it enables developing countries to take trade restrictions for balance-of-payments

[99] Ibid, para 7.424.
[100] Ibid.
[101] WTO, Appellate Body Report. India-Quantitive Restrictions, (August 6, 1999). Para 153.
[102] Ibid., para. 94-95

purposes. But also, that the restrictions taken under that provision must be adopted within the specific conditions set forth in the same Agreement, which means that LDCs and developing countries must not abuse of the restrictions implementation, as any abuse may result in breach of other provisions of the GATT or other WTO Agreements.

2.2.4. EC- Tariff Preferences Dispute:

In this dispute, India petitioned the establishment of a Panel, for it to find that the EC's GSP scheme for developing countries and economies in transition, and particularly the Drug Agreements set out in Article 10[103], were inconsistent with Article I.1 of the GATT (MFN obligation) and could not be justified under paragraph 2(a) of the Enabling Clause[104]. However, the EC disagreed that the Enabling Clause constitutes an exception, but rather a positive rule setting out obligations[105].

The Panel concluded that "*the legal function of the Enabling Clause is to allow WTO Members to derogate from Article I:1 so as to enable developed countries, inter alia, to provide GSP to developing countries*"[106]. Also, that India had demonstrated that the measure at issue was WTO inconsistent, as the tariff advantages were accorded only to the products originating in the beneficiary countries, and not to the like products originating in all other Members, including the ones produced in India. Moreover, that

[103] The countries benefiting from the Drug Agreements were Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela. For further information consult Biswajit Dhar and Abhik Majumdar. *The India-EC Dispute: The Issues and Process.* International Centre for Trade and Sustainable Development. (2006).
[104] Request for the Establishment of a Panel: India. December 9, 2002. WT/DS246/4.
[105] WTO, Panel Report. EC-Tariff Preferences. Para. 7.32. (December 1, 2003)
[106] Ibid., Para 7.38.

the EC had failed to demonstrate that the Drug Arrangements were justified under the Enabling Clause[107].

Consequently, the European Union appealed the decision, by arguing that the Enabling clause was not an "exception" to Article I.1 of the GATT. In fact, the appellant sustained that *"the fact that developed countries are not legally obliged to implement schemes pursuant to the Generalized System of Preferences ("GSP") does not mean that the Enabling Clause does not impose positive obligations, (…)"*[108]. Thus, it argued that by not being an affirmative defense, the burden to prove the justification of the measure did not rest upon the defendant party [109].

The Appellate Body studied the EC´s claim (1) by determining the relationship between the MFN obligation and the Enabling Clause; (2) in setting the allocation of the burden of proof regarding the aforementioned relation; and (3) by analyzing whether the Drug Arrangements were justified or not under the Enabling Clause.

As to the first issue, the Appellate Body upheld the Panel´s finding that the Enabling Clause is an exception of the GATT 1994. In doing so, it made an interpretation of paragraph 1 of this S&DT provision, as follows:

> *"By using the word "notwithstanding", paragraph 1 of the Enabling Clause permits Members to provide "differential and more favourable treatment" to developing countries "in spite of" the MFN obligation of Article I:1. Such*

[107] Ibid., Para 8.1.
[108] WTO, Appellate Body Report. EC- Tariff Preferences. Para.9. (April 7, 2004)
[109] Ibid, Para 10.

treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO "immediately and unconditionally".195 ***Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an "exception" to Article I:1."*** [110]

Accordingly, it determined that the Enabling Clause is among the positive efforts named by the Preamble of the WTO Agreement to be taken by developed Members of the WTO, to enhance the economic development of LDCs and developing countries[111].

Regarding the burden of proof, the Appellate Body concluded that although the defendant party has the task of justifying that the challenged measure falls within the Enabling Clause, the complainant party is required to do more than simply claim inconsistency with Article I.1, as it must define the parameters within which the responding party must make its defense [112]. In other words, the complaining party should define which specific provisions of paragraph b of the Enabling Clause were violated by the challenged preference scheme at issue.

The Appellate Body modified the Panel's finding that the EC bore the burden of invoking the Enabling Clause and justifying its Drug Arrangements under that provision. It determined that it was India´s task to raise the Enabling Clause in making

[110] Ibid para. 90.
[111] Ibid., para. 92.
[112] Ibid., para. 114.

its claim of inconsistency, and consequently, that the EC had the burden to prove that its measure satisfied the conditions of the Enabling Clause, in order to justify the Drug Arrangements under that Clause[113].

Furthermore, the Appellate Body analyzed the text and content of footnote 3 to paragraph 2(2) of the Enabling Clause, as well as paragraph 7, and the object and purpose of the WTO Agreement and the Enabling Clause. It concluded that the main purpose of S&DT contained within the Enabling Clause, is to foster economic development of developing countries[114]. Thus, the Enabling Clause allows Members to grant different tariff preferences to different GSP beneficiaries only for the purposes of *a priori* limitations and preferential treatment in favor of LDCs[115]. In that issue, the Appellate Body stated the following:

> *"In the absence of paragraph 2(d), a Member granting preferential tariff treatment only to least-developed countries would therefore need to establish, under paragraph 2(a), that this preferential treatment did not "discriminate" against other developing countries contrary to footnote 3.* ***The inclusion of paragraph 2(d), however, makes clear that developed countries may accord preferential treatment to least-developed countries distinct from the preferences granted to other developing countries under paragraph 2(a). Thus, pursuant to paragraph 2(d), preference-granting countries need not establish that differentiating between developing and least-developed countries***

[113] Ibid., para. 125.
[114] Ibid., para 160
[115] Ibid., para 175

is "non-discriminatory."[116]

Finally, the Appellate Body maintained the Panel´s decision that in the case at issue, the EC failed to demonstrate that the Drug Agreements were justified under paragraph 2(a) of the Enabling Clause.

This is the only case in which the Appellate Body has performed a profound analysis of the Enabling Clause. From its analysis, it can be concluded that: 1) The Enabling Clause exempts WTO developed members from complying with the MFN obligation for the purpose of providing S&DT, as such treatment is not extended to all Members of the WTO immediately and unconditionally; 2) As to the allocation of the burden of proof of the Enabling Clause, the Appellate Body ruled that both parties share an active roll. Thus, a defendant party must assert the affirmative of the justification of a challenged measure, but only according to the complainant´s specific allegations within the Enabling Clause.

Finally, after completing the assessment of the multilateral trading system's case law regarding the S&DT provisions studied on this paper, there is no doubt that due to the lack of reports on this matter, the interpretation of Article XVIII and Part IV of the GATT, and also of the Enabling Clause, is extremely limited. Thus, the lack of certainty regarding the extent of S&DT under the abovementioned articles hinders the creation of legitimate expectations by the Member States on this subject.

[116] Ibid.,para 172.

3. OVERALL BALANCE OF THE S&DT IN TRADE IN GOODS.

The following chapter, based on the previous assessment of WTO Law and case law, identifies the main benefits and flaws of S&DT, specifically regarding the international trade of goods. Moreover, the chapter analyzes the future of S&DT, in light of the Doha Development Agenda, the Bali Package and the Nairobi Ministerial Conference.

3.1. BENEFITS

S&DT has been in the forefront of criticism for many decades now. From mixed results in the implementation of its provisions, to stagnated negotiations and non-operant clauses, several arguments have been made in favor of trade liberalization and against non-reciprocity and other differential treatments provided to LDCs and developing countries. However, the reason for which S&DT is still an important part of the multilateral trading system is that it does provide several tools for LDCs and developing countries to increase their participation in the international trade market and enhance their development. The following are some of the beneficial aspects that can be found within the S&DT framework, even if many of them have had mixed results in its application or have failed to attain part of its objectives.

3.1.1. Longer periods of time for the implementation of agreements and commitments.

As it was established before, there is a 6-type classification for S&DT provisions under WTO Law. One of these categories relates to provisions that recognize longer

transitional time periods for the implementation of agreements and commitments by LDCs and developing countries.

Whilst most of the S&DT treatment provisions have been considered "best endeavor" provisions, given the fact that their implementation depends on the will of developed countries, these longer time frames for the implementation of the Agreements are tangible concessions[117]. The clauses at issue recognize the inferior capacity of LDCs and developing countries in the implementation of certain obligations, given their lower level of development, their inferior resources, technical expertise and infrastructure, among other elements. Their purpose is to allow these countries to comply with their newly acquired obligations in a time frame that adjusts to their capabilities and to facilitate their full participation in the multilateral trading system.

However, these provisions are not devoid of criticism. As professor Richard Bernal explains: "*The weakness of the current provisions which allow longer implementation periods is that they are not related to any measure of implementation capacity, the cost of implementation or any evaluation of if and when implementation has been accomplished or to what extent further work is required and how long a period would be needed.*[118]. The reality of most agreements is that the implementation period is set for all developing countries, regardless of the particular conditions of each them, when in reality countries like Singapore and Colombia have very different capacities for the implementation of these agreements.

[117] Xin Zhang. *Implementation of the WTO Agreements: Framework and Reform.* Northwestern Journal of International Law & Business. Vol. 23, 2003. At. 388.
[118] Richard L. Bernal. *WTO at the Margins. Small States and the Multilateral Trading System. P. 341.* Cambridge University Press. (2012).

The TFA provides a more realistic approach to this matter. As it was exposed in section 2.1.5 of this paper, this agreement envisages the possibility for developing countries to classify the provisions into three (3) different categories. Category A refers to provisions that will be implemented immediately, at the time the Agreement enters into force, or within a year for LDCs. Category B is for those provisions that will be adopted after a transitional time period. Finally, Category C refers to provisions that, after a transitional period, will be implemented, but that require the technical assistance and support of other Member States and the WTO. This allows them not only to decide the specific time-frame that they will require to implement each of these provisions, but also to select those in which technical assistance from the international community will be required. With this shift in the conception of the provisions that allow longer transitional periods, it will be possible to correct the mistakes made in the past that have made it very difficult for developing countries to implement the provisions of the different agreements.

3.1.2. Generalized System of Preferences (GSP) and the Global System of Trade Preferences (GSTP).

Since its introduction in 1971, the GSP has been a cornerstone provision regarding S&DT, despite its shortcomings and criticism. According to UNCTAD, as of 2015, approximately 200 countries and territories compose the list of beneficiaries from the GSP schemes worldwide[119]. Several developed countries have established since the 70s GSP schemes, including Australia, Canada, the EU, Japan, New Zealand and the United

[119] *Generalized System of Preferences: List of Beneficiaries.* UNCTAD. 2015. UNCTAD/ITCD/TSB/Misc.62/Rev.6

States[120]. This scheme was envisioned as a *"generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries"*[121] to increase the export earnings of these countries, promote their industrialization, and accelerate their rates of economic growth[122].

Although the results have varied depending on the different measurement methods, ranging from no increase in exports in the GSP-eligible products to a 60% increase, most studies have found an increase of about 20% regarding eligible products[123]. As it was conceived, the GSP does provide LDCs and developing countries with beneficial aspects, but in its implementation it has proven insufficient to accomplish its objectives.

One of the main concerns regarding the GSP scheme is that

> *"(…)a country or specific products can be excluded (ex ante) or graduated (ex post) from GSP coverage, which might be relevant for goods in which GSP receiving countries have a comparative advantage, and are thus sensitive to the donor countries import industry7 .For instance, Panagariya (2003) and Grossman and Sykes (2005) point out that textiles and apparel as well as selected agricultural goods are completely excluded from GSP schemes of the European Union and the US."*[124]

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[120] Ibid.
[121] UNCTAD II Conference. *Resolution 21(ii).* New Delhi.1968.
[122] Ibid.
[123] Kevin C. Kennedy. *The Generalized System of Preferences After Four Decades: Conditionality and the Shrinking Margin of Preferences.* Michigan State International Law Review. Vol 20:3. September 26, 2011. At. 521.
[124] Bernhard Herz & Marco Wagner. *The Dark Side of the Generalized System of Preferences.* Working Paper. P. 4. German Council of Economic Experts. (2010).

Several other criticisms have been made to the system, including the strict requirements of rules of origin, the declining preference margin, and the possibility for unilateral termination by the donor countries[125]. This has led to the proliferation of regional agreements or tariff schemes such as the ATPA, the Lomé Convention, and the CBERA. But regardless of the many flaws of the system, it is still a very relevant part of the WTO and it does provide developing countries with preferential treatment in tariffs.

The other relevant issue regarding tariff preferences is the GSTP, aimed to *"promote and sustain mutual trade, and the development of economic co-operation among developing countries, through exchange of concessions"*[126]. This Agreement, promoted by the G77, currently benefits more than 40 countries worldwide that, based on a system of mutuality, grant each other preferences in tariffs, para-tariffs, non-tariff measures, direct trade measures and sectoral agreements[127]. Examples of this are the 31 products to which India granted tariff concessions in 2010 and the more than 40 concessions on products that the MERCOSUR countries granted[128]. Despite the fact that there is a higher expectance with regard to the number of concessions and products covered by the GSTP, this system can become an important tool for developing countries to aid each other and promote their growth and development.

3.1.3. Technical Assistance.

[125] Ibid., pp. 3-6.
[126] Agreement of the Global System of Trade Preferences Among Developing Countries. Article 2. April 13th 1988.
[127] Ibid., Arts. 3-4.
[128] *GTSP*: *Schedule of the Southern Common Market*. MERCOSUR. 2010. http://www.unctadxi.org/Secured/GSTP/Concessions/mercosur_en.pdf

Spread through the different WTO Agreements, the technical assistance provisions are envisaged as S&DT tools to improve the human and institutional capacity of LDCs and developing countries. These provisions are mostly included in those agreements that, given their technical characteristics or difficulty in implementation (TBT, SPS, GATS, Customs Valuation), present themselves as greater challenges to LDCs and developing countries.

The technical assistance for capacity building is either afforded directly by the WTO Members or through the WTO Secretariat. As Thomas Fritz explains,

> *"Technical assistance by the WTO consists mainly of workshops and seminars offered either globally or for specific regional groups of countries. According to its Secretariat, in 2003 the WTO conducted 450 training and assistance measures while there was demand for 1000 such programmes. The measures offered encompass national courses in trade policy, seminars on individual WTO agreements, scientific workshops and, interestingly enough, missions to review national trade policy (WTO 2004)."*[129]

There was a major shift in favor of technical assistance after the Doha Round in 2001, with the creation of the Doha Development Agenda Global Trust Fund, to secure funds for the annual Technical Assistance plans. From 2001 to 2005, 71 million Swiss Francs had been provided to the trust fund, with an additional 24 million Swiss Francs

[129] Thomas Fritz. *Special and Differential Treatment for Developing Countries.* P. 26. The Heinrich Boll Foundation. Global Issue Papers. (2005).

contributed by the WTO regular budget[130]. According to the Institute for Training and Technical Cooperation, the WTO has provided assistance to *"enhance institutional and human capacity in the field of trade; address trade policy issues; integrate more fully into the multilateral trading system; exercise the rights of WTO membership; and fully participate in multilateral trade negotiations"* [131]. The program is mostly focused on the training of government officials from developing countries, LDCs and acceding countries, in a variety of WTO-related subjects. The number of participants has increased significantly over the last 20 years, from less than 2000 in 1985 to over 14700 in 2014[132].

But despite its benefits, technical assistance has also been under scrutiny and criticism for the way it operates in practice. The first major flaw of technical cooperation in general, acknowledged by the United Nations Development Program, is the asymmetrical relationship between the donors and the beneficiaries. Assistance becomes a tool for developed nations to exert power and domination over less developed economies rather than to build partnerships[133]. As Gregory Shaffer recognizes,

> *"capacity-building programs can be controversial. Who defines the purpose of technical assistance and capacity-building, and who oversees how funding is used, can shape programs toward different ends. In this sense, technical*

[130]Gregory Shaffer. *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?*. Wisconsin International Law Journal. March 2, 2006. At. 643.
[131] https://www.wto.org/english/tratop_e/devel_e/teccop_e/ittc_e.htm
[132] *Improving Understanding of the WTO Trading System: Training and Technical Assistance.*. World Trade Organization. See at: https://www.wto.org/english/thewto_e/20y_e/ta_brochure2015_e.pdf
[133] Sakiko Fukuda-Parr ET AL. *Capacity for Development: New Solutions to Old Problems.* P. 10. UNDP. Earthscan Publications Ltd. (2002).

assistance is never neutral. Technical assistance programs can be relatively donor-driven to serve donor-defined interests, or they can be relatively demand-driven to serve interests defined within the recipient countries."[134]

Hence, technical assistance has become a mechanism for developed countries to achieve their own personal objectives, instead of bearing in mind the true purpose of helping developing countries to implement the agreements, and actively participate in the WTO system. In fact, another problem that has been identified regarding this mechanism of assistance, is that it is often granted only after the beneficiaries make concessions in other WTO-related issues[135]. In other occasions they are given to avoid granting other concessions in more controversial issues under the argument that these countries are already receiving benefits.

Other flaws have been identified in this system, such as the narrow scope of issues, mostly for implementation, for which the resources are used, or the fact that there is no analysis about the real conditions and needs of each beneficiary country, as they are simply grouped in LDCs and developing countries[136]. But despite its imperfections, technical assistance contributes to the commendable objective of supporting these countries' attempt to fully implement the WTO Agreements and actively participate within the multilateral trading system.

[134] Gregory Shaffer. *Can WTO Technical Assistance and Capacity-Building Serve Developing Countries?* Wisconsin International Law Journal. March 2, 2006. At. 643.
[135] Thomas Fritz. *Special and Differential Treatment for Developing Countries.* P. 25. The Heinrich Boll Foundation. Global Issue Papers. (2005).
[136] Ibid.

The true benefits of S&DT have been put in question in several occasions; just as trade liberalization itself and the multilateral trading system have been under the spotlight for their shortcomings and setbacks. But in reality, there is a solid foundation within the WTO legal framework to provide these countries with the proper tools to participate actively in international trade, develop properly, and increase their participation in the multilateral trading system.

3.2. FLAWS

3.2.1. Definition of the term "developing": a matter of self-declaration.

None of the provisions that have been analyzed in the light of S&DT, define what "developing" countries mean, as the developing status under the WTO system has been grounded on the principle of self-declaration[137]. As such, Members of the WTO decide for themselves, whether they should be considered "developed" or "developing" amongst the international trade community [138]. This means that members with real possibilities to participate in international trade in normal conditions enjoy the preferential conditions of S&DT, as free riders, and benefit from a differential treatment that grants them competitive advantages[139].

[137] Akiko Yanai. *Rethinking Special and Differential Treatment in the WTO.* IDE Discussion Paper No. 435. Institute of Developing Economies. December 2013. At. 9.
[138] *WTO, Who are the developing countries in the WTO?* (last visited November 10,2015) *available at* www.wto.org/english/tratop-e/dlwho-e.htm;
[139] Edwini Kessie. *Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements*. The Journal of World Intellectual Property. Vol. 3. November, 2000. At. 959.

According to Anne Marie Brennan, the current S&DT mechanism only serves to cultivate inequality among WTO members, as it encourages protectionism, which consequently delays participation of developing countries in the international trading system[140]. In light of the above, the author states that the non-definition of the term "developing country", as a flaw of S&DT under the WTO, should be analyzed under the human rights equality principle[141]. That means that in the light of substantive equality, the creation of mechanisms that attempt to defeat economic disparity among WTO members will remain ineffective until a clear differentiation among countries is reached.

For instance, differentiation among groups of countries must be created objectively and reasonably. For Brennan, *"the standard which has been invoked under international trade law, that the WTO member in question must be developing, does not identify the group in question properly nor depict the trade associated inequality which grounds the provision"*[143]. Hence, the self-determination of the developing status opens the door for S&DT to be manipulated or even abused. Brennan proposes that the concept must be limited by the human right ideal that S&DT will only be legitimate for those cases in which the objectives of equality for which is was designed, have not been achieved. [144].

The demands to resolve the problem of self-determination, emerged with the inception of the Doha Development Agenda, as developed countries increasingly refused to grant the same concessions to all developing WTO Members, regardless of their economic

[140] Anna Marie Brennan. *The Special and Differential Treatment Mechanism and the WTO: Cultivating Trade Inequality for Developing Countries?.* Trinity College Law Review. 2011. At. 53
[141] Ibid., p. 154
[143] Ibid., p. 154.
[144] Ibid., p.155

size, especially as the system lacks objective criteria to determine their special condition. According to Professor Yanai:

> *"The landscape of the global economy is changing with the growth of developing countries. Emerging economies are becoming a stronger economic presence, and African countries have been increasing their voice by forming interest groups. At multilateral trade negotiations, consensus cannot be formed anymore without the agreement of developing countries. Especially where there are large differences of position concerning issues between developed and developing countries, collision of these two sides has become intense. The S&D negotiation is one such complicated issue".* [145]

Following this situation, while developing countries promoted a new approach of S&DT, developed Member States demanded the creation of a criterion for country classification[146]. As Jean-Marie Paugam states, *"they claimed that "one size" of WTO rules "does not fit all" the diverse developing economies* "[147]. On the other hand, developing countries rejected the proposal for differentiation. This situation is still persistent among WTO Members: developed countries still argue that more generous S&DT will only be granted if developing countries agree to the establishment of a new graduation system between them[148].

[145] Akiko Yanai. *Rethinking Special and Differential Treatment in the WTO.* IDE Discussion Paper No. 435. Institute of Developing Economies. December 2013. At. 5.
[146] Bernard Hoekman. *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment.* Journal of International Economic Law. 2005. At. 410.
[147] Jean-Marie Paugam & Anne-Sophie Novel. *Why and How Differentiate Developing Countries in the WTO?* Institut Français des relations internationales. September, 2005. At. 2.
[148] *Special and Differential Treatment (SDT) for Developing Countries.* Trinity College Dublin. Available at: https://www.tcd.ie/iiis/policycoherence/wto-agricultural-trade-rules/special-differential-treatment-developing-countries.php

Moreover, regrouping WTO members in a larger number of sub-groups, is not an easy task; not only because of the LDCs' and developing countries' resistance to do so, but also because there is no homogeneous criteria that makes them eligible for S&DT across all WTO agreements[149]. Moreover, even if the criteria existed, the decision would be subject to discretionary decision making by all members [150].

3.2.2. S&DT provisions in the trade of goods as "best endevour"

Since the beginning of the Doha Round, LDCs and developing countries arrived to the conclusion that under the WTO system, S&DT provisions had not been implemented, and that no remedies were conceived against countries that fail to comply with them[151]. Furthermore, they were concerned about the legal enforceability of S&DT provisions, which, as an integral part of the WTO Agreements, should not be reduced to voluntary clauses for developed Members[152]. For instance, by failing to make these provisions binding, developing countries' participation in the multilateral trading system is not as active as they expect it to be[153].

Consequently, in the Doha Declaration, the Members agreed that in order to strengthen the S&DT provisions and make them more effective, the Committee on Trade and Development should identify which of the S&DT provisions were legally enforceable,

[149] Alexander Keck & Patrick Low. Special and differential treatment in the wto: why when and how. P. 26. Economic Research and Statistics Division, WTO. (2004).
[150] Ibid.
[151] Ambassador D. Baichoo of the Republic of Mauritius. *Seminar on Special and Differential Treatment for Developing Countries.* Geneva. (March 7, 2000). Available at: https://www.wto.org/english/tratop_e/devel_e/sem01_e/sdtmus_e.htm
[152] Edwini Kessie. *Enforceability of the Legal Provisions Relating to Special and Differential Treatment under the WTO Agreements*. The Journal of World Intellectual Property. Vol. 3. November, 2000. At. 974.
[153] Anna Marie Brennan. *The Special and Differential Treatment Mechanism and the WTO: Cultivating Trade Inequality for Developing Countries?*. Trinity College Law Review. 2011. At. 59.

and consider the legal and practical implications of making mandatory those which were non-binding at the moment[154].

Accordingly, in the Decision on Implementation-related Issues and Concerns adopted at Doha the Committee identified the binding or non-binding nature of the provisions. In doing so, it classified the S&DT provisions in the six (6) categories used in previous Secretariat documentation, which have been mentioned in the preceding chapters of this paper[155]. The Secretariat Note focused on distinguishing mandatory from non-mandatory provisions throughout the six types, "*on the basis of the following rule: mandatory provisions use "shall" language; non-mandatory provisions use "should" language*."[156]. As such, non-mandatory provisions are those that do not impose specific obligations.

In accordance with the Secretariat Note, S&DT provisions under GATT are classified into three (3) categories, which are: (i) provisions aimed at increasing the trade opportunities of developing country Members; (ii) provisions under which WTO Members should safeguard the interests of developing country Members and (iii) flexibility of commitments of action, of and use of policy instruments**.** Articles XXXVI.2-5; XXXVII.1(a) and 4; XVIII.2 (c) and 2(e) of the GATT, are part of the non-mandatory provisions of the first category. Also the Enabling Clause is a non-mandatory provision that aims to increase trade opportunities of developing countries.

[154] Committee on Trade and Development. *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions: Mandatory and Non-mandatory Special and Differential Treatment Provisions.* World Trade Organization. Note By Secretariat. WT/COMTD/W/77/Rev.1/Add. 1. December 21, 2001.
[155] Ministerial Decision. *Implementation-related Issues and Concerns*. Para. 12.18(i). November 14, 2001.
[156] Ibid.

On the other hand, Part IV; Articles XXXVI.6,7 and 9; XXXVII 1(b) and (c), 2 (a)-(c), 3 (a)–(c), and 5 and XXXVIII.1, 2 (a), (b), (d), (f) of the GATT, are non-mandatory provisions of the second category.

The aforementioned provisions are voluntary in character and consequently of "best endeavour"[157]. According to Professor Frank J. Garcia:

> *"The discretionary provisions employ language that is only permissive and that does not purport to create any obligation, moral or legal. An example would be paragraph 1 of the Enabling Clause, which state that "contracting parties may accord differential and more favorable treatment to developing countries."81 This language quite specically authorizes such treatment, and the most-favored nation violation it constitutes, without requiring parties to accord it such treatment. "Best endeavor" clauses, which are quite prevalent in the WTO Agreements, express what might be termed a "moral" obligation on Members to "try their best."*[158].

Finally, the GATT includes S&DT provisions that are part of the flexibility of commitments, of action, and use of policy instruments category. Those are Articles XXXVI.8, XVIII.7 (a), 8 and 13[159]. According to the Secretariat Note on 2001, "*These specify levels of flexibility and transition time periods that developing countries may*

[157] Thomas Fritz. *Special and Differential Treatment for Developing Countries.* P. 14. The Heinrich Boll Foundation. Global Issue Papers. (2005).
[158] Frank J. García. *Beyond Special and Differential Treatment.* Boston College International and Comparative Law Review. 2004. At. 311.
[159] Committee on Trade and Development. *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions: Mandatory and Non-mandatory Special and Differential Treatment Provisions.* World Trade Organization. Note By Secretariat. WT/COMTD/W/77/Rev.1/Add. 1. December 21, 2001.

choose to exercise should they so wish"[160], which means that they have a completely voluntary nature.

Since the beginning of the Special Sessions of the CTD, there have been no actions regarding the transformation of the non-mandatory S&DT provisions´ nature or content. As such, the questions, which were first brought by a member of the UNCTAD more than ten years ago, remain the same*:* (1)*"How to ensure the enforceability of the "best endeavour" clauses, i.e. the provisions drafted with vague language, where the rights and obligations are not clearly defined (the "soft law" as opposed to the "hard law")?* [161]"; (2) *how to improve the effectiveness and operationalization of S&D without allowing for changes in the existing provisions*?"[162].

3.2.3. Non-reprocity as a barrier to economic development within the multilateral trading system

Critics contend that the provisions that regulate S&DT, obstruct economic development, which happens to be one of the main goals of the WTO. Through the implementation of S&DT provisions, north-south trade relations have had non-reciprocal trade preferences and market access as their main features[163]. As such, the application of the traditional S&DT deprives LDCs and developing countries from fully benefiting in the multilateral

[160] Ibid.
[161] Manuela Tortora. *Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet.* P. 8. UNCTAD. (2003).
[162] Ibid.
[163] Bernard Hoekman. *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment.* Journal of International Economic Law. 2005. At. 407.

trading system by becoming active exporters of goods and services in diverse areas of trade, rather than demanding for imports from developed countries[164]. I

According to Hart and Dymond, with the application of S&DT provisions enshrined in the WTO Agreements, developing countries and LDCs do not benefit from fundamental advantages of the free trade system, such as: 1) support provided to each country to reform its domestic policies; and 2) market access for exports and imports[165]. Consequently, these authors state that *"The full application of traditional special and differential treatment measures will continue to be a drag on economic development, poverty alleviation, and the full participation of developing countries in the trading system, core elements of the Doha Agenda.* [166]*"*.

Moreover, it has been stated that non-reprocity allows "free-riding", but also that national economies hurt themselves with protectionist policies, as they inhibit specialization on competitive products and innovation import [167].

To correct this flaw, a new approach of the implementation of S&DT within the WTO system has been proposed, that pursues *"a delinking of development assistance from trade policy"*[168]. The proposal includes: 1) lowering MFN trade barriers by improving access to markets both of developing and developed countries, with the implementation

[164] Pallavi Kishore. *Special and Differential Treatment in the Multilateral Trading System.* Chinese Journal of International Law. July, 2014. At 374.
[165] Michael Hart & Bill Dymond. *Special and Differential Treatment and the Doha "Development" Round.* Journal of World Trade. Vol. 37, 2003. At. 395.
[166] Ibid..
[167] Thomas Fritz. *Special and Differential Treatment for Developing Countries.* P. 32. The Heinrich Boll Foundation. Global Issue Papers. (2005).
[168] Bernard Hoekman ET AL. *More Favourable and Differential Treatment of Developing Countries: Towards a New Approach in the WTO.* World Bank Policy Research Working Paper 3107. October, 2003. At. 29.

of full reprocity; 2) re-negotiations of existent provisions in order to balance legitimate interests; 3) country differentiation; and 4) technical and financial assistance for developing countries to expand supply capacity and improve the investment context in low income countries[169]. These proposals continue to be relevant, as their related issues remain unresolved in the WTO system.

Regarding the first proposal, upholding formal equality and full reciprocity among developed, developing and least-developed Members within the multilateral trading system, will only be in detriment of substantive equality, which is one of the WTO objectives that has already been explained. Perhaps, a gradual abolishment of MFN trade barriers, by granting developing and LDCs transitional periods for the implementation of this proposal, will reduce the harm that full equality will bring on their economies, although such measures will still be harmful for these countries.

As to a re-negotiation of the existent provisions and country differentiation, it is clear how these two proposals have been at the core of the dispute of S&DT among WTO Members, but there are still no real solutions. Finally, technical and financial assistance operates as an instrumental mechanism towards development, but it does not guarantee that developing countries and LDCs will have a more active participation in international trade, which is one of the fundamental objectives that S&DT provisions pursue.

3.3. PERSPECTIVES

[169] Ibid., pp. 27-29.

3.3.1. Adopting a flexible system of classification by economic sectors.

There have been three (3) main approaches to resolve the developing countries self-declaration flaw, all of which use economic criteria to determine the applicability of the S&DT provisions among WTO developing members. Those are the following: 1) country-specific differentiation; 2) agreement-specific differentiation; and 3) rule-of-thumb differentiation, which combines the first two proposals[170].

The country-based approach classifies WTO Members sharing objective development situations, such as: 1) geographic factors (location, relief, climate, natural resources, exposition to natural disasters, size), and 2) socio economic indicators (developmental difference, GNP per capita, vulnerability index, human development indexes, governance, freedom index, trade related indicators such as trade agricultural position)[171]. The main advantage of this approach is that it takes into account substantive inequality, as developing countries will be classified by using exclusively objective criteria. However, its main flaw is that those criteria do not provide information regarding a particular country's participation on the diverse areas of trade. This means that a given developing country, according to the objective criteria set above, will still be a free rider in those areas of trade in which its participation is active, areas in which it should not be considered as developing and in which it should participate in equal terms as developed countries.

[170] Bernard Hoekman. *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment.* Journal of International Economic Law. 2005. At. 429.
[171] Jean-Marie Paugam & Anne-Sophie Novel. *Why and How Differentiate Developing Countries in the WTO?* Institut Français des relations internationales. September, 2005. At. 11.

The second approach is opposite to country-based graduation, as it differentiates Members based on an *ex-ante* objective criteria on an agreement-by-agreement analysis, according to specific developmental needs of the developing countries [172]. As such, "*The first step involves designing relevant criteria for the purpose of each specific SDT measures. The second step requires identification of the targeted group of countries corresponding to the final SDT objective*."[173]. This approach solves the flaw of the country-based graduation proposal. However, reaching consensus among Members regarding the selection of criteria and making a case-by-case analysis of each country with respect to each S&DT measure, is almost impossible.

The rule-of thumb approach identifies a first group of countries, in which the LDCs and the developing countries with the smallest economies, lower incomes and weaker institutional capacities, are contained. This group benefits from the traditional S&DT within the WTO system. The remaining developing countries are allowed to select their S&DT benefits based on the need of resource intensive implementation, to achieve development priorities such as public health or food security[174]. Even though this proposal differentiates among non-developed economies and may be more effective than self-determination, allowing developing countries to select their own S&DT benefits, does not address the free riders concern.

However, developing countries have resisted the implementation of differentiation based on the previous approaches. Actually, they suspect that formal graduation is a strategy from developed WTO Members *"to remove privileges from some countries at*

[172] Ibid.
[173] Ibid., p. 12.
[174] Ibid., p. 14.

the upper end of the developing category[175]". For these reasons, the Members' conviction regarding graduation must be reinforced, by according them advantages and by demonstrating that the existing rules are beneficial because more open market access contributes to their development.

Regarding the trade of goods, this paper proposes an approach that promotes differentiated access, according to objective economic criteria built on a case-by case basis. Some of the objective criteria regarding this proposal could be market share and significant exports of the given good within the international trading system. For example, a developing country having a significant market share of a given commodity could not benefit of the S&DT GATT provisions, regarding the trade of that specific commodity. Hence, in the negotiation and trade of that specific commodity, that developing country should be seen as an equal and thus, both, the developing country and its developed counterpart should comply with the same obligations and commitments. Nevertheless, that same developing member would be granted S&DT regarding the trade of those goods in which it has not a significant market share, nor significant exports within the international trading system. This is just an illustrative example regarding the trade of commodities, but the same approach could be applied with respect to all the covered agreements, thus, to all areas of international trade.

This solution ensures that the non-reciprocity principle will not be subject of abuse by free riders, as developing countries will still benefit from S&DT provisions, but only when really needed. Consequently, the free market principle within the trade of goods will rule, without disregarding development requirements.

[175] Ibid., p. 12.

3.3.2. Overall Assessment of the Monitoring Mechanism for Special and Differential Treatment and the TFA.

There is a mixed sentiment regarding the success of the Bali Ministerial Conference, once an assessment of the Monitoring Mechanism and the TFA is conducted. On the one hand, the Monitoring Mechanism, following the initial ecstasy of its creation, has been a disappointment. The Mechanism itself, as it was already analyzed in section 2.1.6. of this paper, does not have the tools to effectively review the S&DT provisions and fulfill the mandate of the Doha Declaration.

First of all, given the fact that it can only review issues that are brought to it by Member States, the system has yet to be inaugurated, due to their inactivity. Furthermore, even if submissions were made, the system does not seem that promising because the Mechanism can only issue non-binding recommendations to the pertinent bodies, that don´t even have to be reviewed.

On the other hand, the TFA does provide a positive outlook for the WTO system and the goals of the Doha Development Round. If properly enforced, studies show that it will contribute to the economic development of developed and developing nations[176], by imposing a set of measures for the expedite transit of goods between borders. It will increase efficiency, transparency, and impose a set of homogeneous rules that are based on the best trade practices found worldwide. The TFA'S second major contribution is that it proposes an innovative implementation system for LDCs and developing

[176] See section 1.2.6.

countries, where each country selects what provisions to implement in what time-frames, based on its necessities, and identifies as well the measures that will require technical assistance for their implementation.

If one disregards the fact that many of the most controversial issues were left aside and unresolved during the Bali Ministerial Conference, its outcome is still one of mixed success. The Monitoring Mechanism has the same problem of most S&DT provisions in the WTO, which is its non-binding character. The TFA, on the other hand, poses a great challenge but a promising future, if properly fulfilled, for the WTO system and its Members.

3.3.3. Regionalism and the Regional Trade Agreements

Regional Trade Agreements (RTAs) and the multilateral trading system have coexisted since the creation of the latter in 1947. Although at first they were considered a complement to the system, as a tool for trade liberalization, discussion around this subject currently centers on whether the proliferation of RTAs will lead to the erosion of the WTO and the MFN principle and with it, of S&DT as a tool for development.

A RTA is any agreement in which *"the parties (…) offer to each other, by definition, more favorable treatment in trade matters than to the rest of the world, including WTO Members."*[177]. Although some authors include Preferential Trade Agreements (PTAs) within the classification of RTAs, they must be distinguished. This, considering the fact that the under the WTO, PTAs refer to agreements that grant unilateral trade

[177] Rafael Leal-Arcas. *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*. The International Law Annual. 2013. At. 50.

preferences to a country or group of countries, rather than mutual concessions between the parties[178]. Then, the two sub-categories of RTAs under the WTO are the Free Trade Agreements (FTAs) and the Custom Unions (CUs).

Although all RTAs are an exception of the MFN principle of the WTO, they are not inconsistent with WTO Law. Regarding goods, since its inception, GATT 1947 incorporated Article XXIV, which expressly recognized the possibility to create FTAs and CUs, provided that these agreements do not raise barriers to trade of other contracting parties with these territories[179]. Moreover, the Enabling Clause recognized the possibility for developing countries to establish global and regional preferential trade agreements for the mutual reduction and elimination of tariffs and non-tariff measures[180].

However, the data collected during the last decade demonstrates that the position of RTAs in trade liberalization has shifted, from a secondary element complementing the multilateral trading system, to a key component of it, endangering the predominant position of the WTO. During the GATT years (1948-1994), 124 RTAs were notified, whereas by April 2015, 612 RTAs had been notified under GATT/WTO. Of these 612, 406 are in force[181]. In fact, according to the WTO, with the exception of a handful of countries such as Mongolia and Mauritania, all WTO members are currently engaged in at least one RTA[182]. And it's not only a matter of proliferation of RTAs worldwide, but

[178] General Council Decision. *Transparency Mechanism for Preferential Trade Agreements*. World Trade Organization.. Article 1. December 14th, 2010. WT/L/806.
[179] General Agreement on Tariffs and Trade. Article 4. 1947.
[180] Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries. Paragraph 2(c). 1979.
[181] See Annex 1.
[182] See Annex 2.

also their actual effects on trade. In fact, following a study conducted by the WTO Secretariat, professor Leal-Arcas recognizes that *"if one examines the share of international trade occurring under RTAs, one notes that already in 2005, around 50 percent of world trade came from RTAs, which demonstrates the quantitative relevance of RTAs in the international trade."*[183]

Two questions remain regarding this issue: (1) what are the reasons that have led WTO members and countries in general to engage in RTAs in the recent years?, and (2) ¿does this phenomenon pose a threat to the stability and prominence of the WTO and of S&DT?

One of the main reasons that generated the rapid proliferation of RTAs, is the current discontent with the results of the WTO's rounds of negotiation. After the clear shortcomings of the Uruguay Round, the deadlocks on critical issues from the Doha Round in Seattle and Cancun, and the uncertainty regarding some of the fundamental problems of the WTO, countries have opted for smaller fora to advance their international trade agendas.[184]

Specifically, regarding developing countries, *"the promised expansion of trade in three key areas of agriculture, textiles and services has been dismal. Moreover, incipient protectionism and lack of willingness among developed countries to provide market access on a multilateral basis has prompted many developing countries to look for*

[183] Rafael Leal-Arcas. *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?.* The International Law Annual. 2013. At. 50.
[184] Jo-Ann Crawford & Roberto V. Fiorentino. *The Changing Landscape of Regional Trade Agreements.* P. 6. WTO publications. (2005).

regional alternatives"[185]. It is precisely the lack of results during the Doha Round and during S&DT negotiations what has forced developing countries to find new ways to acquire the preferential treatment that is otherwise denied to them in the multilateral scene.

A second reason for this proliferation, is commonly known as the "domino regionalism". It refers to a phenomenon according to which countries, and especially small ones, enter into RTAs to avoid being excluded from certain markets. In a scenario where the larger economies are celebrating this kind of agreements with other nations, a country is motivated to negotiate as well, to maintain the same level of preferential treatment that it previously enjoyed under the multilateral trading system[186]. This is why, according to Parthrapratim Pal, "*Many economists including Bhagwati (1993), Panagariya (1996) and Bergsten (1996) believe that USA's transformation from a supporter of multilateralism to a follower of regionalism is another major reason behind this growth of regionalism since the 1990s."*[187]. With the proliferation of RTAs and especially of FTAs involving the EU and the United States, other countries are moving towards regionalism, to enjoy the same benefits and to avoid being excluded from relevant markets. The problem with this phenomenon is that instead of pursuing as a group a set of homogeneous, more favourable trade rules (like those of S&DT in the WTO), the Members are being forced into regional agreements, to maintain their position in international trade, where the conditions set are uneven.

[185] Parthapratim Pal. *Regional Trade Agreements in a Multilateral Trade Regime: An Overview.* P. 7, (2004). See: http://www.networkideas.org/feathm/may2004/survey_paper_rta.pdf.
[186] WTO Secretariat. *The World Trade Report 2003.* pp. 50-51. (2003).
[187] Parthapratim Pal. *Regional Trade Agreements in a Multilateral Trade Regime: An Overview.* P. 8. (2004). See: http://www.networkideas.org/feathm/may2004/survey_paper_rta.pdf.

The coexisting nature between the WTO and RTAs is at risk, as it only works if the former has a prevalent nature over the latter. There is much doubt about the actual trade effects of the RTAs, but several risks have been identified both by the WTO Secretariat and by the literature on the matter.

The first risk identified is not necessarily a negative effect itself, but a consequence of a flawed and slow operating system like the WTO. If RTAs become successful and prove to be more efficient in achieving the countries' agendas, the interest of WTO Members in participating in the multilateral trading system, will be diminished, as it has been happening. In fact, during the failures of the Ministerial Conferences of Seattle and Cancun, countries such as the US and the EU, that opposed certain issues like binding commitments in S&DT and concessions in neuralgic topics like agriculture, stated that they would pursue their agendas, whether at the multilateral level or, if necessary, at the regional level.

But the RTAs do pose a threat to the principle of non-discrimination and to the transparency of the international trading system. Authors like Krugman and Bhagwati are of the view that *"increased regionalism is dangerous because it (…) leads to inter block trade wars and domination of small countries by bigger partners in the regional blocks"*[188]. Unlike S&DT under the WTO, where a set of rules are established for a group of countries with supposedly similar traits, the RTAs completely erode the principle of MFN, where the benefits reaped by the countries depend on the RTAs they sign, even when they are unwilling to enter into such agreements in the first place.

[188] Parthapratim Pal. *Regional Trade Agreements in a Multilateral Trade Regime: An Overview.* P. 11, (2004). See http://www.networkideas.org/feathm/may2004/survey_paper_rta.pdf.

In imposing this dominance, the WTO Secretariat recognizes that RTAs provide a helpful tool for developed nations to exclude "difficult sectors" such as agricultural issues from the negotiations[189]. Following the "domino regionalism", countries will engage in RTAs to avoid being excluded from the relevant markets and, in the process, will make concessions that are beneficial for their developed counterparts only. Instead of promoting the welfare and active participation of developing countries and LDCs, as S&DT currently intends, these agreements might become a tool for developed countries to exert power over them and to further on their own agendas.

From the analysis of the RTAs and the multilateral trading system several conclusions can be made: (1) the RTAs are increasing rapidly their influence in international trade and threatening the WTO system; (2) this is mainly due to the failed negotiations of the WTO system and the desperation of the countries interested in advancing on their own agendas, especially developing countries; (3) the RTAs, though beneficial in certain aspects, pose a threat to the participation and bargaining capacity of developing countries and LDCs in the subjects that matter to them, as the RTAs become tools for developed powers to exert power over them , and (4) it is necessary that the WTO, starting with the Nairobi Ministerial Conference, advance on the several issues that have not been resolved, and that are fundamental for the future success and existence of the WTO trading system, starting with the S&DT issues that have been avoided for decades.

[189] WTO Secretariat. *The World Trade Report 2003.* P. 65. (2003).

3.3.4. The Nairobi Ministerial Conference

On December 10, 2014 the General Council decided that MC10 will take place in Nairobi, Kenya, from 15 to 18 December 2015; the first to be held in Africa. The Director-General joined Kenya's Minister of Foreign Affairs, at the WTO's Fifth Global Review of Aid for Trade to discuss MC10[190].

At the reunion, the Director-General stated that the Nairobi Conference would be the first opportunity to review the outcomes of Bali 2013, with regards to several issues such as the LDCs and developing countries' preferential treatment. On the other hand, Kenya's Minister stated that WTO Members must deliver a pragmatic package on development and should bring the TFA into force as soon as possible[191].

In light of the 10th Ministerial Conference, the Ministers of the African, Caribbean and Pacific Group of States responsible for Trade Matters, met in Brussels from the 19th to the 21st of October 2015, to review their preparations for the mentioned reunion. As to the S&DT issue, their common position includes the following points:

1) Affirmation of the development objectives of the Doha Development Agenda in all aspects of negotiating outcomes, including the principle of S&DT and less than full reciprocity; 2) demand for Members in Nairobi to deliver, in favor of developing countries, binding decisions in accordance with Doha Declaration paragraph 44, on the twenty-five Doha Development Agenda S&DT agreement specific proposals submitted

[190] WTO. *Ministerial Conference in Nairobi "must deliver on development"*. (July 1, 2015). See: https://www.wto.org/english/news_e/news15_e/aid_01jul15_e.htm .
[191] Ibid.

by the G90; 3) demand for Members in Nairobi to deliver, in favor of developing countries, affirmation that different tariff reduction targets should be defined for developed countries and developing countries, in accordance with the principles of S&DT and less than full reciprocity, and confirming that LDCs shall be exempt from making tariff reductions; 4) affirm that S&DT for developing countries shall be an integral element of the agricultural negotiations[192].

The European Parliament is also preparing a resolution regarding the role of the Doha Development Agenda in light of the MC10. As to S&DT it has stated that it "*reiterates the imperative need to ensure that the principle of special and differential treatment (S&DT) constitutes an integral part of all layers of the negotiations, reflecting the varying economic development levels of WTO members as set out in paragraph 44 of the Doha Ministerial Declaration*"[193].

The beginning of a new round of negotiations represents an opportunity for LDCs and developing countries to pursue results with regard to the commitments adopted in Bali in the light of the Doha Development Agenda. However, declarations made by developed countries show that they are not going to accept binding commitments in the LDC package or developmental outcomes in S&DT provisions[194]. Certainly, *"The developed countries have almost prepared the ground to walk away from Nairobi,*

[192] *APC Group Declaration on the Tenth WTO Ministerial Conference (MC10).* Available at: http://www.acp.int/content/acp-group-declaration-tenth-wto-ministerial-conference-mc10 . (21 of October, 2015).
[193] European Parliament. *Draft Motion for a Resolution to wind up the debate on the Statement by the Commission pursuant to rule 123(2) of the Rules of Procedure on the State of Play of the Doha Development Agenda in the view of the 10th WTO Ministerial Conference.* B8-0000/2015. September 1, 2015.
[194] Thirld World Network. *No binding commitments at Nairobi on LDC package, say US, ICs Published in SUNS #8115 dated 19 October 2015.* (October 23,2015). See : http://www.twn.my/title2/wto.info/2015/ti151018.htm

Kenya, without delivering "credible", "lasting", and "binding" outcomes in either the LDC package, export competition pillar, or improvements in the S&DT provisions"[195].

4. CONCLUSIONS

The object of this paper has been to expose the current lack of effectiveness of S&DT, by making a thorough assessment of the past, current state, and possible pathway of S&DT in relation to the trade in goods of the GATT, in a moment in which, not only the Doha Development Round is at the brink of failure, but also the entire WTO system has been put into question.

As it becomes evident when history is analyzed, tension has always existed between those countries that have sought to maintain their status as the developed economies of the world, and those who have increasingly pressured the international trade community for a higher share of participation within it. In that struggle, the LDCs and developing countries have managed to secure a set of provisions to enable their participation in international trade and enhance their development. But in the process, certain developed nations have managed to utilize these provisions in their favor, by granting their weaker counterparts small benefits in minor issues, whilst maintaining a *status quo* in the more relevant topics that would really benefit these emerging economies.

S&DT constitutes an important tool for the promotion of development in those nations that, under non-differential conditions, would not be able to reap the benefits that trade liberalization and international trade have to offer. But the current state of S&DT, with

[195] Ibid.

its non-binding provisions, faulty monitoring mechanism, non-comprehensive graduation system and the unwillingness to compromise on both sides of the negotiation, has left the Doha Round of Development in a fragile state. These flaws, which were exposed in chapter 3 of this paper, demonstrate the challenges that lie ahead for the WTO trading system to successfully contribute to the development of the weaker economies. The framework of S&DT has been built through the past decades; it is now necessary to focus the WTO's efforts on its effective implementation.

And with the current failures of the Doha Round, the WTO has been left exposed. The impossibility to reach consensus in the most neuralgic issues like agriculture, textiles, services and S&DT, are a clear sign of the incapacity or unwillingness of its Members to regulate trade properly and evenly in a multilateral scenario. The current proliferation of RTAs threatens the prevalence of the WTO in the international trade community and with it, the principle of non-discrimination as well. These RTAs have increasingly become the mechanism for countries, and especially developed ones, to advance on their agendas, without incurring in the costly and consuming negotiations of the multilateral scene.

This is a crucial moment for the WTO. The Bali Package, but especially the TFA, demonstrates that the multilateral trading system is not obsolete. The Nairobi Ministerial Conference poses itself as a critical moment for the Member States to show that consensus can be reached and that the north-south tensions can be resolved. However, so far, the declarations of the different parties involved reveal a rather bleak picture for the 10th Ministerial Conference and the outcome of this negotiation, given the unwillingness of the parties involved to compromise on the most important issues.

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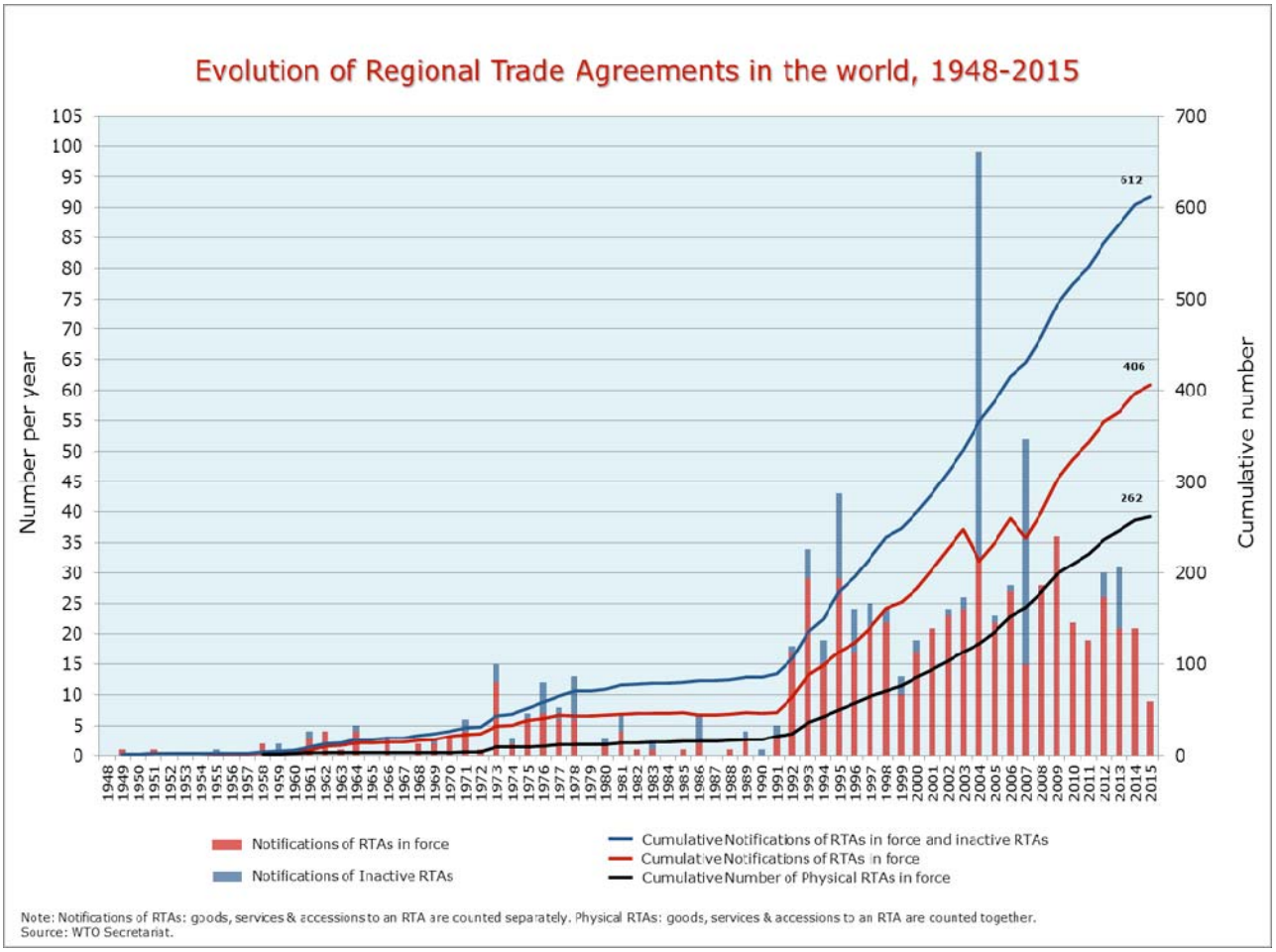
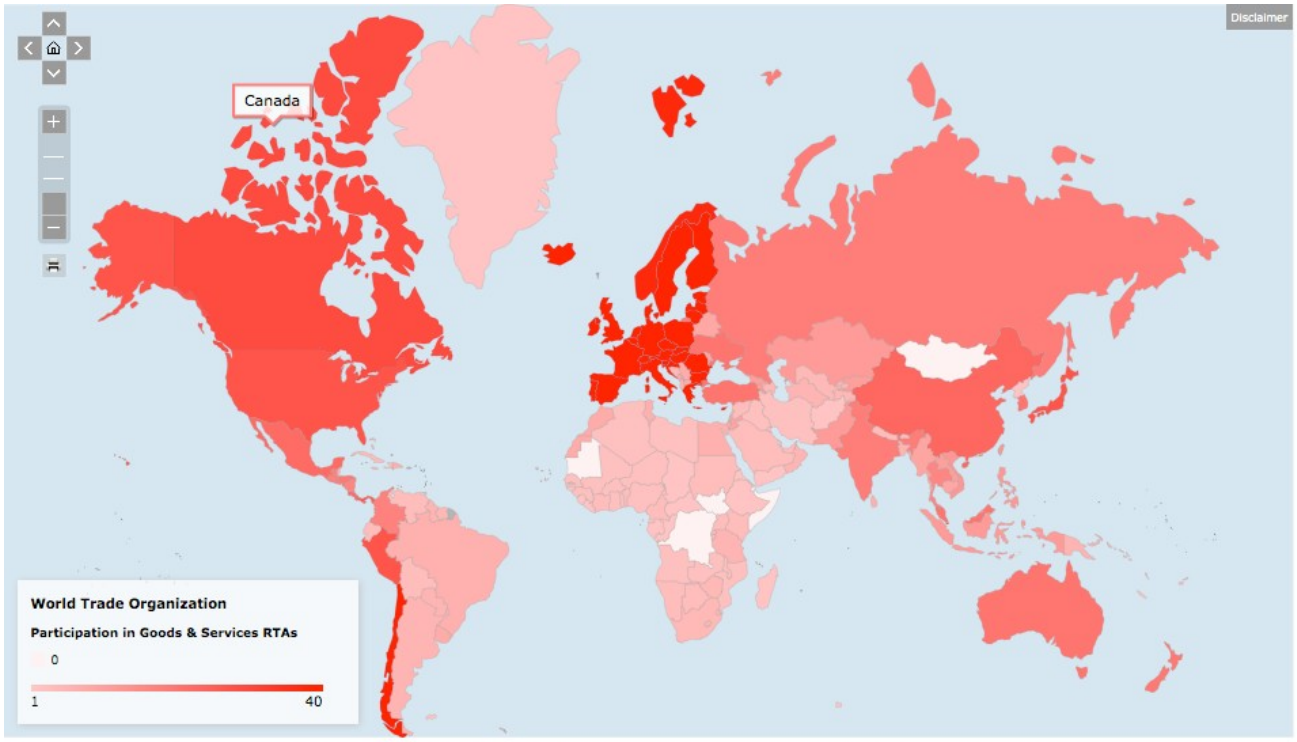
6. ANNEXES

6.1. Annex 1.



Source: https://www.wto.org/english/tratop_e/region_e/regfac_e.htm. 2015.

6.2. Annex 2



Note: WTO statistics on RTAs are based on notification requirements rather than on physical numbers of RTAs. Thus, for an RTA that includes both goods and services, we count two notifications (one for goods and the other services), even though it is physically one RTA.

Source: https://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm. 2015.