S&D under the WTO Agreements in the Era of Diversification among Developing Countries

by

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DISSERTATION

Submitted in Partial Fulfillment of the Requirements

for the Degree of

Doctor of Philosophy
in International Development

GRADUATE SCHOOL OF INTERNATIONAL DEVELOPMENT

NAGOYA UNIVERSITY

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ACKNOWLEDGEMENT

I am greatly indebted to my advisor, Professor Fujio, Kawashima, with the great respect, for providing invaluable ideas and insights that have guided me in not only this work, but also my vision about law and development, with broader connection with policy, economics, and international relations and negotiations. As all the alumni, who are making substantial contributions to their own society as great experts and government officials, have felt, his advice and encouragement are always more than helpful and give us a new view and suggest the best way to tackle the challenges we face. This work would not have been possible without his continuous support and supervision. I am also very thankful to Professor Hideo Yamagata, Professor Sanae Ito, and Professor Yuzuru Shimada, for substantial contribution to my study with greatly insightful advice. I would also like to thank Professor Tomohiko Kobayashi, at Otaru University of Commerce, for his support.

Nagoya University and Graduate School of International Development (GSID) are a part of my heart and life. I have learned a lot from friends whom I have met and faculty whom I took the courses given by. Also, special thanks to the World Trade Institute (WTI), in Bern, Switzerland, for giving me the opportunity to study in the programme of Master of International Law and Economics (MILE). How fortunate I was to be able to receive the high-quality education dedicated to international law and economics from the great professors and practitioners. My appreciation goes to Ms. Margit Vetter for making our student life easier, and especially to Professor Pierre Sauvé, Director of External Programmes and Academic Partnerships of WTI, for believing and supporting our future career. The experiences and all the friends at these graduate programmes are and will be my asset for all my life.

Finally, I would also like to express my gratitude to my family both in Japan and Geneva, as well as to my great friends, Pan Xiaoming, Alejandra Maria González, Lissette Milagros Nonalaya Aranda, Takahiro Yamada, Yuya Ota and Satoshi Fukuda, for all time support and encouragement, which surely enables me to keep up on my study and pursuing my career goal.

ABBREVIATIONS

ACP	African, Caribbean and Pacific
CBDR	Common but Differentiated Responsibility
DDA	Doha Development Agenda
DFQF	Duty-Free and Quota-Free
EC	European Community
EEC	European Economic Communities
EU	European Union
GATS	The General Agreement on Trade in Services
GATT	The General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNI	Gross National Income
GSP	Generalized System of Preferences
IPR	Intellectual Property Right
LDCs	Least-Developed Countries
MFN	Most Favoured Nations
NAMA	Non-Agriculture Market Access
OECD	Organisation for Economic Co-operation and Development
S&D	Special and Differential Treatment
SCM	Subsidies and Countervailing Measures
SEs	Small Economies
SVEs	Small and Vulnerable Economies
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Intellectual Properties

UN	The United Nations
UNCTAD	The United Nations Conference on Trade and Development
UNFCCC	The United Nations Framework Convention on Climate Change
UN-OHRLLS	The UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States
WTO	The World Trade Organization

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Chapter I

Introduction

1. Overview

It has been more than ten years since the current trade negotiation round, the Doha Development Agenda (hereinafter the DDA), was launched. Many scholars and negotiators have identified conflicting and divergent views between large trading partners. Even though it is undeniably true that divergence among major countries largely accounts for the stalemate, more factors should be considered. Since the establishment of the World Trade Organization (hereinafter the WTO) in 1995, more and more developing countries have acceded to the organization and now developing countries constitute more than three-quarters of the 159 members.[1] There are 48 Least-Developed Countries (hereinafter LDCs) on the United Nations (hereinafter the UN) list,[2] and 33 of them have become GATT/WTO members.

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[1] As of 2 March 2013.

[2] Currently, the list of LDCs includes following countries: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao People's Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Sao Tome and Principe, South Sudan, Sudan, Timor-Leste, Togo, Uganda, United Republic of Tanzania, Tuvalu, Vanuatu, Yemen, Zambia (as of 31 March 2014).

The following three criteria were used by the UN:

1) *Low-income criterion*, based on a three-year average estimate of GNI per capita, based on the World Bank Atlas method (under $992 for inclusion, above $ 1,190 for graduation as applied in the 2012 triennial review).
2) *Human Assets Index (HAI)* based on indicators of: (a) nutrition: percentage of population undernourished; (b) health: mortality rate for children aged five years or under; (c) education: the gross secondary school enrolment ratio; and (d) adult literacy rate.
3) *Economic Vulnerability Index (EVI)* based on indicators of: (a) population size; (b) remoteness; (c) merchandise export concentration; (d) share of agriculture, forestry and fisheries in gross domestic product; (e) share of population living in low elevated coastal zones; (f) instability of exports of goods and services; (g) victims of natural disasters; and (h) instability of agricultural production.

(UN-OHRLLS, available at http://www.unohrlls.org/en/ldc/164/, visited on 31 March 2014.)

Upon the establishment of the WTO, members clearly state the recognition of "need for possible 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[.]"[3] The interpretation of this paragraph could be that development and growth of developing country members is one of the fundamental goals of the WTO, and the institution itself recognizes the need to achieve this goal. As developing countries' presence has grown, the trade talks have had to deal with a wider range of commercial interests. Because of the bigger presence of developing countries, at the current trade-negotiation round members have tabled issues of trade and development as well as interests of developing countries at the heart of the WTO's work, and the Hong Kong Ministerial Declaration highlights the central importance of the development dimension of the Doha Work Programme.[4]

It has been apparent that some developing countries with larger economies have succeeded in economic development and even gained influence on trade negotiations. In contrast, smaller developing countries, including the LDCs and small economies, have been left far behind and they are still struggling to achieve substantial development. This marginalization of weaker developing countries with small economies has caused quite divergent interests even within the developing country group, which has triggered discord among them. Under the WTO Agreements, developing countries are accorded more preferential treatment, so-called "special and differential treatment" (hereinafter S&D). These S&D provisions include, for example, exemption from commitment to eliminate export subsidies, more preferential market access and longer transitional periods to implement the commitments. As the Doha

[3] Paragraph 2 of the preamble of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.
[4] Paragraph 2 of the Ministerial Declaration of 18 December 2005, WT/MIN(05)/DEC, 22 December 2005, http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.pdf (hereinafter the Hong Kong Ministerial Declaration).

Ministerial Declaration states that the provisions for S&D are an integral part of the WTO Agreements,[5] S&D is supposed to assist developing countries better integrate into the multilateral trading system. However, the sufficiency and effectiveness of S&D have been criticized by both developing countries themselves and scholars, as they argue most S&D are not meaningful for those countries that are in need. Many of the transitional periods have expired and most S&D are, in principle, blanket applications categorizing all developing countries, with different development levels and divergent characteristics, into one category, with the only exception for LDCs.

Although developing countries acted and worked together as one block in the 1960s and 1970s, it is now quite evident that heterogeneity of developing country members has been increasing and that their needs, priorities and interests have largely diverged. They are divergent not only in geographical conditions and the level of development, but also in commercial and economic interest, as well as in their political influence in trade negotiations. Accession of China to the WTO in 2001 has particularly changed the economic and trade structure in the world, and both gaps in development and interests within developing countries have broadened.[6] Due to this divergence, traditional S&D turns out to be neither practical nor effective. In the current trade negotiations, a group of small developing countries,[7] such as small economies (hereinafter SEs) and small and vulnerable economies (hereinafter SVEs), have submitted a series of proposals to improve the effectiveness of S&D under various committees, including ones to grant more preferable treatment. However, none

[5] Paragraph 44 of the Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf (hereinafter the Doha Ministerial Declaration).

[6] Amin Alavi, *Legalization of Development in the WTO: Between Law and Politics* (Austin: Wolters Kluwer, 2009), 101.

[7] There is no clear and uniform definition of "small developing countries" under the WTO or any other international financial institutions. In this study, the term "small developing countries" means the developing countries with small national economies, low-income, and low capacity for large-scale production and domestic demand.

of the proposals targeting SEs or SVEs have been agreed on, while members have agreed to grant LDCs even more favorable S&D, permitting almost full exemptions and offering the most preferential market access. There has been no study to provide a reasonable explanation for such distinct treatment between LDCs and other developing countries with small economies.

Furthermore, some members have often questioned the validity of S&D and also expressed their skepticism even on providing S&D for developing countries. There should be a clearer and more persuasive justification, and more effective and meaningful application, of S&D. To do this, as a number of scholars have already pointed out,[8] it would be necessary to provide S&D tailored to individual needs and priorities of developing countries. Such work could also contribute to progress in the current stalled trade negotiations.

With the recognition of the striking disparities in capacity and priorities across the WTO membership and need to overcome the current situations of developing countries, this study will examine the origin and concept of 'substantive equality' of development under international law and the emerging concept of 'common but differentiated responsibility' (hereinafter CBDR) under international environmental law, and apply economic theories for justifications of S&D. It will also take into account "policy space" aimed at allowing developing countries to pursue their flexible national policies and attaining their own development goals. Towards the conclusion, the study will offer a concrete way to make S&D effective and operationalized by proposing how to differentiate developing country members with reasonable criteria and to provide new application of S&D. It aims to solve both systemic and substantive challenges of the WTO, which are conflicts of interests within

[8] Michael Hart and Bill Dymond, "Special and Differential Treatment and the Doha 'Development' Round." *Journal of World Trade* 37.2 (2003): 409. See also Yong-Shik Lee, Gary N. Horlick, Won M. Choi and Tomer Broude, *Law and Development Perspective on International Trade Law* (Cambridge: Cambridge University Press, 2011), 117.

developing country members, and to propose how to differentiate them in order to realize more practical and effective application of S&D.

2. Problem Identification

2.1 Marginalization of Small Developing Countries

During the past 50 years, trade has been the engine for national economic growth and contributed to deepening economic integration and raising the standard of living. Many developing countries have passed through the process of trade growth and economic development and been closing the economic gap with richer countries. The trade share of developing countries increased to more than 40 percent in 2012, with substantially expanding trade in merchandise and services. Though the success of some relatively large developing countries has been remarkable, LDCs and low-income developing countries have been left far behind and are struggling to expand trade, and their share of world trade has been remained around 1 percent and 5 percent, respectively (Figure 1.1 to 1.3). As seen in figures below, lower income developing countries and LDCs are not only left behind in trade growth, but also the gap among the groups of developing countries has been getting wider.

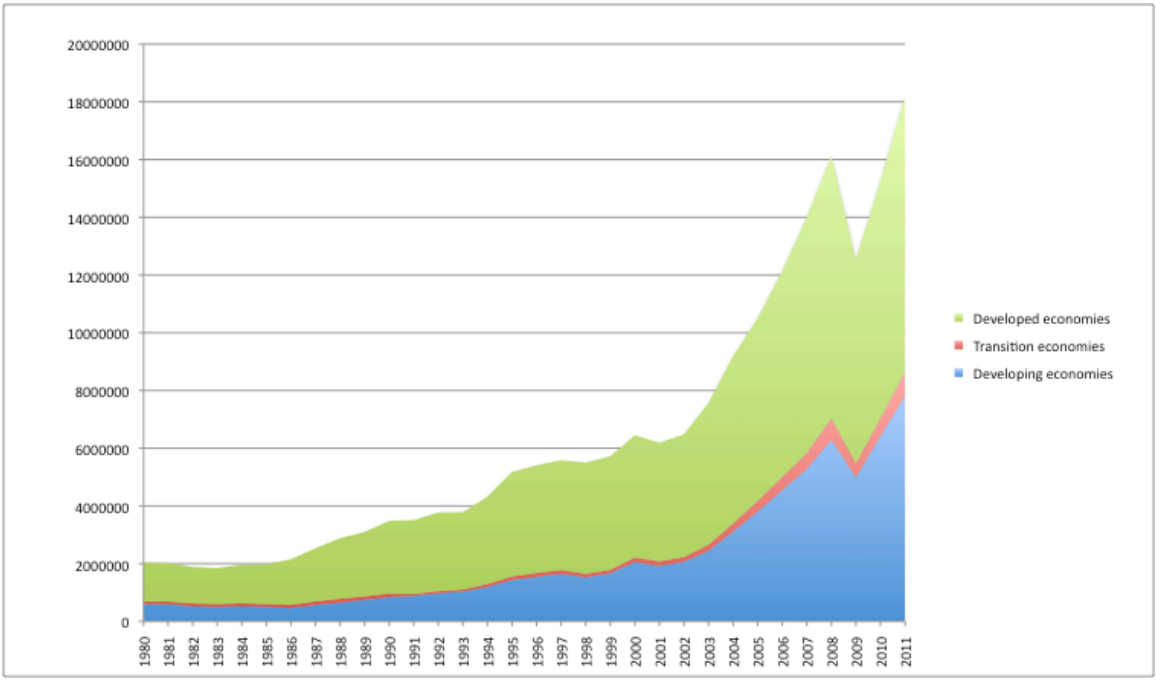
The United Nations Conference on Trade and Development (hereinafter UNCTAD) pointed out that the reason why those small developing countries had been left out of world trade was not that they were against liberalization, but that they lack the capacity to increase productivity.[9] Dependency on the export of primary commodities also enlarges the gap in trade share and deepening marginalization. The Doha Ministerial Declaration addresses the marginalization of small developing countries, especially LDCs, and promises to support their

[9] UNCTAD, *Trade and Development Report* (New York and Geneva: United Nations, 1998), 14-15.

meaningful integration and effective participation in the multilateral trading system, through providing duty-free quota-free market access, longer transitional periods and exemptions, as well as trade-related technical assistance and capacity building.[10]

Figure 1-1: The Trend of Merchandise Exports by Economic Groupings

Source: UNCTAD STATS (2012)



[10] Paragraph 42 of the Doha Ministerial Declaration.

Figure 1-2: The Trend of Developing Countries' Merchandise Export by Economic Groupings

Source: UNCTAD STATS (2012)

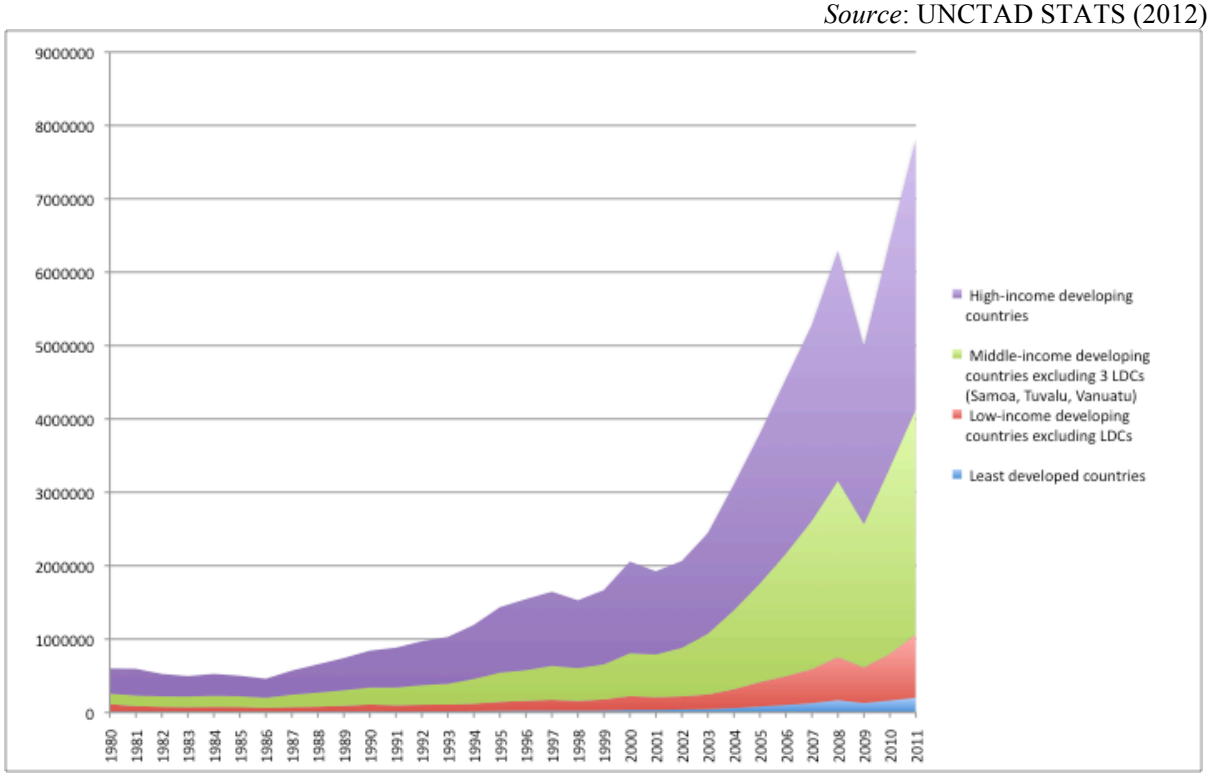


Figure 1-3: The Trend of Developing Countries' Merchandise Export Share by Economic Groupings

Source: Ibid

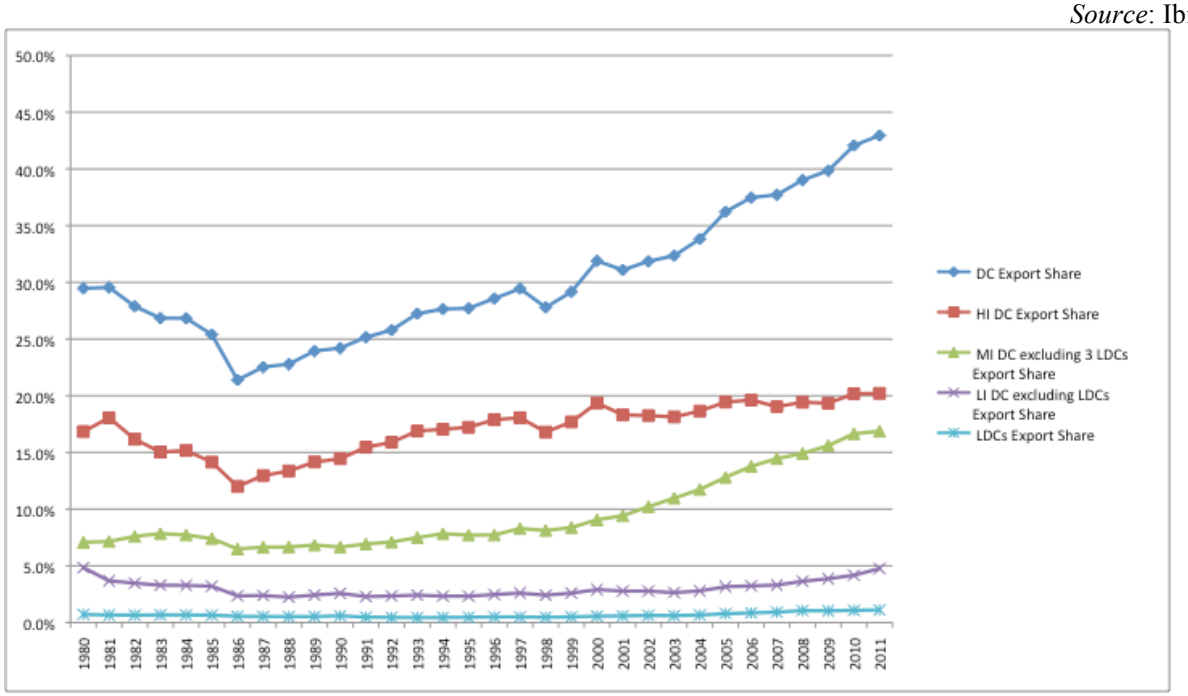


Table 1-1: UNCTAD Economic Grouping of Developing Countries by GDP per capita

Source: UNCTAD Stats (2012)

* Based on 2004-2006 per capita GDP: high-income (above $4500), middle-income (between $1000 and $4500) and low-income (below $1000), LDC (UN List)

*** China shifted upwards into the middle-income developing countries in 2011 (UNCTADSTATS).

LDCs	Low-Income Developing Countries (excluding LDCs)	Middle-income Developing Countries (excluding LDCs)	High-income Developing Countries
Afghanistan	Cameroon	Algeria	American Samoa
Angola	Cote d'Ivoire	Belize	Anguilla
Bangladesh	Ghana	Bolivia	Antigua and Barbuda
Benin	Guyana	Botswana	Argentina
Bhutan	**India**	**Brazil**	Aruba
Burkina Faso	Indonesia	Cape Verde	Bahamas
Burundi	Iraq	**China*** **	Bahrain
Cambodia	Kenya	Colombia	Barbados
Central African Republic	Korea, Dem. People's Rep. of	Congo	Bonaire, Saint Eustatius and Saba
Chad	Mongolia	Cuba	British Virgin Islands
Comoros	Nicaragua	Dominica	Brunei Darussalam
Dem. Rep. of the Congo	Nigeria	Dominican Republic	Cayman Islands
Djibouti	Pakistan	Ecuador	Chile
Equatorial Guinea*	Papua New Guinea	Egypt	China, Hong Kong
Eritrea	Senegal	El Salvador	China, Macao
Ethiopia	Sierra Leone	Fiji	China, Taiwan Province of
Gambia	Solomon Islands	Gabon	Cook Islands
Guinea	Somalia	Grenada	Costa Rica
Guinea-Bissau	Viet Nam	Guatemala	Curaçao
Haiti	Zimbabwe	Honduras	Equatorial Guinea*
Kiribati		Iran	Falkland Islands
Lao People's Dem.Rep.		Jamaica	French Polynesia
Lesotho		Jordan	Guam
Liberia		Maldives	Korea, Republic of
Madagascar		Marshall Islands	Kuwait
Malawi		Mauritius	Lebanon
Mali		Micronesia	Libya
Mauritania		Morocco	Malaysia
Mozambique		Namibia	Mexico
Myanmar		Nauru	Montserrat
Nepal		Occupied Palestinian territory	Netherlands Antilles
Niger		Panama	New Caledonia
Rwanda		Paraguay	Niue
Sao Tome and Principe		Peru	Northern Mariana Islands
Samoa**		Philippines	Oman
South Sudan		Saint Helena	Pacific Islands, Trust Territory
Sudan		Saint Vincent and the Grenadines	Palau
Timor-Leste		South Africa	Qatar
Togo		Sri Lanka	Saint Kitts and Nevis
Uganda		Suriname	Saint Lucia
United Republic of Tanzania		Swaziland	Sandi Arabia
Tuvalu**		Syrian Arab Republic	Seychelles
Vanuatu**		Thailand	Singapore
Yemen		Tokelau	Saint Maarten
Zambia		Tonga	Trinidad and Tobago
		Tunisia	Turkey
* High-Income but LDC		Wallis and Futuna Islands	Turks and Caicos Islands
** Middle-Income but LDC			United Arab Emirates
			Uruguay
			Venezuela

2.2 The Grand Bargain and Implementation Issues

At the conclusion of Uruguay Round, developing countries accepted new commitments on so-called "trade related" agreements as part of the "Grand Bargain," in exchange for improved access to developed markets by developing country exporters, particularly those of agricultural goods, textiles and clothing.[11] As the result of this bargain, developing country members realized that obligations and commitments under the new, broader agreements, were much higher than the anticipated benefit from greater market access to developed countries' markets for agricultural, cotton and textile products, and from more technical and financial assistance to facilitate their integration into the global economy. The agreements also included new areas such as investment and intellectual properties. The agreements made them commit to give up a large degree of the policy autonomy that both the mature and late industrialized countries had enjoyed during their periods of industrialization or economic catch-up. On the other hand, developing countries have hardly gained greater market access to developed countries despite their expectation, and new forms of selective protectionism, such as non-tariff measures, have even increased. Imbalances in the outcome of the Uruguay Round Agreements, as discussed above, have brought in, *inter alia*, numerous implementation issues and concerns.

With regard to the issue of development, 'implementation issue' is one of the examples. Several years after the WTO was established, developing countries realized that there were many difficulties in implementing the complex obligations under the WTO Agreements, such as phasing trade-related investment measures (hereinafter TRIMs), customs valuation, intellectual property rights, sanitary and phytosanitary standards, and so on. The implementation issue was one of the negative consequences resulting from the so-called

[11] Silvia Ostry, "The Uruguay-Round North-South Grand Bargain: Implications for future negotiations." In *The Political Economy of International Trade Law,* edited by D.L.M Kennedy and J.D. Southwick, 285-300 (Cambridge University Press, 2002), 287.

"single-undertaking." It was not only because the cost of implementing obligations was enormous but also because developing country members lacked knowledge and institutions to implement such obligations, as well as financial and human resources.[12] Ostry also pointed out that the developing countries poorly understood the implications of the Uruguay Round Agreement.[13] They have apparently opposed engaging in further multilateral negotiations which force them into higher commitments and have demanded relaxation or exemption from the current obligations.

For example, they have expressed substantial concerns about phasing TRIMs. While regulations or preferential measures on TRIMs may often be inefficient instruments to subsidizing multinational enterprises, some of these measures may have economic justification in countervailing or offsetting the anti-export bias in the trading system and improving the welfare of developing countries.[14] However, transitional periods of TRIMs, as one of S&D granted to developing country members, were provided at the time of establishment of the WTO,[15] regardless of the level of their economic development. They had difficulty even in notifying the WTO body of TRIMs and more so in eliminating them. Hence, they have raised many criticisms of implementing obligations under the TRIMs Agreement, as well as on the difficulty in requesting extension.

In the Doha Ministerial Declaration, members agreed on "attach[ing] the utmost importance to the implementation-related issues and concerns raised by members and …

[12] Michael J. Finger and Philip Shuler, "Implementation of Uruguay Round Commitments: The Development Challenge" *The World Economy* 24.4 (2000): 511-525. See also Michael J. Finger and Julio J. Nogues, "Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations" *The World Economy* 25.3 (2002): 321-340.
[13] Ostry, "The Uruguay-Round North-South Grand Bargain", 289.
[14] World Bank, *Globalization, Growth, and Poverty: Building an Inclusive World Economy*, A World Bank Policy Research Report, Oxford University Press (2002), 62.
[15] Article 5 of the Agreement on Trade-Related Investment Measures, 15 April 1994, Annex 1A of the Agreement Establishing the World Trade Organization (hereinafter the TRIMs Agreement).

[determining] to find appropriate solutions to them."[16] Also, they agreed "negotiations on outstanding implementation issues shall be an integral part of the Work Programme" that would "be addressed as a matter of priority by the relevant WTO bodies."[17] Read together with this paragraph of the Doha Ministerial Declaration, the Decision on Implementation-Related Issues and Concerns provided that about half of the items were settled at or before the Doha Conference and decided for immediate delivery, and the remaining items were to be subject to the further negotiation.[18] However, there is still a huge disparity among members, and the Doha negotiation has experienced two severe deadlocks in 2006 and 2008. Although developing country members have submitted a number of proposals on S&D related to implementation, the negotiation could hardly achieve the agreement on such implementation issues or be able to foresee substantial beneficial outcomes for developing countries.

2.3 Issues over Existing S&D

S&D has been criticized and its effectiveness questioned by many scholars even since the conclusion of the Uruguay Round. First, Supperamaniam pointed out the serious problem that there was a fundamental presumption that developing countries should in a certain period be equipped to undertake obligations similar to those of developed countries that had reached much higher level of economic development.[19] Developing countries were expected to liberalize toward the same level that developed countries had with a longer time period. Based on this presumption, there was criticism that S&D was provided in a blind and blanket way, while ignoring the actual differences in terms of development needs and capacity for

[16] Paragraph 12 of the Doha Ministerial Declaration.
[17] Ibid.
[18] For the explanation of the Doha Implementation Decision, see the WTO website: http://www.wto.org /english /tratop_e/dda_e/implem_explained_e.htm.
[19] Manickan Supperamaniam, "Special and Differential Treatment for Developing Countries in the World Trade Organization", in *Developing Countries and the WTO: Policy Approaches*, ed. Sampson Gary P. and W. Bradnee Chambers (Tokyo: United Nations University Press, 2008), 133.

adjustment and implementation. It was apparent that there were vast differences within developing countries in competitiveness and capacity to adjust at a sectoral level.

With regard to market access S&D, it has been argued that it is not legally binding, as the provision of preferential market access is based on best-endeavor. In other words, granting preferential market access to developing countries is based on unilateral measures by developed countries. Many scholars criticized the degree of contribution to the substantive economic growth of developing countries.[20]

In addition to those onerous obligations under the WTO Agreements which included a wide range of new areas and took much longer for developing countries to implement, a number of scholars argued that policy flexibility S&D was also provided with no consideration of individual needs and priorities.[21] It was pointed out that the length of the transitional period in various WTO Agreements, including the agreement on TRIMs and on TRIPS, appeared to be inadequate, considering developing countries' difficulties and capacities.[22] Many developing country members, not limited to LDCs, have experienced considerable difficulties in implementing WTO commitments, which are quite onerous and costly. These difficulties were supposed to be overcome through providing technical assistance and longer transitional periods. However, as with technical assistance or many

[20] Edwini Kessie, "Enforceability of the legal provisions relating to special and differential treatment under the WTO agreements", *The Journal of World Intellectual Property* 3.6 (2000): 955-976; Mari Pangestu, "Special and Differential Treatment in the Millennium: Special for Whom and How Different?", *The World Economy* 23.9 (2000): 1285-1302; Sheila Page, "Can Special Trade Measures Help Development, When Trade Tools are Weak and the Conditions for Development are Uncertain?", Prepared for Link Conference (Overseas Development Institute, 2005).

[21] Supperamaniam, "Special and Differential Treatment for Developing Countries in the World Trade Organization"; Constantine Michalopoulos (2000) "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization", World Bank Policy Research Working Paper 2388, World Bank; Ibid., Pangestu (2000); Murray Gibbs, "Special and Differential Treatment in the Context of Globalization", Note presented at the G15 Symposium on Special and Differential Treatment in the WTO Agreements (New Delhi, 10 December 1998); John Whalley, 'Special and Differential Treatment in the Millennium Round', *World Economy* 22.3 (1999): 1065-1093.

[22] Garcia, "Trade and Inequality", 1041; Sonia E. Rolland, *Development at the World Trade Organization*, International Economic Law Series, edited by John H. Jackson (New York: Oxford University Press, 2012), 114.

other elements of S&D, transitional periods appeared to have been negotiated and determined without sufficient involvement of the developing countries' government officials, who well knew how long it would take to establish institutional capacity in the country. It must have been necessary to consider the length of transitional periods very carefully in all areas where they have been or needed to be extended on the grounds of institutional weakness.[23]

In fact, as most of these transitional periods expired in 1999, some members were already in violation. Many developing countries have claimed that they experience difficulties in building institutional and administrative capacity necessary for implementation. There is pressure by developing countries to grant general extensions to all of them, while developed countries would prefer to deal with extensions on a case-by-case basis.[24] On the surface, this should be of no dispute, given that different developing countries have different level of institutional capacities. However, this case-by-case approach would not only take a long time to process in the event that a number of developing countries have problems meeting the timetable of their commitments and need to review their cases individually, but it would also end up being a bilateral negotiation process whereby the developing members would be pressured to give concessions in other areas to obtain the extension. At the same time, it would also appear inappropriate to provide blanket extensions of transitional periods for all developing countries, including the most advanced ones that may no longer need them.[25] Michalopoulos noted that a different approach is clearly needed regarding this and other aspects of S&D which ensures that not all developing countries are treated the same, but one that also does not stall the work of the organization.[26] He argues that this issue needs to be urgently addressed and re-examined in terms of smaller groups of developing countries, and

[23] Michalopoulos, "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization", 31
[24] Ibid.
[25] Ibid.
[26] Ibid.

that both the developed and the developing countries need to shift from their present positions.[27] While the developed country members should give up the request for case-by-case evaluation, the developing country members should abandon the myth that all of them are equally incapable of meeting WTO commitments.[28] He suggests that one possibility can be to extend transitional periods for all low and lower middle-income countries, based on the definition by the World Bank, while evaluating the rest individually. The review of the transitional periods should also have experts' participation from governments and appropriate international institutions with knowledge of capacity building and requirements in the respective areas.[29] Kessie also identified the threat of being sued under the dispute settlement mechanism due to the lack of legal capacity when a developing country tries to apply a certain measure that should be allowed as S&D but that has some adverse effect on another country.[30]

Supperamaniam also argues that the single undertaking adopted at the establishment of the WTO has significantly diminished the importance of S&D.[31] He points out that for the majority of developing countries, the WTO agreements "have put them in a disadvantageous position by restricting them from evolving and implementing a range of policy measures designed to stimulate growth, industrial development and diversification of their economies."[32] Based on his argument, it can be said that there are almost no S&D provisions which would enable developing countries to overcome the negative impact on development of several parts of the WTO Agreements. It has been pointed out that the existing treatment

[27] Ibid., 34.
[28] Ibid.
[29] Ibid.
[30] Kessie, "Enforceability of the legal provisions relating to special and differential treatment under the WTO agreements", 968.
[31] Supperamaniam, "Special and Differential Treatment for Developing Countries in the World Trade Organization".
[32] Ibid. This argument shared the views of Ha-Joon Chang, *Kicking away the Ladder: Development Strategy in Historical Perspective* (London; Anthem Press, 2002).

accorded under the WTO law is to oblige developing countries to eventually implement all the relevant WTO disciplines, not to help them benefit through trade, and there are claims that S&D should help developing countries become self-sustained and prevent them from making the onerous commitments, which would ensure long-term and sustainable growth.

2.4 Deadlock of the Doha Development Agenda

Given the emphasis on tackling the challenges of development through trade, including those of existing S&D, the current trade-negotiation round called the "Doha Development Agenda" puts the issues of developing country members at the centre of negotiation. In the declaration, members promised "to place their needs and interests at the heart of the Work Programme adopted in this Declaration."[33] There is the recognition that globalization has the positive side of promoting economic development, but at the same time has negatives such as dependence on protectionism and widening the gap between rich countries that have succeeded in industrial and technology development and poor countries that still depend on production of primary commodities. Countries have acknowledged the necessity of the work to make sense of the proposition that 'free trade promotes development.' The declaration also affirmed the significance of S&D in the WTO Agreements.[34] In addition, members have clearly recognized the unbalanced outcome of the Uruguay Round along with the "single-undertaking" and "Grand Bargain."[35]

After the setback of the Seattle Conference in 1999, which witnessed a severe confrontation between developed and developing countries, the new round was launched in Doha in 2001 with the intention not to repeat the same failure. However, negotiations in the

[33] Paragraph 2 of the Doha Ministerial Declaration.
[34] Paragraph 44 of the Doha Ministerial Declaration.
[35] Finger and Nogues, "Unbalanced Uruguay Round Outcome," 322. For the discussion about "Grand Bargain", see Ostry, "The Uruguay-Round North-South Grand Bargain".

Doha Round faced a first deadlock in July 2006 because of complex confrontations among members. These were not confined to developed and developing country members, but also between developed country members over agricultural and non-agricultural market access (hereinafter NAMA) negotiations. Negotiators did not meet any of the interim deadlines for completion of the talks, and Members could not even satisfy the requirement for holding ministerial conferences at least every two years.[36]

Generally speaking, the DDA has seen severe confrontation and divergence in the negotiation, especially on agriculture and NAMA. In agriculture, developing countries have kept demanding the elimination of subsidies provided by developed countries and the reduction of high tariffs remaining on agricultural products exported from developing countries. A large number of developed countries have been reluctant to commit to further liberalization of the agricultural market to protect their domestic producers, unless developing countries promise to commit to reduce tariffs on non-agricultural goods. Developing countries have claimed that the tariffs on manufactured products remain high in developed countries and that they are the ones who should show further flexibility in this area. In addition to this difficult deal on agriculture and NAMA, which is the most likely stalemated, huge differences in other areas have been marked (Table 1-2).

Neither has negotiation on S&D review made remarkable progress, though developed countries have shown greater flexibility in providing even more preferential treatment to LDCs. Furthermore, with the emergence of large and influential developing country members, developed countries started to demand their due responsibility in accordance with economic power, which can be construed as the need for differentiation. However, those large emerging countries strongly opposed differentiating themselves, as they fear the loss of

[36] Article 4.1 of the Marrakesh Agreement Establishing the World Trade Organization.

special status as developing countries and bargaining power. Developed countries also intended to bring new issues, the so-called Singapore Issues, insisting on the importance of ensuring fair competition and a good investment environment. This agenda faced severe resistance from almost all developing countries, which would be threatened with the loss of their policy space, something which they felt they had already lost at the conclusion of the Uruguay Round. In the meantime, negotiation on trade facilitation was launched in 2004, with an agreement among members, both developed and developing, with some positive expectation on trade expansion and development. Thus, the DDA was, even from its launch, much too complicated, with the tangled web of national interests and protectionism among member states.

Table 1-2: Feature of the Deadlocked DDA – Claims by Each Group

	Developed Countries	Developing Countries	Other
Agriculture	Resistance to: Eliminating subsidies by US Opening market by EU	Eliminating subsidies Cutting tariff	
NAMA	Cutting remaining high tariff by members	Cutting tariff by developed countries	High tariff → 10-20%
Services	Liberalization of financial and telecommunication sector	Liberalization of movement of people	
Development S&D	Tolerance and flexibility towards LDCs Need for differentiation	Expanded S&D Divergent views on differentiation (opposed by larger DCs, supported by LDCs and SEs)	
New Areas	Competition, investment, government procurement etc. (Singapore Issues)	Rejection of all new initiatives	Start negotiation on trade facilitation

At the beginning of 2008, as negotiators started realizing that when the President of the United States changed in January 2009 the negotiations would face continued stagnation, they decided to hold a high-level meeting for one week in July 2008. Although at this meeting they agreed on many issues, such as the reduction of the United States agricultural subsidies and exemptions for developing countries in NAMA negotiations, the United States and India could not find a compromise solution on the requirement of special safeguard measures for agricultural products permitted for developing countries. Director-General Pascal Lamy had to announce the collapse of the talks in July 2008. Since then, there has been no substantial progress in the negotiation.

When it comes to the work on S&D, the Doha Ministerial Declaration reaffirmed its importance, stating "provisions for special and differential treatment are an integral part of the WTO agreements." It called for a review of S&D provisions in the WTO with the objective of "strengthening them and making them more precise, effective and operational."[37] Efforts to achieve an agreement on S&D have not been successful, reflecting disagreement among WTO members particularly on the appropriate scope and design of S&D. This arises from wide divergence among WTO members in resources and capacity constraints, and national policy and investment priorities, with consequent differences not only in the ability to bear the costs associated with implementation of new rules, but also in the net benefit from trade liberalization.[38] It is safe to say that the adjustment cost of new rules mostly falls on developing countries, as the new rules tend to reflect demands of industrialized countries.

For example, Mongolia, which has been a member of the WTO since 1997, has not benefited but rather faced many problems in terms of implementing obligations and adjusting

[37] Paragraph 44 of the Doha Ministerial Declaration.
[38] Bernard M. Hoekman, "Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment", *Journal of International Economic Law* 8.2 (2005): 406.

national policies to conform with the agreements.[39] In particular, the elimination of export subsidies in the cashmere industry, which is vital for the economy, and the reduction of import tariffs to 5 percent as an applied rate have resulted in the failure of many domestic industries. They have almost no chance to recover and domestic producers have been crowded out of the market as they found themselves unable to compete with foreign producers due to lack of technology and skills. The country also suffers from huge trade deficit.[40] This is not only the case with Mongolia, but with many developing countries that have already encountered the problems and difficulties in WTO accession and post-accession policy orientation because of the lack of expertise in WTO regulations and of the political will to adapt to the WTO discipline. The problems associated with accession and post-accession have also substantially affected the state of practical application of WTO rules.[41]

Nowadays it is clear that no country in this ever-globalizing world can afford to stay outside the universal trading system. This is especially true for small economies, since without the WTO rule-based system such players would be doomed to stay confined to their small domestic markets and left out of the global economy, while the WTO system opens the doors of opportunity by creating economies of scale for the entities in that small economy. Governments should tackle the lack of knowledge and understanding of the WTO and seriously start focusing on building their capacity to clearly understand the WTO's disciplines and its implications. Otherwise, poorer countries will never be able to avoid the risk of choosing inappropriate policy lines or giving up applicable and effective policy options due to the poor understanding on interpretation or legal implication of WTO rules.

[39] Damedin Tsogtbaatar, "Mongolia's WTO Accession: Expectations and Realities of WTO Membership", in *Managing the Challenges of WTO Participation: 45 Case Studies*, ed. Peter K. Gallagher, P. Low and A. L. Stoler (Cambridge: Cambridge University Press, 2005), 409-419.
[40] Ibid., 409-411.
[41] Ibid., 411.

Despite the achievements of GATT/WTO in trade liberalization, the global trading system faces major challenges, as seen in the recent negotiation.[42] First, even after the commitments made upon the conclusion of the Uruguay Round have been implemented, many members still retain high and concentrated protection especially in the areas of developing countries' particular interest. In the area of agriculture, the progress in reducing high tariffs and eliminating distorting subsidies has been limited. In both agriculture and manufacturing, tariff peaks and escalation persist which impede the export diversification of developing country. Moreover, protection also remains high in the same areas in developing countries themselves. This means that use of contingent protectionist measures such as antidumping duties is now widely spreaded among both developed and developing countries.[43]

Second, with the furtherance of economic integration and decrease of tariffs and quantitative restrictions on imports, focus has shifted to other forms of trade obstacles that touch upon domestic policies, such as subsidies and intellectual property rights, and more recently, investment and competition policies. Obligations and pressures to conform domestic regulatory policies to the multilateral trading framework could substantially harm the developing countries' interests.[44]

Third, a number of weaker developing countries have concerns on the onerous costs to implement difficult and complex obligations under the various agreements, such as customs valuations and intellectual property rights, without benefiting much from improved market access or receiving adequate financial and technical assistance to facilitate their effective integration into the international trading system. Due to their capacity constraints to negotiate

[42] Anne McGuirk, "The Doha Development Agenda," *Finance and Development* 39.3 (2002): 3-4, available at http://www.imf.org/external/pubs/ft/fandd/2002/09/mcguirk.htm.
[43] Ibid., 3.
[44] Ibid., 3-4.

and ensure supply-side development, they are unwilling to further engage in multilateral trade negotiations.[45]

There are many who feel that the Doha impasse has caused the loss of the WTO's value. Has the post-World War II trading system collapsed? All the countries in the world have turned their attention towards regional free trade agreements; the most recent and important example is the Trans-Pacific Partnership Agreement. Is the world saying no to multilateralism? Will bilateralism and plurilateralism prevail and become the norm for trade negotiation? While it is hard to drastically change the current momentum for multilateral trade negotiation, it should not be forgotten that negotiation in cross-cutting areas, including development issues, is only possible in the WTO. This is why expanding opportunities and benefit for all member states could be achieved in the multilateral forum.

3. Scope and Objectives of the Study

The study will cover S&D provisions under the WTO law and its justification from both legal and economic perspectives and through the concept of policy space. Not all areas of S&D specifically identified in the following section will be covered by this study , but it will focus on those related to industrial development, *i.e.* industrial policy, which includes market access and policy flexibility under the WTO Agreements.

The severe situation of small developing countries is apparent in figures in the previous section. They are left far behind in achieving substantial economic development through global trade, while larger emerging economies have been done very well and succeeded in catching up with developed countries. The reason for such marginalization could be attributed

[45] Ibid., 4.

to the constraints on developing countries in two aspects, which are endogenous and exogenous. The former includes their insufficient capacity in finance, administration, institutions and human resources, and the latter consists of the international rules and regulations under the WTO system, which have reduced their policy space. One scholar called such situation "kicking away the ladder," aptly pointing out that development-oriented policy choices are no longer available due to their prohibition under the WTO Agreements.[46] The WTO rules accord developing countries S&D, providing more favorable treatment in order for them to better adjust and integrate into the multilateral trading system. However, S&D provisions have not been effective and meaningful for developing countries. A number of criticisms over S&D have been made, as introduced in the previous section. Why, then, has S&D not been effective and meaningful? One answer could be that S&D has been applied in a blind and blanket way and is also now obsolete, as most of the S&D provisions granting longer transitional period have expired. Given that there is little room left for developing countries to utilize industrial policies which appeared to have worked and contributed to the growth of already-developed countries, and most of the S&D provisions are no longer applicable, is there any reasonable and practical ways to improve such situation?

This study aims at tackling the issue of marginalization of small developing countries by answering the question how they can find the development path through the multilateral trading system. It also discusses how to improve the effectiveness of S&D through examining the reasons why S&D have been accorded to developing countries, and how S&D have contributed to their economic development, applying analysis from both empirical and theoretical perspectives. Finally, the study will revisit S&D so as to make them more effective and operationalized, giving consideration to what role S&D should play under the WTO

[46] Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002).

regime and how S&D can be improved in order to meet the goal of the multilateral trading system. Fair and reasonable proposals on improving S&D would validate the progress of current trade negotiations, which would consequently strengthen and enhance the ultimate value of the multilateral trading system.

4. Limitation

In order to clearly identify the limitation of the study, it should be noted that, while the importance of agricultural development and its contribution to the growth of developing countries is recognized, the study focuses on S&D provisions and proposals only in the context of industrial policy, including market access, *i.e.* export opportunities and policy flexibility to utilize industrial policy measures. Such industrial policy is covered by the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), the Agreement on Trade-Related Investment Measures (the TRIMs Agreement), Article XVIII of the General Agreement on Tariffs and Trade (GATT XVIII), and the Agreement on Trade-Related Intellectual Properties (the TRIPS Agreement). Some WTO and other agreements will not be included, in order to make deeper analysis and pragmatic proposals for the objectives of the study. Furthermore, technical assistance as one form of S&D is not covered under the scope of this study, partly because technical assistance has been provided on a unilateral basis by donor country members with so-called “best endeavor,” with no binding nature. Because the form and scope of technical assistance wholly depends on the discretion of providers, to offer proposals to make technical assistance mandatory or to design a rule-based way of providing technical assistance would not be feasible or realistic, assuming the strong opposition by developed countries. More importantly, the study intends to focus on how to improve the

effectiveness of S&D through reviewing and revising S&D provisions under each WTO Agreement. Along with this clear rule-making objective, it will not cover the issues relating to technical assistance.

5. Methodology

The study will apply empirical and theoretical approaches. Through the former, it will introduce what S&D provide under the WTO rules, find what is insufficient, and what the historical and current issues and challenges are relating to S&D. For the latter, it will review the history and origin of the justification for differentiated treatment for developing countries, which can apply to the rationale of S&D under the current trade regulation. The comparison with CBDR, its history and rationales, and the concrete application of legal justification for the differential treatment provided for developing countries, gives insights on S&D, identifying the common origin attributed to differentiated treatment under international law of development. In addition to reviewing international law of development, the empirical evidence on trade and industrial policies also indicates that the policy measures necessary for development may differ in accordance with the level of economic development. Revisiting justifications through legal theory and historical review yields the solution for the question on who needs S&D; in other words, what kind of S&D is needed for the developing country at which development level.

Furthermore, the illustration of conflicts within developing countries over eligibility and coverage for granting S&D describes why existing S&D provisions are only available for LDCs. It also explains the true cause of such confrontation – the threat of possible adverse effect imposed by S&D. This tells us that, to be permitted, S&D should minimize adverse

effects on other countries and that it is vital to identify the level and the range of S&D which does not cause such adverse effects. In order to do so, the differentiation of eligible developing countries is necessary. The analysis and integration of these theories under the concept of policy space offers justification for providing S&D and visualizes the direction for improving S&D, including how S&D should compensate inequality from both legal and economic perspectives. The theoretical approach intends to clarify the objectives and significance of S&D and to indicate how S&D provisions should be, and what effect S&D should have on economic development in developing countries.

With the approaches described above, the study considers and examines: which kinds of S&D should be justified and desirable; whether current S&D has satisfied such objectives and demands; if not, what has been insufficient; and whether the proposals and demands from developing countries to review S&D have reflected the significant elements identified through the theoretical approach. After the examination, the study will offer the desirable direction towards differentiating developing countries, based on theoretical and practical justifications of how S&D should be improved.

6. Significance of the Study

There have been no previous academic studies that argue for S&D from a very comprehensive perspective. This study includes the review of the origin of differential treatment for developing countries, the emerging history of international law of development and "common but differentiated responsibility" under international environmental law, applying traditional economic arguments, and the concept of policy space.

To assure the uniqueness and significance of this study, it is necessary to explain the implications of each approach. From the empirical perspective, through reviewing S&D classification and negotiation history, it will try to figure out whether S&D is sufficient or effective. If not, where is it insufficient and ineffective how can it be improved, and how have members coped with demands and requests from developing countries. For the theoretical approach with a legal perspective, the review and examination of international law of development will identify the original concept of differentiated treatment for developing countries, and will examine whether such justification under international law of development can apply to that of current S&D under international economic law. Also, by learning from the practical application, history and justification of CBDR, it will compare them with S&D under WTO law and examine whether they share any characteristics and justifications with S&D. Then, with traditional economic theories of infant industry protection and government intervention, it will discuss whether S&D can be economically justified. The concept of policy space will show where and how the policy options of developing countries have been decreased and proven to be smaller than those of developed countries, and offer the answer to how such reduced policy space should be compensated. In addition, demonstration and analysis of actual and potential confrontations among developing countries will explain why such confrontation is occurring and will identify the need of country differentiation. It will then suggest how to minimize the loss of the pie in the trade negotiation through finding the way to compensate loss for others. These approaches prove that differentiation and differentiated compensation for the purpose of leveling a playing field are required and are justified, which gives the rationale and recipe for reasonable differentiation of developing countries. Such a comprehensive approach that provides the most reasonable and effective solution to make S&D meaningful has never been utilized.

While a few papers have managed to propose broad approaches to solve S&D issues in the multilateral trading system, they are not concrete enough so as to form practical proposals for actual negotiation. Not only will this study provide in-depth examination of S&D issues, but it also proposes specific and concrete solutions to S&D and development issues in the multilateral trade negotiation; how to differentiate developing countries for more effective and practical application of S&D.

In order for the current multilateral trade negotiation, especially on S&D, to see progress, there is an urgent need to provide concrete solutions to the following challenges: which countries should be eligible for S&D; in what area and what kind of S&D should be provided to such eligible countries; and what S&D should achieve and what role S&D should play in order to achieve substantial economic development.

The differentiation of developing countries in providing S&D proposed in this study would in fact be supported not only by developed country members, but also by a large number of developing countries, especially smaller and weaker developing countries, such as LDCs and SVEs. It would be opposed by larger developing countries, including emerging economies, because they would fear the loss of bargaining power in multilateral negotiation and the special status as "developing" countries. However, it is apparent that one category of "developing countries," in both trade and development context, is no longer applicable or appropriate, with the increasing divergence among countries in terms of level of economic development, commercial interests and geographical and social characteristics. Most of these divergences were recognized several decades ago.[47] Not only could differentiation of developing countries enhance the effectiveness of S&D, but also strengthen justifications for providing S&D. Though developed countries strongly opposed the expansion of exceptions

[47] The disparity in development and difference in geographical characteristics were clearly referred to in the Declaration on the Establishment of a New International Economic Order, 1 May 1974, UN/GA. Res.3201 (S-VI).

for developing countries, this study will successfully provide better and more acceptable conditions and ways of granting S&D. Differentiating developing countries that are eligible to enjoy S&D, with objective and refined criteria, enables the provision of more reasonable, feasible and targeted S&D for each category of developing countries. This approach might provide the solution to the most problematic concern of developed countries with regard to permitting or expanding general and broad exceptions to the multilateral trade rules. It is valuable not only for developed countries but also for developing countries, especially those who have failed to benefit from S&D. Provision of more targeted S&D through differentiation will enhance the effectiveness of S&D. Moreover, legal and economic theories illustrate who is in need of S&D and what S&D they need. By providing S&D which responds to such needs, it would be possible to make the most effective use of S&D and to find the development path through trade for developing countries, especially small economies that are in the most need. Differentiation in providing S&D is, therefore, a meaningful and valuable approach both for developing and developed countries, and also a feasible solution in the context of actual negotiations.

One of the great significances of this study is to reveal the reality of the multilateral trading system. Such reality revealed in the study includes three dimensions: further diversification of developing countries, the real cause of S&D ineffectiveness and the genuine necessity and justification to differentiate developing countries in providing S&D. This task will contribute not merely to shedding light on the real confrontation and current status of the trade negotiation, but to clearly offer the way to solve such challenges in the most feasible and suitable manner.

A specific and integral argument of this study will examine and determine whether measures should be permitted or exempt from prohibition under the WTO Agreements. The

adverse effect of policy instruments applied by a certain developing country as policy flexibility or market access S&D should also be considered an essential factor. In short, if an adverse effect of the policy measure is *de minimis* or below, the country should be accorded policy flexibility to utilize the measure. If there is an adverse effect above the *de minimis* level, the country should pay compensation equal to the adverse effect in order to still gain the room to apply such a policy. Developing countries might choose to pay compensation, taking into account the future positive effect of the measure on its economy. At the same time, they have to know the cost and future benefit of paying compensation at the moment and the positive impact on the economy of such a policy. Identifying the level of *de minimis* and the amount of counter compensation to the applied policy measure, where not *de minimis,* would be very significant and critical for determining to what extent S&D should be permitted. This in turn provides an important justification for allowing specific S&D to certain developing countries. Such an assessment will make S&D operational and effective, enabling it to target the countries which are in the most need and to provide the most necessary and appropriate S&D under the WTO Agreements. Applying the comprehensive approach explained above, this study will offer a significant basis for assessment, where to give up and where to compensate, to what degree and what form compensation should take, which further provides the way to differentiate developing countries and what kind of S&D should be accorded.

Finding an agreeable solution for S&D will also encourage flexibility and compromise from developing countries in the area of agriculture and NAMA negotiation in exchange for gaining benefits in S&D negotiation, which will ultimately bring the breakthrough for the current Doha stalemate. Furthermore, the successful conclusion of the current trade negotiation round will also contribute to substantial economic development through trade

liberalization and expansion. This will be of great benefit and expand the pie for all WTO members.

7. Structure of the Study

Chapter II will first review S&D classification by the WTO and some scholars, and the negotiation history of S&D, both in the GATT era and since the establishment of the WTO. It will also introduce scholars' assessments on S&D provisions, including sufficiency and effectiveness under the WTO law. This chapter will introduce the specific proposals submitted by member states at the negotiation table in the current Doha Round. By describing the history, criticisms and actual proposals from member countries, it attempts to identify the facts behind the emergence of S&D, and where considered insufficient and ineffective, how to move towards improvement of S&D.

Chapter III will demonstrate the actual and potential confrontations between or among developing country members in the multilateral trade negotiation at the current round, and to analyze the reason why such confrontations occur. The analysis will suggest the important consideration of allowing S&D for certain developing countries. It will also explain the reason why most more favorable S&D remains only for the weakest and poorest states, *i.e.* LDCs, and why it is not possible to expand its coverage.

Chapter IV will discuss legal principles and historical evidence to justify the provision of differentiated treatment for developing countries, in connection with the emergence of S&D referred to in Chapter II. Firstly, it will revisit the concept of "international law of development" to explain how differential treatment for developing countries was formed and to assert why it is justified. "Common but Differentiated Responsibility (CBDR)" under

international environmental law is the concrete example of differential treatment advocated by international law of development. Comparison with CBDR offers some useful implications for S&D under international trade law and demonstrates that granting compensatory inequality is necessary to achieve substantive equality. Secondly, this chapter will discuss historical arguments and empirical evidence, including preferential tariffs, the infant industry protection argument, government interventions and trade and industrial policies, and attempt to reaffirm the justification of these policy measures.

Chapter V will introduce the concept of policy space and elaborate how a country's effective policy space is shaped by determinants. Integrating justifications discussed in the previous chapter under the concept of policy space, it will identify not only what has been lost, but also why S&D has not been meaningful. The newly elaborated concept of policy space will point towards expansion of developing countries' policy space and improvement of S&D.

Lastly, the concluding chapter will propose the direction towards differentiation of developing countries, based on the arguments and justifications in the previous chapters.

Chapter II

S&D History, Classification and Negotiation

This chapter will review the detail of the history of S&D negotiation in the GATT and WTO eras, as well as the classification of S&D by the WTO. Also, the following sections will introduce the nature and function of S&D under each agreement and the proposals on S&D submitted by developing country members in the current round over more than a decade. Unfortunately, as mentioned in the previous chapter, the DDA, the current trade negotiation round, is at an impasse and no way out has yet been found. S&D negotiation as the core aspect of development issues has made little progress as a result of the stalemate.

1. History of S&D Negotiation and Legal Amendments before the Establishment of the WTO in the GATT Era

As will be discussed in detail in the following sections, the idea of S&D developed through the persistent effort of developing countries in the GATT negotiations since 1950s. S&D included the concept, initially expressed in the mid-1960s, that poor countries would not be expected or requested to make reciprocal concessions in trade negotiations. The term "special and differential treatment" derived from the Tokyo Declaration in 1973 that recognized the importance of applying the differential measures to provide special and more favorable treatment to developing countries over the possible areas for negotiation.

1.1 1950s: Recognition of the Needs of Developing Countries

The GATT was drafted and adopted by twenty-three countries without much concern for developing countries. In fact, development as an issue did not even exist before the 1960s. The GATT was a "club of like-minded countries" that shared the idea of trade liberalism.[48] During this period, the GATT contracting parties focused on market access with attention to other countries' domestic trade regimes, and development policy was basically applied through government intervention and restrictive measures.[49] The most important provision in the GATT for developing countries was Article XVIII, which related to infant industry protection and preferential tariff agreements.

In the middle of 1950s, the review session of the GATT XVIII was held, and it provided a forum for developing countries to table their concerns. This attempt to amend the article got started from the discussion over dissatisfaction over the complexity and difficulty for developing countries in utilizing the provisions. Before the 1954-55 Review Session, the members had carefully and cautiously dealt with whether the exemption for infant industry protection should be granted and what kind of measures could be permitted under Article XVIII. While several protective measures, including import quota and local content requirement, had been granted for some developing countries under the provisions, the Working Party carefully reviewed each notification and recommended that some measures be subject to specific conditions and some original requests be withdrawn.[50] The representative of the applicant countries, in its statement, pointed out the review procedure stipulated under

[48] Robert E. Hudec, "The GATT Legal System: A Diplomat's Jurisprudence", *Journal of World Trade Law* 4 (1970): 635.
[49] Alexander Keck and Patrick Low, "Special and Differential Treatment in the WTO: Why, When and How?", Staff Working Paper ERDS-2004-03, Economic Research and Statistics Division (WTO, 2004).
[50] Hudec, "The GATT Legal System," 25.

Article XVIII was so strict that "it practically destroys the benefits that it professes to confer."[51]

Because of those criticisms, member countries agreed to review the provision that allowed the exemption for infant industry protection and to relax the requirements. The original text of the paragraph 1 of Article XVIII was amended, giving a more positive tone to the measure under the provision. In other words, it clearly stipulated that the progressive development of members' economies would facilitate the objective of the Agreement[52] and recognized that protectionist measures taken under the article were not deviations from the GATT rules, but instead were fully consistent with GATT policy and objectives.[53] Moreover, the sentence in the original text that warned the risk of harm on both the applicant country and others by unwise use of such measures was deleted. While the requirement of prior approval remained, a provision which granted an absolute veto to the affected countries was removed.[54] Also, the standard for utilizing trade-restrictive measures for the purpose of infant industry protection and the principle of reciprocity regarding developing countries were eased.[55]

Although the result of such relaxation did not change the functioning or the legal position of developing countries in the GATT,[56] it was the foundation for the subsequent treatment for developing countries in the GATT as "together but unequal."[57] Alavi further explained that countries were "together because they were contracting parties to the GATT and had a voice in the negotiations, but they were unequal because the general rules of the game did not apply

[51] GATT Secretariat, *GATT Press Release*, No.177, Geneva, 9 November 1954, quoted in Robert E. Hudec, *Developing Countries in the GATT Legal System* (London: Trade Policy Research Centre, 1987), 41.
[52] Paragraph 1 of Article XVIII of the General Agreement on Tariffs and Trade (hereinafter the GATT).
[53] Hudec, "The GATT Legal System," 27.
[54] Ibid.
[55] Ibid.
[56] Ibid., 28.
[57] Alavi, *Legalization of Development in the WTO*, 89.

to all of them equally."[58] Oyejide identified the asymmetry in the GATT, pointing out that relative protectionism against exports from low-income developing countries in the market of the developed countries still existed because the GATT mostly covered the goods developed countries were interested in. Those from developing countries were in general excluded and the level of their tariffs was not negotiated.[59] Some trade restrictions against developing countries applied by developed countries were not within the scope of the GATT, in particular with regard to agriculture, which was of importance to many developing countries.

1.2 1960s: Emergence of the Group of Developing Countries – Establishment of UNCTAD and the Addition of "Trade and Development" in the GATT

During the 1960s, developing countries consolidated common ground and a platform against trade restriction by developed countries, and formed the Group of 77 with the establishment of the United Nations Conference on Trade and Development (UNCTAD) in 1964. They used UNCTAD as an alternative to the GATT, and it was the venue for positive action to secure developing countries' interests. This significant change in their bargaining position was also a result of the change in their own trade policy. In particular, developing countries realized that their development goals could not be achieved only by trade barriers, but they needed to expand exports, which could be achieved under the GATT regime.[60] The policy postulated new trade principles and policies with differentiated norms for economic development through international trade which favored developing countries. As developing countries succeeded in formulating their demands, they adopted UNCTAD as a forum to put

[58] Ibid.
[59] Ademola T. Oyejide, "Low-Income Developing Countries in the GATT/WTO Framework: The First Fifty Years and Beyond", in *From GATT to the WTO: The Multilateral Trading System in the New Millennium*, ed. the WTO Secretariat (The Hague: Kluwer Law International, 2000), 117.
[60] Joan E. Spero, *The Politics of International Economic Relations*, 4th ed (New York: St. Martin's Press, 1990), 74-75.

these demands on the agenda.[61] UNCTAD forced the GATT to demonstrate its commitment to the interests of developing countries and resulted in the adoption of Part IV of the GATT in 1964.

The principle of non-reciprocity was incorporated in Part IV of GATT, entitled "Trade and Development." Part IV of the GATT became effective in 1966 and was designed to provide special treatment to developing countries within the GATT framework. Part IV consisted of three Articles---XXXVI (Principle and objectives), XXXVII (Commitments) and XXXVIII (Joint Action). Article XXXVI identified the need for development, the need for increased market access, the need to establish stable and equitable processes, the need for economic diversification, and the importance of international cooperation. Developed country members agreed that they did not expect reciprocity with regard to the reduction of tariffs and other trade barriers. Article XXXVII established the commitments of developed country members to give high priority on reducing and eliminating trade barriers to products of particular export interest to developing countries, and to make efforts to maintain equitable trade margins on products of developing country members. It also committed to adopt measures to develop import opportunities for developing countries, and to give a special regard to the trade interests of these emerging members. In Article XXXVIII, member countries agreed to take action through international arrangements, to improve market access for the primary products of developing countries, and to collaborate with the UN and other international organizations.

Although Part IV of the GATT gave a legal basis for differential treatment for developing countries, provisions were not legally binding but only required "best endeavors" from developed countries. However, Part IV of the GATT has been the basic principle for defining

[61] Alavi, *Legalization of Development in the WTO*, 90.

how developing countries shall be treated in the multilateral trading regime. It also defined development basically in economic and trade terms as a rise in standard of living, rapid and sustained expansion of exports, and more favorable market access for products from developing countries.[62]

1.3 1970s: New International Economic Order and the Generalized System of Preferences and Enabling Clause – Preferential Market Access and the Creation of LDC Category

After the major period of decolonization in early 1960s, the UN system recognized the admission of "less-developed countries." The less-developed countries worked as a coalition in an effort to change the existing international economic regime, and to codify new norms into a legal document.[63] In May 1974, the General Assembly of the United Nations adopted a Declaration and Program of Action on the Establishment of a New International Economic Order (hereinafter NIEO).[64] Elements of the NIEO included additional preferential access to developed country markets; changes in international primary commodity markets to reduce price volatility and declines; increased foreign aid; technology transfer; and revision of the international monetary system to finance the recurring deficits.[65] The NIEO challenge to the status quo, and the far-reaching implications of its implementation, was opposed by industrialized countries. Many NIEO provisions have intended to shape the right to development. While the documents do not make any mention of such a right, official UN

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[62] Ibid., 91.
[63] Isabella D. Bunn, "The Right to Development: Implications for International Economic Law" *American University International Law Review* 15.6 (2000): 1430.
[64] Declaration on the Establishment of a New International Economic Order (1974) G.A. Resolution 3021 (S-VI), UN GAOR, 6th Special Session, Agenda Item 6, 2229th plen. mtg. At 1, UN Doc. A/RES/3021 (S-VI).
[65] Bernard M. Hoekman and C. Ozden, "Trade Preferences and Differential Treatment of Developing Countries: A Selective Survey" World Bank Policy Research Working Paper 3566 (2005), 5.

reports on the right of development take into consideration elements of the NIEO.[66] The NIEO framework had an impact on the legal status of the right to development, and states also realized the need for actions to achieve substantial economic development for less-developed countries. In the Tokyo Round, launched in 1973, GATT developing countries claimed, and were entitled to "differential and more favorable treatment" in all areas of the negotiations, thanks to the emerging concept of NIEO.[67] International law of development, which will be discussed in the next section, is also one of the aspects of the NIEO.

The GATT contracting parties recognized the importance of expanding export earnings through trade and securing the share of trade of less-developed countries. Paragraph 4 and 5 of Article XXXVI of the GATT states that "there is a need to provide … favourable and acceptable conditions of access to world markets" for products from less-developed countries for the sake of "permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development."[68]

S&D includes the aspiration to provide enhanced market access to developing country products. Following the introduction of Part VI of the GATT, entitled "Trade and Development," there was an increasing demand for positive actions providing favorable market access for developing countries. This demand resulted in the agreement on waivers from Article I (Most Favored Nations [hereinafter MFN] Obligation) in relation to the implementation of the Generalized System of Preferences (hereinafter GSP), which was introduced in 1971.[69] It also led to the decision on "Differential and More Favourable

[66] Bunn, "The Right to Development", 1431.
[67] Hudec, *Developing Countries in the GATT Legal System*, 73-74.
[68] Article XXXVI of the GATT.
[69] GATT, "Generalized System of Preferences", Decision of 25 June 1971, L/3545, 28 June 1971, http://www.wto.org/gatt_docs/English/SULPDF/90840258.pdf.

Treatment, Reciprocity and Fuller Participation of Developing Countries,"[70] the so-called "Enabling Clause."

Under the GSP scheme, developed countries grant tariff preferences to the products from developing countries, without asking for reciprocity. The aim of this scheme was to increase the export earnings of developing countries, and promote their industrialization and economic growth. In 1971, the GATT adopted a ten-year waiver of obligation under Article I, providing "legal backing"[71] for the GSP.[72] However, the GSP is based on "best endeavors" commitments and developed countries can include conditionality when granting preferences. Oyejide observed "this made it legally *possible* for developed countries to offer trade preferences to low-income countries" (emphasis added).[73] As he implied, the benefit of the GSP appeared to be cynical. First, offering preferences was not a legal obligation for developed countries. In other words, it is up to developed countries whether to grant preferences or not. Second, a number of export products that developing countries have interest in were excluded. Therefore, the positive effect of the GSP was limited.

In the Tokyo Round, member countries agreed to provide S&D on the agreements of non-tariff barriers, and developing countries obtained the legal rationale for a waiver from the reciprocal principle. The Enabling Clause was a significant step towards development needs in the GATT. In 1979, at the conclusion of the Tokyo Round, the contracting parties agreed to establish a permanent legal basis for preferential treatment both for tariff concessions and for

[70] GATT, "Differential and More Favourable Treatment Reciprocity and Fuller participation of Developing Countries", Decision of 28 November 1979, L/4903, 3 December 1979, http://www.wto.org/english/docs_e/legal_e/enabling _e.pdf.
[71] Ademola T. Oyejide, "Development dimensions in multilateral trade negotiations", in *Doha and Beyond: The Future of the Multilateral Trading System*, ed. Mike Moore, Cambridge University Press (2004), 78.
[72] GATT, "Generalized System of Preferences".
[73] Oyejide, "Developing dimensions in multilateral trade negotiations", 78.

non-tariff trade measures in the GATT system. Through the Enabling Clause,[74] the developed countries agreed that, notwithstanding the MFN principles, contracting parties may accord differential and favorable treatment to developing countries without according reciprocal treatment to other contracting parties. Non-application of Article I of the GATT and non-reciprocity apply not only to the existing GSP, but also to differential and more favorable treatment concerning non-tariff measures.[75] It also mentions clearly that the developed countries do not expect reciprocity of commitments made by developing countries in trade negotiation.[76] The clause created a possibility of exception to equality of treatment under the GATT, in which such differential treatment has been expanded from the GSP to concern non-tariff measures, and to account for the needs of the least-developed countries. This was accepted as the norm of international trade law, and Part IV of the GATT and the Enabling Clause created the basis for the S&D provisions. Yet, despite tariff preferences provided under the GSP scheme and the Enabling Clause, developing countries may not have benefited from them, as Fukasaku and Ismail pointed out, because they failed to actively participate in the negotiation of the Tokyo Round on a reciprocal basis.[77] In other words, these preferences prevented developing countries from taking advantage of reciprocal liberalization and the principle of non-discrimination which leads to more economic integration.

Moreover, the Enabling Clause set up provisions for differences in the level of economic development. On the one hand, it stresses the special needs and concerns of least-developed

[74] GATT, "Differential and More Favourable Treatment Reciprocity and Fuller participation of Developing Countries", paragraph 1.
[75] Ibid., paragraph 2.
[76] Ibid., paragraph 5.
[77] Kiichiro Fukasaku, "Special and Differential Treatment for Developing Countries: Does It Help Those Who help Themselves", Working Paper 197, The United Nations University, World Institute for Development Economics Research (2000), 7. See also Faizel Ismail "Rediscovering the Role of Developing Countries in GATT before the Doha Round", *The Law and Development Review* 1.1 (2008): 66-67.

countries.[78] On the other hand, it considers that developing countries characterized by faster growth should gradually return to fuller participation as equal parties in the multilateral trade system, the so-called 'graduation' principle, under which less-developed countries were expected to take greater obligations when "their capacity ... would improve with the progressive development of their economies and improvement in their trade situation".[79] It also identified, for the first time in the international trade regime, LDCs as a separate category of members granted more favorable treatment.

Reviewing the history of the creation of the LDC category suggests why and how it was accepted. While it was 1971 when the UN adopted the formal definition of LDCs, the history dates back to the 1960s. At the first conference of UNCTAD in 1964, the idea that some countries were less-developed than other developing countries was raised. The first reference to "least-developed countries" was made in the second UNCTAD in 1968,[80] and member states adopted a resolution concerning special measures to be taken to help LDCs in the context of the GSP.[81] The process of identifying LDCs at the UN forum started in 1969, and the formal definition was created in 1971. Hawthorne argued that there were three significant events in the creation of the LDC category.[82] The first was the recognition of the concept of "development" in the international community. This was illustrated by the UN's adoption of the 1960s as the "Development Decade" in 1961, as well as the establishment of the International Development Association by the World Bank in 1960. Further, the "Second

[78] GATT, "Differential and More Favourable Treatment Reciprocity and Fuller participation of Developing Countries", paragraph 2(d), 6 and 8.
[79] Ibid., paragraph 7. See also Ewa Butkiewicz, "Impact of Development Needs on International Trade Regulation", in *International Law and Development*, ed. Paul de Waart, Paul Peters, and Erik Denters (Dordrecht; Boston: M. Nijhoff, 1988), 196, and Ndiva K. Kale, "The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System", *California Western International Law Journal* 18 (1988): 298.
[80] Helen Hawthorne, *Least Developed Countries and the WTO: Special Treatment in Trade* (Basingstoke: Palgrave Macmillan, 2013), 18.
[81] UNCTAD Resolution 24 (II), 26 March 1968.
[82] Hawthorne, *Least Developed Countries and the WTO*, 23-27.

Development Decade" started in 1971, and the UN's decision to implement the International Development Strategy gave much impetus to create the LDC category. The strategy included a separate section on "special measures in favour of the least developed" countries.[83]

The second event was the special treatment provided by developed countries. The European Economic Community (EEC) established the Yaounde Convention, which created preferential trading arrangements, including preferential market access, between the members of the EEC and former colonies in the African, Caribbean and Pacific (hereinafter ACP) regions.[84] The convention meant that the EEC recognized and provided special treatment to a small group of developing countries as "a consequence of historical ties."[85] The first attempt by the EEC to provide special treatment for LDCs initially derived from this event.[86]

The third event was the recognition of the poorest or the least developed countries and the need of the different norm providing special treatment for them at the international forum. The first two UNCTAD clearly recognized the existence and disadvantages of the poorest or the least developed countries with official reference to them. UNCTAD reinforced the idea that some countries needed more help than others.[87] After the creation of the LDC category at the UN, UNCTAD adopted the special program for implementation of special measures for LDCs.

These significant historical events show that the creation of the LDC category was the top-down process, an initiative by the developed countries and international community for the provision of special treatment as a form of compensation for former colonies. Other developing countries were not against the creation of the category or the provision of special

[83] Ibid., 27.
[84] Ibid., 25.
[85] Martin Holland, *The European Union and the Third World* (Basingstoke: Palgrave Macmillan, 2002), 30-32.
[86] Hawthorne, *Least Developed Countries and the WTO*, 25.
[87] Ibid., 26.

treatment for LDCs.[88] Thus, the creation of the LDC category and the special treatment for them were accepted not only by developed countries but also by other developing countries which were not considered LDCs.

1.4 1980s: Divergence Between Developing Countries

Since some developing countries had achieved substantial economic development through international trade, the block of developing countries started to fall apart. While newly industrialized developing countries in East Asia succeeded in industrialization and export expansion, those in South Asia and Africa were largely left out of growth through trade. Faced with the success of the newly industrialized countries, some other developing countries began to reconsider their trade policy. Their interests became diverse, which also diversified their approach to the GATT regime.[89] This meant that developing countries became much more heterogeneous. Since then, it has been very difficult to formulate a common "South" position on many issues. The interests of different developing countries are no longer identical.[90] Trebilcock pointed out that the second oil shock and recession in the developed world, which led to the debt crisis in the early 1980s, also compounded the divergence of developing countries.[91] Developing countries had to liberalize their trade regimes much earlier than they had planned in order to reschedule their debts. All these factors revealed that the South block was not solid as it had been.

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[88] Moreover, the Global System of Trade Preference (GSTP) provides special treatment for LDCs. The GSTP established the preferential tariff scheme among developing countries on the basis of the Enabling Clause and entered into force in 1989 (Hudec, *Developing Countries in the GATT Legal System*, 102-103).
[89] Alavi, *Legalization of Development in the WTO*, 94.
[90] Bibek Debroy, *Beyond the Uruguay Round: The Indian Perspective on GATT* (New Delhi: Response Books, 1996), 17.
[91] Michael J. Trebilcock, "Trade and Developing Countries", in *Historical and Conceptual Foundations*, The World Trading System Vol.1, Critical Perspectives on the World Economy, ed. Robert Howse, (New York: Routledge, 1998), 199-232, 200.

In the meantime, in 1982, the United States was pushing for a new trade negotiation round in order to mitigate protectionist pressures brought by the strengthening dollar and mounting job losses. The United States also sought to reinforce domestic efforts to cut agricultural and other subsidies; to enhance access to foreign markets for the United States' suppliers; to reverse the erosion of support for the multilateral trading system and bring the GATT up-to-date by extending its coverage to new areas of international trade (e.g. intellectual property, services); and to integrate the developing countries more effectively into the world trading system.[92] Many countries, both developed and developing, were opposed to setting up the new round. Developing countries especially feared that the measures they had newly adopted in the GATT would lose their effects if a new agenda were adopted.[93] However, some developing countries, specifically in Latin America, had already initiated domestic economic policy reforms. In addition, as many countries felt the need to "counter the growing trend in the United States and Europe towards unilateral actions and the negotiation of preferential trading arrangement[s],"[94] they finally agreed to launch the new round.

The Uruguay Round was launched in 1986 and was supposed to deal with issues of global recession, the debt crisis in developing countries, trade in services, non-tariff barriers to trade, and broadening the scope to include agricultural products. It turned out to be the dramatic, long and final negotiation round under the GATT.

1.5 1990s: Negotiation in the Uruguay Round towards the WTO

The declaration for the Uruguay Round called for a standstill on new restrictive or distorting trade measures, and the elimination of all illegal measures. The round mainly aimed

[92] Jeffrey J. Schott, *The Uruguay Round: An Assessment*, Institute for International Economics, (Washington D.C., 2004), 4.
[93] John Croom, *Reshaping the World Trading System* (Geneva; WTO, 1995), 14.
[94] Shott, *The Uruguay Round*, 5.

to discuss the following four broad issues: issues left over from previous negotiation rounds, e.g. tariffs, subsidies and safeguards; issues relating to developing countries, e.g. tropical products, textiles and clothing; the reform of existing GATT mechanisms such as dispute settlement and the functioning of the GATT System; and new issues, e.g. services, intellectual property rights and investment.[95] As developing countries had become diversified compared to the previous decade, they did not form a unified negotiating group, although they shared common goals. These included securing better market access to developed countries and ensuring and strengthening S&D, as well as threats, such as new issues and losing policy autonomy. Because of different levels of industrialization and economic development, countries had different goals and views on what to achieve and how to bargain in trade negotiations.[96] In addition, while many developing countries were not actively involved in the previous rounds, as under the GATT they could in a sense free ride without obligations because of their special status, some of the large, industrialized developing countries started to engage in the negotiation. This resulted partly from the fact that developed countries were using restrictive unilateral trade measures to safeguard their own markets, and developing countries that tried to expand exports to their markets felt it necessary to get involved in the trade negotiation and to table such issues, in order to change this situation.[97] Srinivasan also pointed out that "their full participation in the multilateral negotiations of the [Uruguay Round] in general and dispute settlement and safeguards issues in particular was the only way to check the growth of aggressive unilateralism and the antidumping and countervailing duties in trade policy."[98]

[95] Alavi, *Legalization of Development in the WTO*, 96.
[96] Croom, *Reshaping the World Trading System*, 16.
[97] Alavi, *Legalization of Development in the WTO*, 97.
[98] T. N. Srinivasan, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future* (Boulder: Westview Press, 1998), 36.

In 1994, the Uruguay Round was concluded and a new multilateral trading system, the World Trade Organization, was established. As previously noted, the WTO covers a wide range of trade issues, including new areas, such as TRIPS Agreement, TRIMs Agreement and the General Agreement on Trade in Services (hereinafter GATS). It also institutionalized and established a new, effective and expeditious dispute settlement and trade policy review mechanism.

Under the GATT system prior to the Uruguay Round Agreements, the case of S&D was couched in development terms, that it was undesirable for developing countries to pursue policies and subject themselves to disciplines that may not have been sensible for them owing to differences in their economic structure and levels of development. Based on the recognition that desired policies vary among each member, developing country members possessed the freedom to decide the degree of commitment under the GATT. In addition, partly because of the need for universality of the regime and the diversity of member countries, the GATT, as the multilateral trading system, required flexible application of rules. S&D played the role of the measure to correct inequality of development.

With the structural changes after the establishment of the WTO, the focus of S&D provisions shifted towards developing countries' institutional capacity, and new forms of S&D provisions, such as longer transitional periods and technical assistance, were included in the system.[99] The main concern of S&D since the conclusion of the Uruguay Round appears to have been that of assisting developing country members in implementing the WTO disciplines, while the agreements contain many S&D provisions for developing and least-developed countries that recognize the special development, financial and trade needs of developing countries. S&D provisions offer developing countries longer time and technical

[99] Constantine Michalopoulos, "The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization", World Bank Policy Research Working Paper, 2388 (World Bank, 2000), 14-15.

assistance to enhance their capacity to adjust. Selected exemption from obligations is also available to developing countries, and parts of the agreements require developed country to provide assistance to developing country members.

These measures are intended to remove difficult obstacles from the paths of developing countries so that they can access the agreements. Different treatment makes it possible for developing countries "to get on board" and to comply with the same rules as other countries, including developed countries. Upon acceptance, developing countries become bound to act in accordance with all of the Multilateral Trade Agreements of the WTO through a "single-undertaking." As a result, the practice of developing countries *vis-à-vis* imports and exports should become subject to the international norms.[100] As noted by Hoekman, it has been recognized that S&D provisions, such as the transitional period and technical assistance, are inadequate, "as these are arbitrary and are not accompanied by or based on an objective assessment of whether (and when) implementation of a specific set of (proposed) rules will be beneficial to a country."[101]

Under the WTO system, the category of "developing" countries is separated into two, "least-developed" and other developing countries. Only the former is able to use their legal status to obtain S&D, and the latter is regarded as substantially equal members with developed countries even though they receive S&D to some extent. The content of S&D has changed from the recognition of inequality caused by structural difference to the issue of catch-up amongst basically equal member countries.

[100] Alice A. Kipel, "Special and Differential Treatment for Developing Countries", in *The World Trade Organization – The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, American Bar Association (1996), 626.
[101] Hoekman, "Operationalizing the Concept of Policy Space in the WTO", 406.

2. Classifications and Function of S&D under the WTO Agreements

2.1 The Definition of "Developing" and "Least-Developed" Countries

In general, a country's status as "developed," "developing," or "least-developed" is determined primarily by its per capita Gross National Income (GNI). However, while the WTO Agreement contains references to "developing" countries, there is no definition of the term "developing" or any specific criteria. Designation of a country as "developing" is normally through "self-designation" and individual member countries can determine appropriate definitions for the term "developing." Traditionally, under the GATT, individual countries determined whether they desired to be treated as developing or developed countries. This has not changed under the WTO system. However, it does not mean that such "self-designation" is without bounds. On the contrary, as to the term "least-developed", the WTO Agreement refers to those countries recognized by the United Nations. Paragraph 2 of Article 11 of the WTO Agreement provides for the preferential treatment of least-developed countries. Specifically, it states that least-developed countries recognized by the UN, "will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities." Although paragraph 2 of Article XI of the WTO Agreement is not essentially a definitional paragraph, nor does it have universal applicability, it effectively defines the term "least-developed" with reference to UN criteria.[102]

The vagueness regarding which countries qualify as developing can be attributed to two factors: lack of consensus as to the definitional standard and disagreement over the goals to be achieved through special treatment for developing countries. Hence, the interplay between a flexible definition and the purpose of special treatment for developing countries becomes

[102] Kipel, "Special and Differential Treatment for Developing Countries", 623.

complex. If a country is willing to describe itself as a developing country and express a need for special assistance, there is a reason to provide special treatment, helping it to ensure market access for its exports and allowing flexibility in designing trade policy. Without any clear definitions, "developing" countries can offer a variety of justifications in support of their need for special treatment. On the other hand, a rigid definition might block a country from meaningful and full participation in the world trading system.

2.2 The Single-Undertaking and the "Grand Bargain"

The Tokyo Round concluded in 1979 established a new strategy in the negotiation rules, the so-called 'code approach,' in which members could choose which agreement to enter into. This approach enabled members to make decisions without consensus among all parties.[103] Developing countries not only felt more comfortable approaching the GATT, but the decision-making process was also much faster and easier. However, in the Uruguay Round, the approach changed drastically. Members had to agree on all issues, basically allowing no deviation, and all issues were to apply to all members. This approach was called the "single undertaking," or the "nothing is agreed until everything is agreed" principle. This approach turned out to be problematic for developing country members, as well as the multilateral trading system as a whole.

Under the single undertaking approach, developing countries had to accept all agreements, from traditional issues to new areas. By accepting such principle, they had committed themselves to follow the same rules as developed countries. Developing countries accepted a wide range of obligations, while expecting further commitments by developed countries for greater market access for agricultural and textile products and in technical assistance.

[103] Alavi, *Legalization of Development in the WTO*, 99.

However, it was found that such benefits did not meet developing countries' expectations and that the cost of implementing obligations in new areas was enormous. This unfair deal is called the "grand bargain"[104] and has caused implementation issues, as developing countries poorly understood the real implication of the deal.[105] It was clear that not all countries had the capacity to adopt the new international trade rules. While developing countries did not fully understand and accurately predict the outcome of the huge deal in the Uruguay Round, they insisted on including S&D, most of which focused on longer transitional periods and technical assistance for implementing obligations under the new rules.[106] However, although a new form of S&D was included in the system, the effort turned out to be insufficient because the transitional periods were not long enough for many recipients to fully implement the new obligations of the agreements, and technical assistance was solely on a voluntary and unilateral basis.[107]

2.3 Classification of S&D by the WTO Secretariat – Distinction by the Objectives

Over the years, there have been arguments over S&D provisions which intended to assist developing country members in gaining benefit through the multilateral trading system. The WTO records that there are about 145 provisions across the various WTO agreements. After the Uruguay Round, the main concern of S&D was to ease implementation of the WTO disciplines and obligations for developing country members. Developing countries were provided longer time period and technical assistance in order to facilitate their adjustments to effectively integrate into the multilateral trading system. The Committee on Trade and

[104] Ostry, "The Uruguay-Round North-South Grand Bargain".
[105] Ibid.
[106] Alavi, *Legalization of Development in the WTO*, 99.
[107] See Section 2.3 of Chapter I.

Development of the WTO has developed six categories to classify the existing S&D provisions as following:

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 actions, and use of policy instruments
4. Transitional time periods
5. Technical assistance
6. Provisions relating to least-developed-country members.[108]

2.4 Classification of S&D by Scholars – Distinction by the Nature or Function

Based on the WTO's classification above, scholars also tried to categorize S&D by its nature or function. GP and ICTSD suggested the following two dimensions for expressing the development concerns of S&D:

- Market access and fair competition in favor of developing countries
- "Spaces for development policies" – that is, the extent to which S&D measures enhance the capacity and the policy autonomy of developing countries in meeting their developmental needs and potential through trade.[109]

Further, Page categorized S&D into the following three types, arguing that S&D should take in the developmental aspect more directly and be permitted in order to achieve

[108] WTO, "Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions", Note by Secretariat, WT/COMTD/W/77, 25 October 2000.
[109] Global Programme for Globalization, Liberalization and Sustainable Human Development (GP) and ICTSD, "Making Special and Differential Treatment Effective and Responsive to Development Needs", Draft Meeting Report for the UNCTAD thematic meeting, 06-07 May 2003.

development goals, such as industrialization, technological innovation and the promotion of better policies:

1. Improved access to developed countries' market; to expand the benefits from trade
2. Longer transitional period for implementation; to reduce the potential cost relating to trade
3. Allowance and flexibility for policies inconsistent with WTO rules; to reduce the cost caused by the multilateral trading rules.[110]

Garcia classified S&D into two broad categories the nature of the measures:

- Market access measures providing preferential access to developed markets for developing country exports
- Market measures providing special protection for developing country markets from domination by developed country exports.

More specifically, preferential market access mechanisms include unilateral preferences programs, such as GSP, and specific market protection mechanisms include the non-reciprocity of tariff obligations, different level of liberalization commitments, longer periods for implementing liberalization obligations, expanded application of the infant industry exception and exceptions permitting broad application of quantitative restrictions.[111]

[110] Sheila Page, "Can Special Trade Measures Help Development, When Trade Tools are Weak and the Conditions for Development are Uncertain?", Prepared for Link Conference, Overseas Development Institute, 16-20 May 2005, Mexico, 3.
[111] Frank J. Garcia, "Trade and Inequality: Economic Justice and the Developing World", *Michigan Journal of International Law* 21, 975-1049 (2000): 989.

2.5 S&D under Existing Agreements

2.5.1 Market Access S&D

GATT Article XXXVI stipulates the principle of preferential market access to developing countries' exports, both for primary [112] and manufactured goods. [113] It identifies the dependence of developing countries on exports of primary commodities and goods and emphasizes the role of exports and market access. The next Article, XXXVII, sets out the commitments and undertakings for the GSP given by developed countries. Paragraph 1 provides the details of concessions to be received by developed countries.[114]

Provisions aimed at increasing the trade opportunities of developing country Members:

- Developed country Members are required to give the fullest consideration to accord the reduction and elimination of tariffs and other restrictions to products with particular export interest to developing countries, to refrain from imposing tariffs or non-tariff measures on products from developing countries, and refrain from imposing new fiscal measures which adversely affect products from developing countries. [Art XXXVII:1]

Although, in the WTO legal framework, the GSP remains an integral part of the industrialized countries' obligations Part IV of the GATT 1994, the scope is now more

[112] Paragraph 4 of Article XXXVI of the GATT.
[113] Paragraph 5 of Article XXXVI of the GATT.
[114] Paragraph 1 of GATT Article XXXVII provides;

> The developed contracting parties shall to the fullest extent possible … give effect to the following provisions;
>
> (a) accord high priority to the reduction and elimination of barriers to products of currently or potentially of particular export interest … including customs duties and other restrictions which differentiate unreasonably between such products in their primary and processed forms;
>
> (b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest;
>
> (c) (i) refrain from imposing new fiscal measures, and
>
> (ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures … which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced … [by] … less-developed contracting parties, and which are applied specifically to those products.

limited as each of the Uruguay Round Agreements incorporates separate, though non-binding, provisions regarding S&D treatment.[115]

2.5.2 Policy Flexibility S&D

2.5.2.1 GATT XXXVI:8

Paragraph 8 of Article XXXVI of the GATT is the legal basis for the reduced commitment of developing countries in tariff reduction. It denies reciprocity between developed and developing country members.[116] Specifically, developing countries "should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments."[117]

Flexibility of commitments, of action, and use of policy instruments:

- Developing countries are accorded to make less concession in tariff reduction negotiation. [GATT Art. XXXVI:8]

2.5.2.2 GATT XVIII

Article XVIII provided deviations from the GATT fundamental principles that allowed developing countries to use selective import controls and restrictions through infant industry protection in order to promote economic diversification and shift away from dependence on primary commodity exports.[118] Specifically, GATT Article XVIII grants developing countries

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[115] William A. Kerr and James D. Gaisford, *Handbook on International Trade Policy* (Cheltenham: Edward Elgar, 2007), 464.

[116] Paragraph 8 of Article XXXVI of the GATT provides;

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

[117] Ad Article XXXVI:8 of the GATT.

[118] William A. Kerr and James D. Gaisford, *Handbook on International Trade Policy* (Cheltenham: Edward Elgar, 2007), 465.

special rights to protect infant industries in their countries with the concept "that economic development is consistent with the objectives of the GATT and that the raising of the general standard of living of the underdeveloped countries which should be the result of economic development will facilitate the attainment of the objectives of the Agreement."[119]

Flexibility of commitments, of action, and use of policy instruments:

- A developing country that is eligible as the economy in the early stage of development and demonstrating special difficulties and the objective of the measures may use import restrictive measures, such as tariff protection and quantitative restrictions, for the purpose of establishing an infant industry or balance of payment. [Art XVIII:2, 4(a), 7, 8, 14]

In order to apply deviation as special treatment for developing countries which "are in the early stages of development," they must notify the measures and consult with relevant countries, recognizing that "the export earning of contracting parties … may be seriously reduced by a decline in the sale of such commodities,"[120] and compensation must be offered to countries that would be negatively affected. While these obligations ensure transparency and help to avoid any abuses, these procedures can be very cumbersome and associated with costly compensation.[121] Since the establishment of the WTO, there have been few cases in which the provisions of Article XVIII above have actually been invoked, and according to the Committee of Trade and Development, only one developing country member cited these provisions in a dispute.[122]

2.5.2.3 The TRIMs Agreement

The TRIMs Agreement is designed to minimize the trade-restrictive and distorting effects caused by certain investment measures related to trade in goods. It attempts "to promote the

[119] L/322/Rev.1 and Addenda, adopted on 2, 4, and 5 March 1955, 3S/170.
[120] Article XVIII of the GATT, paragraph 5.
[121] UNCTAD, *Trade and Development Report* (2006), 198.
[122] WT/COMTD/W/77. Meanwhile, releases have been granted under Section C of Article XVIII to Cuba, Haiti, India, and Sri Lanka. See the list of such releases in the Index of the BISD, at 38S/141.

expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase economic growth of all trading partners, particularly developing countries, while ensuring free competition."[123] It is not intended to impose new obligations, but to clarify the pre-existing GATT obligations. Under the TRIMs Agreement, countries are required to rectify measures inconsistent with the agreement within a set period of time, with a few exceptions. The preamble also takes into account "the particular trade, development and financial needs of developing country Members, particularly those of least-developed countries Members."[124] The TRIMs Agreement contains 4 S&D provisions, which are classified into three separate categories:[125]

Flexibility of commitments, of action, and use of policy instruments:

- Recognition is given to the right of developing country Members to temporarily apply GATT Art. XVIII measures and measures for balance of payments otherwise prohibited TRIMs. [Art. 4]

Transitional time periods:

- Measures specifically prohibited by the TRIMs must be notified to the WTO within 90 days after the entry into force of the TRIMs. [Art. 5.1] Developing country Members have the 5-year transitional period to eliminate all GATT inconsistent TRIMs and developed countries have just two years. [Art. 5.2]

- A developing country Member demonstrating particular difficulties in implementing the provisions of this agreement may have its transitional period for the elimination of notified TRIMs extended by the Council will take into account the individual development, financial and trade needs of the Member concerned. [Art.5.3]

Provisions relating to least-developed country Members:

- LDC Members have the 7-year transitional period to eliminate all GATT inconsistent TRIMs. [Art.5.2]

[123] Preamble of the TRIMs Agreement. See also Arthur E. Appleton and Michael G. Plummer, *The World Trade Organization: Legal, Economic and Political Analysis*, Volume I (New York: Springer, 2005), 440.
[124] Ibid.
[125] Classification and categorization by the WTO.

To date, 27 members have notified the WTO of such measures and eight countries requested an extension of their transitional period.[126] Most measures involve local content requirements for the automotive and agricultural sectors. The reason why many countries requested an extension in the automotive sector is that it may be the most attractive and beneficial for pulling along the national economy. The automotive sector involves many other industries, such as steel, petrochemical, textile, and so on, providing huge positive spillovers, including in technology. Although developing countries, especially those with small economies and little technology, would face many difficulties in evolving such industries by themselves, they are eager for the benefit from those spillovers. Thus, the automotive sector has positive externality and can be regarded as worth promotion with even domestic protection for economic development.

2.5.2.4 The SCM Agreement

The Agreement on Subsidies and Countervailing Measures ("the SCM Agreement"), more so than almost any other agreements of the WTO Agreements, makes special allowance for developing countries. This is due to the belief on the part of developed and developing countries alike that certain types of government subsidization play a critical role in the well-being and economic growth of emerging nations. There are 16 S&D provisions in the SCM Agreement, some of which fall into more than one of the following categories:[127]

[126] Report on the WTO Inconsistency of Trade Policies by Major Trading Partners (METI, 2012). As of 2001, seven developing countries were granted extensions, and the length of extension varies depending on the country. These seven countries were: Argentina (G/L/460), Colombia (G/L/461), Malaysia (G/L/462), Mexico (G/L/463), Philippines (G/L/464), Romania (G/L/465), and Pakistan (G/L/466). In 2003, only Pakistan made a request for a further three-year extension, and in 2006, it withdrew the request (G/C/M/83).
[127] Classification and categorization by the WTO.

Provisions under which WTO Members should safeguard the interests of developing country Members:

- The Members recognize that subsidies may play an important role in the economic development programmes of developing country Members.[128] [Art. 27.1]

Flexibility of commitments, of action, and use of policy instruments:

- Subsidies that are normally presumed to cause serious prejudice to the interests of other Members will not be presumed to do so in the case of developing country Members. These subsidies include; total *ad valorem* subsidization of a product which exceeds 5%; subsidies to cover losses sustained by an industry or, with certain exceptions, by an enterprise; and direct forgiveness of debt and grants to cover debt repayment (Art. 6.1[129]). If a complaint of serious prejudice caused by such subsidies is brought against a developing country, the burden of proof of serious prejudice is shifted to the complaining Member. [Art. 27.8]

- Developing country Members not included in Annex VII of this agreement are allowed to phase out their export subsidies over a period of eight years, as long as these are consistent with their development needs; during this period such Members must not increase the level of their export subsidies, however. [Art. 27.2(b), 27.4] Annex VII countries (LDCs and certain other developing countries) are exempt from the prohibition on export subsidies that is applicable to other WTO Members. [Art. 27.2(a)]

Transitional time periods:

- Upon request from an interested Member, the committee will determine whether or not a specific export subsidy practice of a developing country conforms with its development needs. [Art. 27.4] The phasing-out period for developing country export subsidies may be extended year by year if necessary and agreed to by the committee. If an extension is not granted, however, then export subsidies must be phased out within two years. In practice, this means that any developing country applying for an extension before the original eight years are up will automatically gain two more years exemption, even if the application is turned down. [Art. 27.2(b) and 27.4]

- The prohibition on import substitution subsidies does not apply to developing country Members for a period of five years after entry into force of the Final Acts, nor to LDC Members for a period of eight years. [Art.27.3]

- Developing country Members other than Annex VII countries that attain "export competitiveness" for particular products have two years to phase out export subsidies on these items. Competitiveness exists if developing country's exports of a product reach 3.25% of the world trade in that product, for two consecutive years. Annex VII country Members have a period of eight years in which to phase out export subsidies on products for which have attained export competitiveness. [Art. 27.5 and 27.6]

[128] This provision itself could not safeguard their interests, and rather contributed to to the establishing establishment the basis of interpretation of other provisions.

[129] These kinds of actionable subsidies were provided in Art 6.1, which lapsed in 1999. The Agreement on Subsidies and Countervailing Measures (hereinafter the SCM Agreement), Art. 31. This may mean there is no S&D treatment for developing countries anymore.

Table 2-1: General Rules on Preferential Measures and Transitional Arrangements of Red-light Subsidies

Source: Report on the WTO Inconsistency of Trade Policies by Major Trading Partners (2004)

	Export Subsidies	Import substitution subsidies
Least-Developed Country (LDC) Members	Not applied	Not applied for a period of 8 years from the date of entry into force of the WTO Agreement
Developing Country Members described in Annex VII (b)	Not applied	Not applied for a period of 5 years from the date of entry into force of the WTO Agreement
Other Developing Country Members	Not applied for a period of 8 years from the date of entry into force of the WTO Agreement[130]	Not applied for a period of 5 years from the date of entry into force of the WTO Agreement
Developed Country Members	Not applied for a period of 3 years from the date of entry into force of the WTO Agreement	Not applied for a period of 3 years from the date of accession

2.5.2.5 The TRIPS Agreement

The TRIPS Agreement only provides transitional periods for developing countries and LDC members, not allowing flexibility in commitments. Member countries that were involved in drafting, mostly developed countries, believed obligations under the agreement were based on a minimum standard.

Transitional time periods:

- Developing country Members are accorded an additional period of 4 years to general period of 1 year for implementation. [Art. 65.1]
- Regarding with patent protection to the areas of technology, developing countries are accorded to an additional period of five years. [Art. 65.4]
- LDC Members, recognizing special needs and requirements, as well as their economic, financial and administrative constraints and their need for flexibility to create a viable technological base, are accorded a period of ten years for implementation. Extension of this period may be granted upon duly motivated request by a least-developed country Member. [Art. 66.1]

[130] However, export subsidies were extended for 20 countries.

Technical assistance

- Developed country Members shall provide technical and financial assistance in favor of developing and least-developed country Members, in order to facilitate the implementation of the Agreement, on request and on mutually agreed terms and conditions. [Art. 67]

Provisions relating to least-developed country Members:

- Developed country Members shall provide incentives to enterprises and institutions for promoting and encouraging technology transfer to LDC Members, in order to enable them to create a sound and viable technological base. [Art. 66.2]

3. S&D Negotiation and Proposals under Each Agreement in the DDA

The Doha Ministerial Declaration stated "special and differential treatment are an integral part of the WTO agreements," Thus reaffirming its importance.[131] This stress on S&D in the round largely resulted from the claims by developing country members about the insufficiency and ineffectiveness of S&D, as argued in the previous chapter.[132] Members agreed to review all S&D provisions "with a view to strengthening them and making them more precise, effective and operational."[133] In May 2003, developing countries submitted 88 proposals on S&D,[134] claiming review and revision of S&D provisions over almost all agreements. Out of 88 proposals, most have never been adopted because the Cancun Ministerial Conference did not reach the conclusion due to disagreement between developed and developing countries, mainly over high tariffs and trade distorting subsidies in agriculture and Singapore Issues.[135]

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[131] Paragraph 44 of the Doha Ministerial Declaration.
[132] See Section 2.3 of Chapter I.
[133] Paragraph 44 of the Doha Ministerial Declaration.
[134] WTO, "Agreement-Specific S&D Proposals", General Council Chairman's Proposal on an Approach for Special & Differential Treatment, JOB(03)/68, 7 April 2003.
[135] 28 proposals on agreement-specific proposals were in principle agreed at the Cancun Ministerial Conference, The Conference was failed because developing countries were strongly opposed to including the four new issues in the negotiation, which are transparency in government procurement, trade facilitation, trade and investment, and trade and competition. These four issues are called the "Singapore Issues."

At the Hong Kong Ministerial Conference, members agreed and adopted five decisions in favor of LDCs and the promotion of Aid for Trade. More specifically, it was agreed that developed countries shall, and that developing countries in a position to do so should, provide duty-free and quota free market access to products from LDCs, and that an additional transitional period for existing and new TRIMs will be accorded to LDCs. It also recognized the need for further technical assistance for LDCs for the implementation of their obligations which would not be subject to conditionality on, for example, loans, grants and other official development assistance that may contradict their rights and obligations under the WTO Agreements.[136]

After the Hong Kong Ministerial Conference, there remained sixteen agreement-specific proposals for consideration, of which members have mainly focused on seven relating to GATT XVIII and the SPS Agreement and Import Licensing Agreement, while the remaining nine proposals have been set aside. However, even text-based discussions have not made progress so far and members still need to make further efforts.[137]

3.1 Market Access S&D

3.1.1 Duty-Free Quota-Free Market Access to LDCs

While the preferential tariff under the GSP scheme has been granted to developing countries since the previous era, members agreed on providing more favorable market access to the products from LDCs, called duty-free and quota-free (hereinafter DFQF) market access, at the Hong Kong Ministerial Conference. Members agreed that DFQF market access should be provided "on a lasting basis for all products from LDCs by 2008 or no later than the start of the implementation period, in a manner that ensures stability, security and

[136] Annex F of the Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, 22 December 2005.
[137] WTO, Report by the Chairman, Special Session of the Committee on Trade and Development, TN/CTD/W/22, 17 July 2008.

predictability."[138] Annex F of the Hong Kong Ministerial Declaration set out that, if members face difficulties during this time, DFQF market access must be provided for at least 97 per cent of products originating from LDCs, defined at the tariff line level.[139] In addition, providing members must "take steps to progressively achieve compliance with the obligations, … taking into account the impact on other developing countries at similar levels of development, and, as appropriate, by incrementally building on the initial list of covered products."[140] The agreement was based upon the recognition that LDCs are still left behind due to a lack of economies of scale, institutional, human and financial constraints. Although developed countries have to pay the costs for expanding other countries' exports, the expected increase of LDCs' exports in domestic market under the DFQF market access may be negligible and have a small enough of impact on domestic industries to minimize their dissatisfaction. Also, products from LDCs tend not to share the market and not to compete against each other. Therefore, accepting the proposals on LDCs market access seems easier for developed countries. In addition, some emerging economies, such as China, Brazil and India, have recently started providing DFQF market access to LDCs, with less percentage of product coverage.

3.2 Policy Flexibility S&D

3.2.1 Negotiation on NAMA Modality

At the Doha Ministerial Conference in 2001, members agreed to further liberalize trade of non-agricultural products, based on the modalities, aiming to reduce or eliminate tariffs and non-tariff barriers, particularly those on products of export interest to developing countries. While product coverage must be comprehensive and without *a priori* exclusions, the special

[138] Annex F of the Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, 22 December 2005.
[139] Ibid.
[140] Ibid.

needs and interests of developing and LDC members embodied in Part IV of the GATT, the Enabling Clause, and all other relevant WTO provisions, should be taken fully into account through the less-than-full-reciprocity rule in reduction commitment.[141] The modality to be agreed should include measures for capacity building to facilitate LDCs' effective participation in trade negotiation.[142]

The NAMA negotiation framework, which contains the initial elements for future work on modalities, was agreed on as a part of the General Council's decision on the Doha Agenda work programme, the so-called the "July package," on 1 August 2004.[143] With this decision, it was agreed that LDCs are not required to cut tariff by applying the formula nor participating in sectoral approach for tariff cut,[144] and that developing countries shall be accorded a longer transitional period, though the length of the period was not specified.[145] Flexibility in tariff reduction was given to developing countries, with regard to the percentage of tariff line coverage.

In the course of negotiation, the Group of SVEs[146] claimed their own S&D, and in the latest negotiation text, they inserted a paragraph about special flexibility for countries with a share of less than 0.1 percent of world NAMA trade.[147] It specifies the non-application of formula, instead positing an average tariff cut for a certain percentage depending on the tariff

[141] Paragraph 16 and 50 of the Doha Ministerial Declarations (WT/MIN(01)/DEC/1, 20 November 2001).
[142] Ibid., Paragraph 16.
[143] WTO, Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, WT/L/579.
[144] Paragraph 9 of Annex B of Doha Work Programme, Decision Adopted by the General Council on 1 August 2004 (WT/L/579, 2 August 2004).
[145] Paragraph 8, ibid.
[146] SVEs in the NAMA negotiation consist of 20 members**:** Antigua and Barbuda; Barbados; Bolivia; Dominica; Dominican Republic; El Salvador; Fiji; Grenada; Guatemala; Honduras; Jamaica; Maldives; Mongolia; Nicaragua; Papua New Guinea; Paraguay; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Trinidad and Tobago.
[147] For the reference period of 1999 to 2001.

lines.[148] The draft text also includes special treatment for the Recently Acceded Members (RAMs),[149] and they are granted additional flexibility in implementing tariff reduction,[150] while some of them[151] are not required to undertake tariff reductions beyond their accession commitments.[152] Additionally, the latest draft negotiation text provides a transitional period for implementing the tariff reduction of 5 years for developed country members and 10 years for developing country members.[153] All of these flexible conditions for developing countries are still under the negotiation and depend on concluding the current round or perhaps adopting the draft negotiation text in a different track.

3.2.2 GATT XVIII

In the current round, developing country members have submitted proposals on Article XVIII of the GATT regarding the negotiation of S&D, which are categorized as Category I.[154] These include the proposals dealt with intensively before the Cancun Ministerial Conference and more likely to secure agreement. By the end of 2007, the discussions had made some progress within the context of agreement-specific proposals, which also included three other proposals on the SPS Agreement and three on the Import Licensing Agreement, based on the revised language of the proposal submitted by the African Group.

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[148] Paragraph 13 of the Fourth Revision of Draft Modalities for Non-Agricultural Market Access: Revision, TN/MA/W/103/Rev.3, 6 December 2008 (hereinafter the December 2008 Negotiation Text).
[149] Albania; Armenia; Cape Verde; China; Croatia; Ecuador; Former Yugoslav Republic of Macedonia; Georgia; Jordan; Kyrgyz Republic; Moldova; Mongolia; Oman; Panama; Saudi Arabia; Chinese Taipei; Tonga; Viet Nam; and Ukraine (Footnote 8 on page 9 of the December 2008 Negotiation Text (ibid)).
[150] Ibid., Paragraph 19.
[151] Albania, Armenia, Cape Verde, Former Yugoslav Republic of Macedonia, Kyrgyz Republic, Moldova, Mongolia, Saudi Arabia, Tonga, Viet Nam and Ukraine (Paragraph 20 of the December 2008 Negotiation Text (ibid)).
[152] Ibid.
[153] Ibid., Paragraph 6 (a).
[154] WTO, "General Council Chairman's Proposal on an Approach for Special and Differential Treatment", JOB(03)/68, 2003.

During 2002, there were relatively intensive discussions on Article XVIII of the GATT in the Special Session of the Committee of Trade and Development. Each proposal tabled by the African Group, LDC Group and St. Lucia (the representative of SVEs) contained concrete textual suggestions.[155] In June, African countries submitted a joint communique, including the proposal on interpretation of the article, which stated that there was a need to revise the language of the provision and to clarify the elements for operationalization. Their proposal was the following:

> It is understood that the provisions of this Article aim to promote the rapid development of domestic industries and the needed adjustment where domestic industries experience difficulties in developing and least-developed country Members. Therefore, this Article shall be implemented, interpreted and applied by Members and in all the WTO processes in a manner that fully supports the attainment of these goals. In particular, developing and least-developed country Members shall not be subjected to cumbersome requirements or conditions, or to any requirements and conditions that would undermine the attainment of these goals. In determining whether any requirements or conditions are cumbersome, the views of the developing and least-developed country Members concerned shall be fully accommodated and shall not be prejudiced or rejected except with the consensus of all Members.[156]

This proposal intended to substantially expand flexibility under the article. In particular, the first underlined part can be understood as extending the existing objective of the measure[157] and indirectly to expand eligibility. The second part underlined is worth noting because it tries to introduce the negative consensus method similar to the procedure of WTO dispute settlement in considering the requirements, conditions and views of developing and least-developed countries. That is, developing countries' views must be respected and they can

[155] See WTO, Special and Differential Treatment Provisions: Joint Communication from the African Group in the WTO, TN/CTD/W/3/Rev.2, 17 July 2002, for the proposal by African Groups, Special and Differential Treatment Provisions: Joint Communication from the Least-Developed Countries, TN/CTD/W/4/Add.1, 1 July 2002, for the proposal by LDC Group and Special and Differential Treatment Provisions: Joint Communication from Saint Lucia, TN/CTD/W/8, 24 June 2002, for the proposal by St. Lucia.

[156] Ibid., WTO, Special and Differential Treatment Provisions: Joint Communication from the African Group in the WTO, TN/CTD/W/3/Rev.2 (underlined by the author).

[157] *I.e.* "in order to implement programmes and policies of economic development designed to raise the general standard of living of their people." Paragraph 2 of Article XVIII of the GATT.

impose requirements and conditions that would less cumbersome and more favorable. At the same time, this proposal could be an interpretation guideline on for all the provisions of Article XVIII.

The LDC Group proposed to relax the compensation and prior approval requirements, arguing that the agreements adopted in the Uruguay Round impinged on the effectiveness of S&D which had functioned before and that the rigid application of the requirements had prevented opportunities to utilize S&D under Article XVIII of the GATT. The proposal included that members should be restrained from seeking compensation when LDCs need to modify or withdraw a tariff concession, and that it is necessary to examine how to modify and improve the existing procedures for granting approval prescribed by Section C of the Article, in order to promote utilization of such measures by developing countries, particularly by LDCs. They proposed rules to safeguard actions taken for "development purposes" under the article without the need to seek prior approval, referring to those applicable under the Agreement on Safeguards for the safeguard actions taken "in emergency situations".[158] In this regard, it should be noted that the Safeguard Action for Development Purposes Decision of 28 November 1979 provided additional flexibility with deviation from notification and consultation requirements (paragraph 14, 15, 17 and 18 of Section C of Article XVIII). This is applicable when delay in the application of measures "may give rise to difficulties in the application of programmes and policies of economic development."[159] It should also be noted that the proposed flexibility only applied to LDC members, while the proposal by African Group covered all developing country members, including LDCs.

[158] WTO, Special and Differential Treatment Provisions: Joint Communication from the Least-Developed Countries, TN/CTD/W/4/Add.1, paragraph 17.
[159] GATT, Safeguard Action for Development Purposes, Decision of 28 November 1979, L/4897, paragraph 2.

St. Lucia, representing SVEs, submitted an even more concrete proposal, particularly on consultation and compensation requirements for the sake of improving utilization of Section C of Article XVIII. The proposal included the establishment of the basic guidelines to clarify procedural ambiguities in the text and broader interpretation of conditions. It included not limiting conditions to circumstances involving "infant industries", and also cases where established industries are threatened by an absolute or relative increase in imports. This was proposed in order to facilitate the implementation of sustainable economic development programmes in SVEs, clearly reaffirming the duration and review of measures and it achieves its objectives. The proposal called for restraint in seeking compensation and/or retaliation for an initial period of application, given the limited ability of SVEs to provide compensatory concessions as well as limited adverse impact which restrictive measures would have on global trade, and also recognized "a lack of symmetry regarding the application of trade remedies."[160] It affirmed Article XVIII:C would be a new and distinct trade policy instrument permitted as one of the S&D for SVEs with limited administrative capacities, and "not merely a measure of last recourse."[161] These proposals were distinct from the proposals by African and LDC Groups, seeking to waive the right of compensation and to relax the necessity requirement, targeted at "small and vulnerable developing countries."[162]

Developed country members expressed caution against these proposals. For instance, Japan expressed its difficulty in accepting them, stating the proposal by St. Lucia and the LDC Group on Article XVIII of the GATT would establish rules and specify that developing country members and LDCs could be exempted from those obligations that they found cumbersome. Japan believed that the question of whether "compensatory adjustment" was necessary should be subject to the judgment of members and such decisions should be made based on

[160] WTO. Special and Differential Treatment Provisions: Joint Communication from Saint Lucia.
[161] Ibid.
[162] Ibid.

individual requests for compensatory adjustment.[163] The European Community was also concerned that eliminating compensation requirements would be an inducement to use the flexibility in Article XVIII in ways which would not always lead to the pursuit of development objectives.[164] In addition, Canada pointed out that S&D treatment was meant for integration into the world trading system and that its delegation did not wish to see protectionism equated with development.

Including those proposals and discussions above, the chair of the WTO General Council, with the cooperation of the chair of the CTD, circulated the document, called "General Council Chairman's Proposal on an Approach for Special and Differential Treatment"[165], in April 2003. This document was a compilation of the various proposals on S&D by developing country members, including five proposals on Article XVIII of the GATT. Of those five proposals,[166] only one, Number 13 by the African Group, had made any progress by the end of 2007, which was mentioned in the CTD Report to the General Council.[167] Although in the beginning the original proposal by the African Group aimed to substantially expand flexibility in application under the Article, the language of the proposal was pared down with regard to achieving the development goal, due to a compromise made at a later stage in light of the cautiousness shown by developed country members.

In May 2007, the WTO Secretariat mentioned the discussion on Article XVIII of the GATT in reporting on the progress of the Doha Development Agenda. It recognized the

[163] WTO, Note on the Meetings of 7 and 18 October 2002, TN/CTD/M/7, 30 April 2003.
[164] Ibid.
[165] WTO, "General Council Chairman's Proposal on an Approach for Special and Differential Treatment".
[166] The five proposals included: the proposal by African Group on Article XVIII (no.13) and Section A (no.14) and Section B (no.15), the proposal by St. Lucia and the LDC Group on Section C of the Article (no.16 and 17), all of which were categorized in Category I. See ibid.
[167] Some proposals by St. Lucia and the LDC Group on the procedures under Section C of Article XVIII were to be discussed after the Cancun Ministerial Conference, the preparatory document for the Conference stated (JOB(03)/150/Rev.2). However, because the Cancun conference failed to reach a conclusion, the report on the discussion of this issue was not submitted.

possible benefit of the proposal for developing countries, noting that "the proposal on Article XVIII of the GATT 1994 would assist them to implement programmes which would put their economies on the path of sustainable growth and development."[168] However, in the CTD Special Session held the following month, the views of members were still far from consensus. Developed country members reiterated that they were not willing to accept a proposal which sought to reinterpret Article XVIII by introducing new elements. One member proposed that eligibility "be restricted to developing and LDC members dependent on primary products." Developed country members insisted on language relating to the need to take "due account of other Members' rights," stating that it would be important to ensure "the rights of other Members" to be taken into account if the type of flexibility sought in the proposal was to be granted, which developing country members wanted to delete.[169] Developed countries also suggested that members consider whether wished to "simplify the existing procedures of Article XVIII" or "develop new ones" and highlighted the need to involve "due process" in the proposal.[170]

After those discussions, in July 2007 the Chairman of the CTD issued the revised text of proposal Number 13 on Article XVIII of the GATT:

> It is understood that the provisions of Article XVIII aim to promote the progressive development of economies which can only support low standards of living and are in the early stages of development. Therefore, the implementation of these provisions shall be carried out in a manner that facilitates the attainment of the goals mentioned in Article XVIII. While taking due account of the rights of other Members, developing and least-developed country Members shall not be expected, in the context of Article XVIII, to undertake measures that would undermine the attainment of these goals. Members agree to review and simplify the procedures laid down for recourse to Article XVIII.[171]

[168] WTO, Developmental Aspects of the Doha Round of Negotiations: Note by the Secretariat, WT/COMTD/W/143/Rev.3, 22 May 2007.
[169] WTO, Note on the Meeting of 5 June 2007, TN/CTD/M/29, 16 July 2007.
[170] Ibid.
[171] Underlined by the author. This language was circulated to members at the formal session of the Special Session held on 11 July 2007 (WTO, Report by the Chairman to the Trade Negotiations Committee and the General Council, TN/CTD/20, 25 July 2007).

Although this text was circulated as the basis for the forthcoming work, the text itself mostly incorporated the arguments of developed country members, especially regarding "due account of the other Members' rights." As expected, developing country members expressed objection to the revised text, and the delegation of from Egypt requested further discussion be based on the proposed language discussed before July 2007.[172] The delegation of Uganda, as a representative of the African Group, also argued that the adoption of simplified procedures for the recourse to Article XVIII was important, as the present procedures were too complex and rigid. Uganda claimed that while most African countries depended on exports of primary products and the only way to promote the development of new or recently established industries was to add value to those products, the flexibility for developing countries to do so was no longer available.[173]

In the meantime, developed country members also expressed their dissatisfaction with the revised text. They argued the importance of avoiding unilateral measures and the need to maintain the balance between the rights and obligations, and the flexibility for developing countries and the protection of other members' rights implicit in the article. They were also concerned that no information or clear explanation has been provided as to why Article XVIII had rarely been invoked or the need to strengthen it.[174]

Despite the fact that substantial discussions on the concrete proposals on the Article had continued from 2002 up to the end of 2007, the discussion was put on hold because the proponents did not provide a new language proposal.[175] Apparently, there was still a considerable divergence in the views of both sides, and it would require further time-consuming negotiations.

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[172] WTO, Note on the Meeting of 28 September 2007, TN/CTD/M/31, 25 October 2007.
[173] Ibid.
[174] Ibid.
[175] WTO, Report by the Chairman to the Trade Negotiation Committee, TN/CTD/22, 17 July 2008.

3.2.3 The TRIMs Agreement

Many developing countries increasingly recognized the importance of spaces lost under the TRIMs Agreement. The proposal tabled in 2002 by India and Brazil for the review of the agreement, falling under the mandate of paragraph 6 of Decision on Implementation-Related Issues and Concerns,[176] was a clear example. It called for an amendment of Article 4 of the TRIMs Agreement in order to incorporate specific provisions that would provide developing countries with the necessary flexibility to implement development-friendly policies. The proposal submitted the extension of situations that would enable developing countries to temporarily deviate from the provisions of Article 2 of the agreement as a possible solution.[177] In the meantime, the African Group submitted proposals claiming that exception under Article 2 should include quantitative restriction provided under GATT XII, XVIII and XIX, and local content requirement permitted under GATT XVIII, so as to raise the standard of living in developing countries.[178] They also requested that temporary deviation from Article 2 should be accorded for no less than 6 years and that transitional period accorded under Article 5.3 should be extendable and include newly introduced TRIMs.[179] LDC Group made the proposal on Article 5.2 to exempt themselves from obligations under the TRIMs Agreement, arguing that a transitional period is the right of LDCs and flexibility should be granted, as TRIMs were an important means of development policy and that the provided transitional period was not sufficient.[180] Developed countries on the whole opposed providing additional flexibility on temporary deviation and insisted that it might be beyond the coverage provided

[176] WTO, Implementation-Related Issues and Concerns, Decision of 14 November 2001, WT/MIN(01)/17, 20 November 2001.
[177] See WTO, Communication fron Brazil and India, G/C/W/428, G/TRIMS/W/25, 9 October 2002.
[178] WTO, Special and Differential Treatment Provisions: Joint Communication from the African Group in the WTO, Revision, TN/CTD/W/3/Rev.1, 24 June 2002.
[179] Ibid.
[180] WTO, Special and Differential Treatment Provisions; Joint Communication by the Least-Developed Countries, TN/CTD/W/4, 24 May 2002.

under the article and should be determined on a case-by-case basis; otherwise the balance of rights and obligations would be undermined.[181] However, developed countries did not explicitly show opposition to or even reluctance about the proposals regarding transitional periods for LDCs.

Then, as expected, at the Hong Kong Ministerial Conference, members agreed to extend the transitional period on existing TRIMs, based on the proposal made by the LDC Group. The new transitional period would last for seven years and new TRIMs would be covered by transitional period of five years, with the requirement to notify and possible extension.[182] As seen, under the TRIMs Agreement, while all transitional periods have expired, those for LDCs were extended and the coverage was broadened.

3.2.4 The SCM Agreement

Under the mandate of paragraph 28 of the Doha Ministerial Declaration and paragraph 10 of the Decision on Implementation-Related Issues and Concerns, members started a discussion based on the proposals made by developing countries on S&D under the SCM Agreement. Developing countries argued the positive impact and justification of providing subsidies,[183] claiming that subsidization of national development was a right.[184] Developed countries refuted this argument and expressed skepticism about the effect of subsidies from an academic viewpoint, and the possible adverse effect caused by trade-distorting subsidies.[185]

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[181] WTO, Note on the Meetings of 7 and 18 October 2002.
[182] Annex F of the Hong Kong Ministerial Declaration.
[183] The Developing Country Group, as motioned by India, requested to delete the word "may" under Article 27.1 of the Agreement on SCM (WTO, Special and Differential Treatment Provisions: Joint Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/CTD/W/1, 14 May 2002)
[184] Special and Differential Treatment Provisions: Joint Communication from the African Group in the WTO, Revision, TN/CTD/W/3/Rev.2 and WTO, Special and Differential Treatment Provisions: Joint Communication from the African Group in the WTO, TN/CTD/W/28, 14 February 2003.
[185] WTO, Note on the Meeting of 21 and 23 October 2002, TN/CTD/M/9, 20 December 2002.

The LDC Group requested to correct the inconsistency in the length of transitional periods between SCM and TRIMs Agreement, and to allow the utilization of local content under both agreements as long as a country has LDC status.[186] With respect to the request to extend the transitional period, the African Group proposed to put the burden of proof on the country that considered the concerned subsidy inconsistent with development needs, and to show that it fell within the scope of prohibited or actionable subsidies and would not bring any benefit to domestic industry in a developing country. They also requested that the extension sought by developing countries should be accorded in the flexible time frame.[187] In addition, the proposals from the African Group included a more flexible interpretation of the adverse effects caused by developing countries providing subsidies. In particular, it requested that nullification and impairment in cases of actionable subsidies that developing country members grant or maintain should mean only the displacement or impediment of imports of a like product into the market of the developing country member or injury to a domestic industry in the market of the importing member. The African Group also argued that subsidies given for the privatization programmes to ensure good adjustment in their economies should be allowed and that "limited period" should be at least eight years.[188] Developed country members countered that justification for providing subsidies was still necessary and the period of eight years was sufficient, and that further flexibility should not be necessary in the sectors in which developing countries have better competitiveness.

Since 2005, the negotiation shifted from the Committee on Trade and Development to the Negotiation Group on Rules. With regard to the criteria of export competitiveness set out in Article 27.5 and 27.6 of the agreement, Egypt, India, Kenya and Pakistan made a concrete

[186] WTO, Special and Differential Treatment Provisions; Joint Communication by the Least-Developed Countries.
[187] Ibid.
[188] Ibid.

textual proposal in 2006.[189] They pointed out that the period of two years was not sufficient to determine export competitiveness and should be extended to a longer, more reasonable time frame to ensure that a developing country indeed gained export competitiveness in a given product. They proposed a system in which the achievement of a 3.25 per cent share would be determined by taking a moving average of the past five years. The proposal also included the flexibility to reintroduce export subsidies if the export share of a country fell below the 3.25 per cent level later on.

Despite such concrete proposals, the discussion made no progress because the proponents of the changes were not able to participate in the meeting and discussions.[190] The forum had completely shifted to the Negotiation Group of Rules and it no longer dedicated discussion to S&D, as the Negotiation Group had to deal with many other controversial issues, including fishery subsidies. There also remained the need to clarify the proposals for further discussion. The consolidated draft of the Chair text[191] did not include any revision on Article 27 of the SCM Agreement.

3.2.5 The TRIPS Agreement

At the launch of the Doha Round, considerable importance was attached to implementation and interpretation of the Agreement on TRIPS in a manner supportive of public health,[192] while not much was mentioned specifically about S&D, including the transitional period under the agreement. In 2002, however, the TRIPS Council adopted a

[189] WTO, Improvement and Clarification in Article 27.5 and 27.6 of the ASCM Regarding Export Competitiveness: Submission by Egypt, India, Kenya and Pakistan, TN/RL/GEN/136, 16 May 2006.
[190] WTO, Proposals on Special and Differential Treatment Referred to the Group by the Chairman of the General Council. Report to the General Council by the Chairman of the Negotiating Croup on Rules, TN/RL/14, 22 July 2005.
[191] WTO, Draft Consolidated Chair Texts of the AD and SCM Agreements, TN/RL/W/213, 30 November 2007.
[192] Paragraph 17 of the Doha Ministerial Declaration.

decision to extend the transitional period only for LDCs, with respect to patent and protection of undisclosed information in pharmaceutical products,[193] and with respect to exclusive marketing rights[194] till 1 January 2016. Moreover, in the Hong Kong Ministerial Conference, the extension of general transitional periods for LDCs until 1 July 2013 and strengthening of technical and financial assistance to LDCs[195] were adopted,[196] in addition to five LDC proposals. Such extension could be granted upon a duly motivated request from an LDC Member, and at the Eighth Ministerial Conference, members agreed to give full consideration to such requests.[197] With regard to technical assistance, the TRIPS Council has so far received nine submissions from seven LDC members on their individual priority needs for technical and financial cooperation under the decision of 29 November 2005.[198]

At the most recent TRIPS Council in June 2013, members agreed on the extension of the transitional period provided for LDCs, which was about to expire on July 1 2013, for eight more years, up to 1 July 2021.[199] The group of LDCs has not only obtained a longer period than the period of extension granted in 2005, but also succeeded in removing the language on the condition of non-roll back.[200] Additionally, the new decision ensures flexibility and technical assistance by developed countries for LDCs for creating a technological base and

[193] WTO, Extension of the Transitional Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products, Decision of the Council for TRIPS of 27 June 2002, IP/C/25, 1 July 2002.
[194] WTO, Obligations under Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products, Decision of 8 July 2002, WT/L/478, 12 July 2002.
[195] WTO, Extension of the Transition Period under Article 66.1 for Least-Developed Country Members, Decision of the Council for TRIPS of 29 November 2005, IP/C/40, 30 November 2005.
[196] Paragraph 47 of the Hong Kong Ministerial Declaration.
[197] WTO, Transition Period for Least-Developed Countries under Article 66.1 of the TRIPS Agreement, Decision of 17 December 2011, WT/L/845, 19 December 2011.
[198] WTO, Extension of the Transition Period under Article 66.1 for Least-Developed Country Members, IP/C/40. In 2007, Sierra Leone made two submissions (IP/C/W/499 and 523), and Uganda two also (IP/W/500 and 510). In 2010, Bangladesh, Rwanda and Tanzania made submissions (IP/C/546, 552, and 555, respectively). In 2012, Mali made a submission (IP/C/575).
[199] WTO, Extension of the Transitional Period under Article 66.1 for Least-Developed Country Members, Decision of the Council for TRIPS of 11 June 2013, IP/C/64, 12 June 2013.
[200] Paragraph of 5 of the decision on extension adopted in 2005 stated that LDC Members "will ensure that any changes in their laws, regulations and practice made during the additional transitional period do not result in a lesser degree of consistency with the provisions of the TRIPS Agreement" (IP/C/40).

building capacity.[201] It appears that in terms of S&D under the TRIPS Agreement, LDC members have gained a full degree of flexibility and the right to request technical assistance.

[201] Paragraph 2 of the decision on the extension adopted by the TRIPS council in 11 June 2013 stated that "Nothing in this decision shall prevent least developed country Members from making full use of the flexibilities provided by the Agreement to address their needs, including to create a sound and viable technological base and to overcome their capacity constraints supported by, among other steps, implementation of Article 66.2 by developed country Members" (IP/C/64).

Chapter III

Investigating Confrontations among Developing Countries over S&D

The last chapter introduced the negotiation history and classification of S&D, as well as the proposals made by developing country members in the current round. It also revealed the confrontation within developing countries over preferential treatment, including market access and policy flexibility. Whereas the DDA itself has been facing a significant deadlock due to the divergent views between developed and developing countries on various issues, there is also considerable divergence and conflicts among developing country members, especially regarding S&D, as discussed in the previous chapter. This chapter aims to illuminate such confrontations between developing countries and to explain and analyze the reason why they occur and why existing S&D remains available only for LDCs. This analysis will also suggest how S&D negotiation can reach a breakthrough in achieving overall benefit for developing country members.

1. The Causes of the Doha Impasse

1.1 Heterogeneity of Developing Country Members

While developing countries had acted as one block back in 1960s and 70s and gained preferential treatment under the GATT, they have diversified considerably, not only at the level of economic development, but also in their trade and commercial concerns and interests, especially since the conclusion of the Uruguay Round and the establishment of the WTO. Many groups of developing countries can be easily classified, for example, LDCs, Small and

Vulnerable Economies (SVEs), Small Island Developing Countries (SIDS), Land-locked Developing Countries (LLDCs), Commodity-exporting Developing Countries, Net-Food-Importing Developing Countries (NFIDCs), Oil-exporting Developing Countries, Industrialized Developing Countries, and so on. Though the World Bank and the UN special agencies classify developing countries based on Gross National Income (hereinafter GNI) per capita,[202] they conduct research analysis and target projects based on the categories of countries mentioned above.[203] This practice means those development agencies place an importance on the specific difficulties and needs of each group.

Their concerns in the international trading system also vary, depending on their geographic conditions, the scale and structure of their economies, their major export products, attractiveness for foreign investment, and so on. For example, while SIDS recognize the commercial interests in expanding service sectors, including tourism, LLDCs insist on the needs of larger aid and trade facilitation in the area of infrastructure for better transportation and border transactions. Also, while SVEs and commodity-exporting developing countries consider improved market access for their export products a the high priority, more industrialized developing countries that have achieved relatively higher growth and economic development place importance on attracting more investment and obtaining more policy flexibility to promote and foster their economies. Developing countries are divergent not only in geographical characteristics but also in the commercial and economic interests towards achieving economic development through international trade.

[202] See http://data.worldbank.org/about/country-classifications (2012 classification).
[203] See http://www.worldbank.org/en/country/smallstates, or http://sids-l.iisd.org/events/unctad-expert-group-meeting-addressing-the-vulnerabilities-of-sids-more-effectively/.

1.2 *"De facto"* Differentiation under the WTO Agreements and Negotiations

Although the WTO Agreements neither legally differentiate between developing countries nor treat individual categories of developing countries differently, some of them stipulate specific categories that shall be accorded more flexible treatment, including no requirements to eliminate prohibited subsidies under the SCM Agreement. Table 3-1 shows how the specific WTO Agreements provide different treatment to developing countries. Because LDCs have almost no requirements to eliminate prohibited measures and to implement reduction commitments under the agreements (cells in white), there should be a clear and firm distinction between LDCs and other developing countries, as shown by the thicker red line in the table below.

In the figure, the darker the cells get, the less flexibility for countries to utilize policy instruments is available. The darkest gray area, except for the rows in market access and Aid for Trade, illustrates that those categories of developing country bear the same level of commitments and obligations as developed countries do. For example, in the case of the SCM Agreement, because all the transitional periods provided for developing countries have expired, all developing countries except for the LDCs and one other category had to eliminate the prohibited subsidies just as developed countries did. However, developing countries can request extension for the use of prohibited export subsidies under Article 27.4.[204] Such extensions could be better tolerated if the economic impact of the subsidy is minimal. On the other hand, the cells in darker gray mean that category of developing countries enjoy no more flexibility for their development policies, mainly because the transitional periods have expired and because some countries have too big a commercial influence to be granted the deviation

[204] Article 27.4 of the SCM Agreement provides that "[i]f a developing country Members deems it necessary to apply such subsidies beyond the eight-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial, and development needs of the developing country Member in question."

from the commitments and obligations. The same logic applies for requests for extension under the TRIMs Agreement.[205]

Table 3-1: Differentiation of Developing Countries in Practice under the Relevant WTO Agreements and Measures

	LDC	SVEs/SEs	Low Income DCs	Lower-Middle	Upper Middle	Higher Income
SCM Prohibition of Export Sub	No requirement (SCM27.2(a), Annex VII)	Less than $1000: No requirement (SCM 27.2(a), Annex VII)	8 years, standstill (expired) (SCM27.2(b))			
			Request for extension (SCM27.4)			
SCM Prohibition of Domestic Sub	8 years (expired) (SCM27.3)	5 years (expired) (SCM27.3)				
TRIMs	7 years (TRIMS 5.2) + ~'16 (inc. new TRIMs, HK 2005)	5 years (expired) (TRIMS 5.2)				
		Request for extension (TRIMs 5.3)				
GATT XVIII	Potential ◎	Potential ○	Potential △	…	…	.....
TRIPS	10 yrs (TRIPS 66.1) + possible extension ~'13 (IP/C/40) + possible extension ~'16 on patents for pharmaceutical products (IP/C/25) Technology transfer by ACs (TRIPS 66.2)	General: 5 years (expired) (TRIPS 65.2) Patent protection to areas of new technology: 10 years (expired) (TRIPS 65.4)				
NAMA Modality	No requirement (Decision July 2004* and Dec 2008 Negotiation Text**)	Proposed for SVE; No application of the formula; less than 0.1% share of export	Proposed for RAMs; No requirement to reduce more			
			Proposed for DCs with low tariff lines; No application of the formula			
			Proposed transitional period; 10 years to implement after the Doha Conclusion			
Market Access	◎ DFQF	○ GSP …… up to ?? = unilaterally provided				Providers
Aid for Trade	EIF	AfT				Providers

At the same time, the SCM Agreement exempts a certain category of developing countries from being subject to the obligation to eliminate prohibited export subsidies.[206] Paragraph (b)

[205] Article 5.3 of the TRIMs Agreement.

of Annex VII of the agreement provides that the provisions to prohibit export subsidies under paragraph 1(a) of Article 3 shall not apply to developing countries whose GNI per capita is less than $1000 per annum.[207] The agreement treats some developing countries with small economies differently by allowing them to use prohibited subsidies, which differentiates them from other developing countries shown with the red line.

In the case of the GATT XVIII, which accords developing countries policy flexibility to utilize tariffs and import restrictions to establish a particular industry or protect an infant industry, the decision whether to grant the release would depend on the adverse economic impact of the measure and whether the country was eligible for it.[208] LDCs and smaller developing countries would be more likely to receive permission to utilize such policy instruments because their adverse economic impact would be considered sufficiently small.[209] Thus, even though evaluation takes place on case-by-case basis, it has been observed that the article practically differentiates between developing countries based on the economic size and the negative impact of the measure in permitting deviation from the GATT obligation, although there is no clear and legal basis.

In the ongoing negotiation on NAMA Modality, the trend of diversification is even clearer. The groups and subgroups of members encompass twenty different packages and twenty-four special cases.[210] For example, SVEs defined with specific criteria, such as export share, have insisted that they should be exempt from the application of the formula for tariff reduction. There are also differentiated treatments for other subgroups, such as recently acceded

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[206] Article 27.2 (a) of the SCM Agreement.
[207] Paragraph (b) of Annex VII of the SCM Agreement.
[208] Paragraph 4 and 13 of Article XVIII of the GATT.
[209] 児玉みさき [Misaki Kodama], 「GATT第18条Cの援用可能性に関する考察 ―ドーハ開発アジェンダにおけるS&D交渉を題材に―」["Is GATT Article XVIII Section C Still Alive?: Reviewing S&D Negotiation in the Doha Development Agenda"], 日本国際経済法学会年報［*Yearbook of International Economic Law*] 17 (2008): 175-208.
[210] Pablo Klein-Bernard and Jorge Huerta-Goldman, "The Cushioned Negotiation: The Case of WTO's Industrial Tariff Liberalization." *Journal of World Trade* 46.4 (2012): 862.

members and developing country members with low tariff lines. The WTO Secretariat pointed out that "[i]f there is one thing the NAMA negotiations cannot be accused of it is having a 'one size fits all' approach."[211] Even though the current distinction between LDCs and other developing country members based of the agreement in July 2004 by members requires no commitment on tariff reduction of manufactured goods by LDCs,[212] such specific differentiation is apparent among developing countries, both in the current negotiation and presumably in the future text of NAMA Modality.

There is a clear line between LDCs and other developing countries. Despite *de facto* differentiation of developing country members, based on specific criteria for each area of negotiation and agreement, why can such visible dual-structure for providing S&D, *i.e.* LDCs versus other developing countries, be observed? The next section will explain the reason why this distinction has developed and is still noticeable.

1.3 The Structure of Confrontations and Negative Interactions within Developing Countries

Up to the Uruguay Round, the conflict between developed and developing countries was pronounced, as seen in the history of negotiation since the adoption of the GATT. After the establishment of the WTO, the conflict between these two blocks continued, and at the Seattle Ministerial Conference in 1999, there was confrontation over the Singapore Issues, including transparency of government procurement, competition, investment and trade facilitation. The current round, the Doha Development Agenda, was launched in 2001, and the Cancun Ministerial Conference in 2003 failed to produce progress in negotiation. At Cancun, the creation of two major coalitions of developing countries was observed. They are the group of

[211] Patrick Low and Roy Santana, "Trade Liberalization in Manufactures: What is Left After the Doha Round", *The Journal of International Trade and Diplomacy* 3.1 (2009): 67.
[212] WTO, Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, WT/L/579, 2 August 2004.

bigger developing countries with middle or higher income that hold generally aggressive views on agriculture, and the group of smaller developing countries, such as LDCs, the African Group, and the ACP Group.

In 2005, the Hong Kong Ministerial Conference was successfully concluded, achieving the unanimous adoption of five LDC proposals, including duty-free quota-free market access, extension of transitional periods under the TRIMs and TRIPS Agreements.[213] By the adoption of these specific LDC proposals, the line between LDCs and other developing countries became clearer and more rigid. This is also seen in the adoption of the Enabling Clause, Article 11.2 of the Marrakesh Agreement, and the Enhanced Integrated Framework, as well as the United Nations LDC Conference, which is outside of the WTO framework.

In addition, at the Eighth Ministerial Conference held in Geneva, December 2011, at the very last moment members agreed on LDC waivers on services,[214] more flexible consideration of transitional period extensions under the TRIPS Agreement,[215] and the LDC Accession Guidelines.[216] Moreover, further extension of transitional period under the TRIPS Agreement for LDCs was adopted in June 2013.[217] Such distinct flexibility for the LDC members has made the line between LDCs and other developing countries more pronounced. The Eighth Ministerial Conference also witnessed not only traditional conflict between developed and developing countries, but new confrontation between or among groups of developing country members. For example, the group of SVEs submitted a proposal on enhancing aid for trade and preferential market access as well as requesting members to

[213] Paragraph 47 of the Hong Kong Ministerial Declaration.
[214] WTO, Preferential Treatment to Services and Service Suppliers of Least-Developed Countries, Decision of 17 December 2011, WT/L/847, 19 December 2011.
[215] WTO, Transition Period for Least-Developed Countries under Article 66.1 of the TRIPS Agreement, WT/L/845.
[216] WTO, Accession of Least-Developed Countries, Decision of 17 December 2011, WT/L/846, 19 December 2011.
[217] WTO, Extension of the Transitional Period under Article 66.1 for Least-Developed Country Members, IP/C/64.

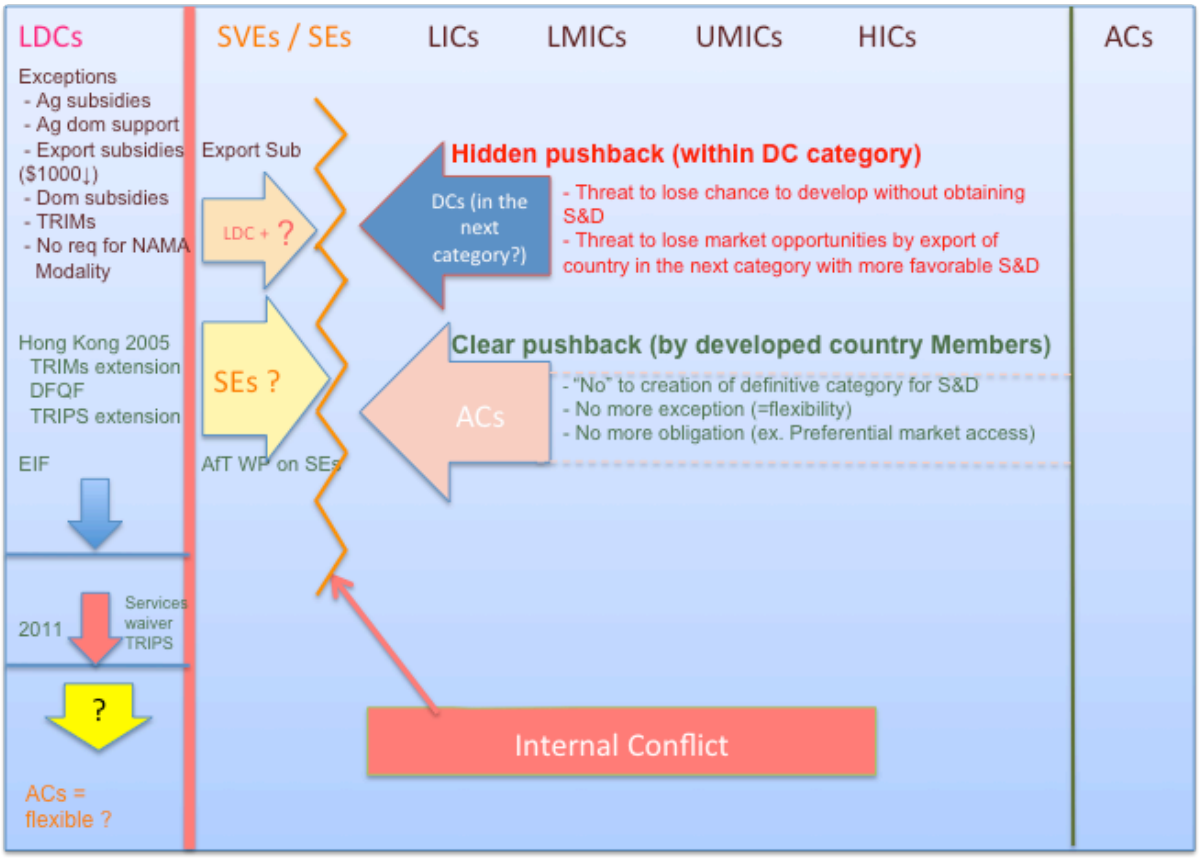
implement the work programme dedicated to small economies.[218] However, they did not gain the full support by developed country members or from other developing country members, especially small ones. They all reaffirmed their resistance to creating a new sub-category. Furthermore, it is interesting to note that there is a conflict of interests even within the LDC Group over duty-free quota-free market access.[219]

Figure 3-1 below illustrates the conflict between and among the groups of developing country members. As pointed out above, there is a solid and clear line between LDCs and other developing countries. Preferential treatments for LDCs, on the one hand, have expanded through the adoption of the five LDC proposals at Hong Kong in 2005 and from the decisions at the Eighth Ministerial Conference in 2011, which developed country members accepted with great flexibility. On the other hand, small developing countries, such as SEs, have often submitted proposals demanding more preferable S&D,[220] but few have been accepted, compared to the ones for LDCs. WTO members adopted the decision on the Work Programme on Small Economies (SEs) at the Eighth Ministerial Conference, as well as instructing the Committee on Trade and Development Dedicated Session to continue its work, which was mandated under paragraph 35 of the Doha Declaration.[221] However, it does not systemically provide legally effective flexibility for small economies like LDCs have obtained, but only analytical work and research to better understand their current situation and the obstacles to integrating into the multilateral trading system. While recognizing the special

[218] Permanent Mission of Barbados in Geneva, *Small, Vulnerable Economies Work Program: Fact Sheet* (2006), available at http://www.foreign.gov.bb/geneva/pageselect.cfm?page=1.
[219] The Committee on Trade and Development witnessed the divergent view on DFQF market access between African LDCs and Asian LDCs. While Asian LDCs, such as Bangladesh, that have better competitiveness in textile products demand the strengthening of DFQF market access, African LDCs that have already benefited from the preferential tariff scheme provide by the US, such as the African Growth and Opportunity Act (AGOA), are quite reluctant to strengthen DFQF market access because they fear the loss of relative competitiveness and market for their own exports.
[220] Permanent Mission of Barbados in Geneva, *Small, Vulnerable Economies Work Program* (2006).
[221] WTO, Work Programme on Small Economies, Decision of 17 December 2011, WT/L/844, 19 December 2011.

challenges and needs faced by small economies or SVEs, it seems to be almost impossible to create a new sub-category of countries nor to agree on granting a particular group of countries specific and more preferable S&D, as seen in the current trade negotiation.

Figure 3-1: Negative Interactions within Developing Countries



It is already apparent that developed country members will not accept efforts by a small group of developing countries and will strongly oppose the creation of a definitive category to be accorded more S&D, as well as the granting of more exceptions and flexibilities to enable them to expand policy space. They also would not be willing to bear more obligations to offer preferential market access. These reactions by developed countries form a clear pushback to the effort made by small economies or SVEs. Until now, it has been believed that pushback

from developed countries is the only obstacle for small developing countries that have sought more preferable S&D. However, there is also a negative interaction within the group of developing countries, that is, a "hidden pushback," as seen in the current negotiation. The group or category right next to the one which is likely to be granted more favorable S&D often shares an economic structure and trade interests. This could lead them to losing the development opportunities by not being able to obtain S&D as preferable as the treatment accorded to the lower category, and to losing export opportunities by not being granted market access as preferential as the lower category gains.

As illustrated by Figure 3-1, LDCs have been trying to expand their preferential treatment inside the clear line separating them from other developing countries. There is no opposition and pushback from other developing countries or developed countries, which have even shown great flexibility, and expansion has been achieved. On the other hand, the group of small developing countries next to the LDC category has been facing opposition and pushback not only from developed countries but also from other developing countries, especially from the group categorized right next to them. In fact, proposals aiming to expand their policy flexibility have almost never been accepted so far.

The story of such pushback does not include only small developing countries, but repeats itself throughout the categories. If a certain group of smaller developing countries, for example, the Small Economies in the figure above, becomes eligible and is granted more preferable S&D, the developing country group right next to them, that is the lower-income developing countries, would feel threatened and push back against granting such S&D. This phenomenon is likely to occur until all developing countries enjoy uniform S&D. For this reason, the current WTO Agreements failed to differentiate between developing countries in providing S&D, except for LDCs and in a very few cases, and granted minimum blanket S&D

which was permitted even for bigger developing countries, such as Brazil, India and China.[222] The next section will introduce cases of confrontation between developing countries, to demonstrate diversification and the conflicts of trade interests among them.

2. Actual and Potential Confrontations among Developing Countries

As described in the previous chapter, confrontation has been apparent in practice, including in negotiations and surveys. The explicit effort or implicit attempt to create a new sub-category, for example SEs, has failed not only because developed country members were opposed but also because emerging economies and other small developing countries refused to agree. This failure was attributed to the fact that large economies strongly opposed the differentiation of developing countries because it might result in the loss of developing country status and bargaining power in negotiation, and because small developing countries felt threatened by the possible negative effects of not receiving preferable S&D. In the case of preferential market access, such confrontation is much more obvious. There has been conflict between developing countries and even within the LDC group over this kind of preferential market access. In particular, the group of small economies submitted a proposal on specific preferential market access.[223] However, it did not gain support from developed countries, and was opposed by other developing countries. This was because there should be competition for market opportunities among developing countries with similar commercial interests, including similar export products and destinations. Especially for the developing countries with conflicting interests and similar sized economies, providing more preferable market access to a certain group would not be acceptable.

[222] Annex VII of the SCM Agreement.
[223] WTO, Work Programme on Small Economies, WT/L/844.

The proposal on agricultural market access by small developing countries in 2000 also demonstrates a clear example of confrontation over preferential market access. Swaziland, as the representative of the group of "small developing countries,"[224] stated that "[N]o small developing countries should be disadvantaged in the wake of giving special and differential treatment to other developing countries. In particular, the existing preferential arrangements are one of the main avenues for meaningful human development in the developing countries involved."[225] This proposal was supported by Barbados, St. Lucia, Trinidad and Tobago, Jamaica, Fiji, Namibia and Mauritius, claiming disadvantages resulted from "smallness."[226] Swaziland further stated that "[a]pplying preferences to all developing countries would mean some would become better-off at the expense of others."[227] This clearly shows that the representative and supporting countries were greatly concerned about the threat to lose export market opportunities exactly because of more preferential market access granted to developing countries belonging to the next category.

As long as demand in the destination market has an upper limit, expansion of imports from one country through preferential market access may crowd out similar products from another country. Given this fact, a country without preferential market access will oppose the expansion of preferences. Moreover, even the group of LDCs is not uniform in terms of economic and development interests, and they scramble for preferences provided by developed countries. In seeking better DFQF market access, there is a divergent view between Asian and African LDCs, especially regarding textile products. Asian LDCs, such as

[224] The group of "small developing countries" is neither legally defined nor recognized as a negotiating group in the WTO. Swaziland, in the negotiation on agriculture, identified itself as the representative of "small developing countries" without clarifying what constitutes "smallness" or who belongs to the category, and its proposal was supported by many SVEs.
[225] WTO, Market Access under Special and Differential Treatment for Small Developing Countries, G/AG/NG/W/95, 22 December 2000.
[226] WTO, Summer Report on the Fifth Meeting of the Special Session held on 5-7 February 2001, G/AG/NG/R/5, 22 March 2001.
[227] Ibid.

Bangladesh, intend to expand their textile exports to the U.S. market, while African LDCs are reluctant to make the effort. This divergence results from the threat of losing relative value or preferences, even between LDCs.

Apart from preferential market access, actual and potential confrontations between developing countries are inherent also in the case of other policy flexibility S&D. For example, local content requirements, which are allowed for some developing countries as S&D under the TRIMs Agreement and GATT XVIII, and import restriction under GATT XVIII would have a negative impact on a country that exports related products. Hence, the country adversely affected by the measures would oppose such S&D. In fact, through the consultation mechanism under Section C of the GATT XVIII in 1950s and 60s, another developing country exporting a product affected by a measure requested the GATT Panel to consider the adverse effect on its trade. Upon the request, the Panel examined how compensation could be made through the imports of other raw materials and parts.[228] This case clearly show that there was a practical confrontation regarding the measures allowed as S&D even since 1960s, and that the important element to be considered was the adverse effect of the measure on other developing countries.

Another example of confrontation in terms of policy flexibility S&D is the dispute over export subsidies between developing countries. In October 2012, Mexico requested consultation with China concerning measures that allegedly support producers and exporters of apparel and textile products.[229] As China gave up S&D regarding export subsidies upon its accession to the WTO, another textile-exporting developing country, in this case Mexico, made complaints about China's use of prohibited export subsidies. This case shows that the

[228] GATT, Report of the Panel on Article XVIII, L/1113, 19 November 1959, 4.
[229] WTO, *China – Measures Relating to the Production and Exportation of Apparel and Textile Products*, Request for Consultations by Mexico, G/AG/GEM/103; G/L/1004; G/SCM/D94/1; WT/DS451/1, 18 October 2012.

use of export subsidies causes clear confrontation between developing countries due to the adverse effect of the measure. It also suggests the "cliff effect" of using export subsidies, as pointed out by Neto.[230] Though the SCM Agreement permits some of the small economies listed in Annex VII to utilize export subsidies, once GNI per capita reaches a certain level, the country can no longer use such measures and suddenly will face potential complaints by other competing developing countries. The confrontation between developing countries over export subsidies is easily observed.

The survey conducted by Jones *et al.* in 2010 also illustrated that small developing countries themselves were aware of their influence on a trade partner of similar economic size. Almost 70 percent of all respondents said they had a 'high' or 'moderate' influence in negotiating with small states,[231] while the influence could be both positive and negative. This result can be understood as meaning that the negotiators of such countries feel they have a greater influence over their trade partners when they negotiate with those of similar economic size.

The cases introduced above clearly illustrate the existing confrontations and high likelihood of more conflict between developing countries. Such confrontations have been more apparent due to increasing diversification among developing countries. Why, then, does such confrontation within developing countries occur? The next section will offer an in-depth explanation for the mechanism of confrontation and seek the direction to mitigate conflicts between or among developing countries.

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[230] Paulo P. Neto, *International Trade Subsidy Rules and Tax and Financial Export Incentives: From Limitations on Fiscal Sovereignty to Development-Inducing Mechanisms* (Bloomington: Author House, 2012), 21.

[231] Emily Jones, Carolyn Deere-Birkbeck and Ngaire Woods, *Manoeuvring at the Margins: Constraints Faced by Small States in International Trade Negotiations* (London: Commonwealth Secretariat, 2010), 63.

3. Towards Mitigating Confrontations

In the current stalemate of the Doha Development Agenda, , the "hidden pushback" from the group of developing countries lying right next to the ones that are granted the more preferential S&D indicated in Figure 3-1 is likely to take place because they are engaged in negotiations based on a fixed-pie concept or zero-sum game.[232] This is the very reason why the internal confrontations occur. Developing countries may share the perception that the "pie" for all actors is fixed and that increasing the pie for one category means reducing the pie for the next.[233] The "pie" here, in the context of S&D negotiation, represents the amount of benefit that the group of developing countries can receive, including both market access and policy flexibility. Countries in the next category would be, as a matter of course, opposed to granting S&D to a weaker category of developing countries, because it means the loss of part of the pie for them. Regarding preferential market access, Prebisch pointed out in his report that "some developing countries … may fear that they will not be able to benefit from preferences if they have to compete with other more advanced members of the developing group."[234] This observation posits the concept of the fixed pie for the export market. The competition for the market share takes place not only between more and less advanced economies, but also between some with more and less preferential treatment.

Another important remark to be made here is that the degree of adverse effect imposed on other countries by a measure is the crucial question in whether to allow S&D, and that

[232] The negotiation theory in collective bargaining, introduced by Walton and McKersie, identified two major types of collective bargaining, which are "distributive bargaining" and "integrative bargaining." The internal conflict or "hidden pushback" within developing countries can be described as "distributive bargaining" based on the fixed-pie concept or zero-sum game. See Richard E. Walton and Robert B. McKersie, *A Behavioral Theory of Labor Negotiation* (New York: McGraw Hill, 1965).

[233] Under this perception, for example, expanding more preferential S&D for LDC "plus" category (which could be countries with slightly greater GNI per capita than as defined by The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States [UN-OHRLLS)) could mean shrinking the benefits for other SVEs.

[234] Raúl Prebisch, "Towards a New Trade Policy for Development", United Nations, *Report by the Secretary-General of UNCTAD* (1964), 67.

negative impact varies depending on the type of S&D. Because the confrontations among developing countries occur due to the conception of the fixed pie, how much a country's portion of that pie is affected by a given S&D measure should be the most significant determinant for the country. For market access type of S&D, especially preferential access to developed countries' markets, developing countries think according to the fixed-pie principle, so inability to obtain preferential market access for export goods would be a zero-sum proposition. As long as the destination market is fixed, when a weaker category of developing countries gets more preferential conditions, other developing countries that export the same or similar lose market opportunities in the concerned market.

Conversely, with policy flexibility S&D, the pie is not fixed because measures such as import restriction or local content requirement aim mainly to promote domestic industries and do not directly and adversely affect the market opportunities and policy flexibility of other countries. In other words, certain measures may cause adverse effects on developing countries that export goods to the developing country applying for S&D, but none at all on other developing countries that do not export to the applicant country. Moreover, the loss of "pie" by applying policy flexibility S&D should be much more limited if the market of the developing country is small enough. If there is adverse effect on a certain trading partner, it could be easily compensated with imports of other goods necessary for production,[235] or simply with financial compensation. In this regard, a pure confrontation or zero-sum bargaining does not occur for this type of S&D. These instances suggest that pushback from developing countries should be more sophisticated and that factors causing confrontations, the way and degree of imposing adverse effect and the elements to be considered in examining such adverse effect differ for each measure taken by the developing country. Given that such

[235] The Panel suggested the possible compensation in the case of Article XVIII Section C of the GATT (GATT, Report of the Panel on Article XVIII, L/1113). See Section 2 of this chapter.

confrontation depends on the nature and the area of measures, the WTO Agreements need different classification and differentiation of developing country members for providing S&D, based on the type of policy measures.

Is there, then, any possible way to break the impasse in the current trade negotiation, which has witnessed confrontations between or among developing countries? Under the current trade negotiation, avoiding severe confrontations among developing countries should be still possible. Negotiation in the multilateral trading system contains many trade areas, as well as memberships. S&D, as one of the negotiation issues, is cross-cutting and also covers many areas. Moreover, even among groups of developing countries, interests do vary.

For example, the priority for SVEs is to secure access to the export market through retaining preferences.[236] As their domestic market and consumption are very limited, the revenue from exports is vital for them. On the other hand, policy flexibility may not be so important because domestic industries are not big enough and the government often faces considerable financial and administrative constraints. In addition, to develop heavy industries that require large-scale government support is very difficult because SVEs, in many cases, lack natural, human and financial resources. They also face huge disadvantages associated with geographical constraints and high transportation cost, which causes difficulties in attracting foreign direct investments. On the other hand, for bigger developing countries, the priority should be to foster or enlarge domestic industries in order to gain greater competitiveness and expand their exports. Therefore, policy flexibility S&D is of great importance for them. They may already obtain market access to developed and other developing countries or may not need preferential market access anymore, as the export sector

[236] Edwin Laurent, "Priorities for small States in global trade governance," in *Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries*, ed. Carolyn Deere- Birkbeck (Cambridge: Cambridge University Press, 2011), 212. See also Richard L. Bernal, "Improving the participation of small developing countries in the governance of the multilateral trading system," in ibid., 234.

in such countries often already have international competitiveness. However, there might be still a threat to them of losing export market opportunities when other developing countries gain competitiveness and expand the export of similar goods.

Nevertheless, considering how to minimize adverse effects and putting these ideas into practice has significant implications for trade issues and negotiation at all three levels: the level of individual measures, the level of confrontation between countries, and the level of the whole multilateral trade system. First, at the level of individual measures applied by countries, there should be in a sense "bargaining" between counter compensation and preservation of future benefit and the value expected to be brought by such measures. Countries which intend to apply measures with possible adverse effects on their trading partners would pay a certain amount of compensation, such as accepting withdrawal or modification of tariffs on certain products or providing a certain amount of financial payment, in order to implement measures with expected future benefits. However, such forecasts require sufficient capacity to make sound cost and benefit assessments between compensation and future benefit.

Second, in order to avoid deep and severe confrontations between developing countries and ensure solidarity and good negotiation relationships in the multilateral talks, identifying counter compensation and letting countries pay it potentially expands the whole pie. Expanding the pie is possible by prioritizing interests and in the course of trade-offs and negotiation.

Finally, the calculation and cost of counter compensation so as to preserve the whole value of the WTO can be pursued in the current trade negotiation. Trade negotiation is the very example of pay-and-buys and bargaining over various issues, ranging from industrial tariffs to development. When negotiating on tariff reduction with modality, a country has to take into

account what to aim for and what to offer in the different areas of negotiation. While this, on the one hand, has been causing huge difficulties in the multilateral negotiation, on the other hand, it may be possible to find a breakthrough by eliciting compromise from developing countries by offering them practical and agreeable solutions on the S&D issue. In short, by paying for an agreeable compromise on various issues, including S&D, in a sense would be to fix the cracked part of the multilateral trading system and to ensure the whole value of the WTO.

The discussion and analysis of confrontations among developing countries discussed in this chapter explain the fact that LDC is the only category which is already officially differentiated and recognized to be eligible for S&D under the current agreements. What is happening behind the scenes is that, when a certain category of developing countries attempts to obtain specific S&D, other developing countries that have similar sized economies and share commercial interests may oppose such an attempt because they feel threatened by the adverse effect and loss of "the pie" resulting from S&D being granted to certain developing countries. It should be reiterated that the most significant element to consider is the adverse economic impact which is caused by policy measures allowed or to be possibly allowed under each S&D provision. If such adverse impact is negligible enough, it should be permitted as the level of *de minimis*. Finding the level of *de minimis* for no compensation can provide an important guideline for practical and justifiable differentiation as well as the newly differentiated S&D application for developing countries in the multilateral trading system. Countries should be able to identify what constitutes an adverse effect on the whole value to be compensated and how and by what means it should be compensated. In order for members to clearly understand and realize each commercial interest and policy option, as well as the positive and adverse effect of policy measures, there is a need to differentiate developing

countries according to each agreement and type of S&D. In addition, as some scholars have aptly pointed out, the magnitude of adverse impact on other countries associated with the use of policy measures would vary, depending on the economy size of affected countries.[237] Negative impact caused by the measure taken by a certain small developing country would be minimal in world trade terms or on OECD countries. However, for countries whose economies are also small enough and/or similar in structure and commercial interests, the adverse effect might be substantial and need some sort of compensation. As to losing the pie and its degree, with regard to allowing S&D, the single *de minimis* standard may not be sufficient.

[237] Bernard M. Hoekman, "Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment", *Journal of International Economic Law* 8.2 (2005): 417.

Chapter IV

Revisiting the Justifications for S&D from Theoretical and Historical Perspectives

This chapter will be dedicated to the review of theories and historical evidence relating to the justifications for S&D. Specifically, this will be done by looking at the origin and fundamental notion of international law of development, as well as the "common but differentiated responsibility" under international environmental law as one of the concrete applications of the principle, and the empirical evidence of trade and industrial policies. The multidimensional justifications for differentiated treatment being accorded to developing countries offer a valuable and fresh insight on the core issue of this study, that is, how and why S&D should be provided.

1. Differential Treatment under the International Law of Development

For almost half a century, relations between developed and developing countries in the international trading system have been conflictive. Developing countries have consistently rejected two fundamental concepts of the GATT, that is, equal treatment and reciprocal trade liberalization. Arguing "equal treatment for unequals is unfair," developing countries have insisted on their development needs and demanded discriminatory treatment in their favor, to wit, "different and more favorable treatment." Because of their demands, developed countries have granted favorable market access to developing countries through the system of preferences.

However, trade liberalization through the GATT regime has neither brought most developing countries substantial development nor helped them overcome their disadvantages. This section reviews the history of the concept and justification for "differential and more favorable treatment" under international law of development and in the sphere of international environmental law, and then suggests the way to revisit S&D and make it operational and effective.

1.1 The Origin and Fundamental Concept of the International Law of Development

1.1.1 Equality of States and Inequality of Development

All states are considered to be equal before international public law. While "equality" has been defined in many ways, Dickinson identified two important legal principles. The first is "the equal protection of the law or equality before the law," in which "international persons are equal before the law when they are equally protected in the enjoyment of their rights and equally compelled to fulfill their obligations."[238] As an important example, he made a significant remark at the Second Hague Conference in 1907: "[E]ach nation is a sovereign person, equal to others in moral dignity, and having, whether small or great, weak or powerful, an equal claim to respect for its rights, an equal obligation in the performance of its duties."[239] Moreover he stated that "the word 'equality' may be used to mean an equal capacity for rights."[240] He further clarified that "[t]he equality of states […] means, not that all have the same rights, but that all are equally capable of acquiring rights, entering into transactions, and performing acts."[241]

[238] Edwin D. Dickinson, *The Equality of States in International Law* (London: Cambridge Harvard University Press, 1920), 3.
[239] Ibid.
[240] Ibid., 4.
[241] Ibid.

1.1.1.1 Formal Equality – Traditional International Law

Under traditional international law, once states obtain sovereignty, they are considered to have equal capacity and guaranteed "formal equality." Tabata illustrated three significant elements for states equality under traditional international law: equality in the application of law; equality in the content of law; and equality in the process of law-making.[242] The principle of state equality that consists of these three elements was based on the idea of an international society of homogeneous and equal actors. Equality among states is be secured by prohibiting discrimination among them regardless of their actual differences. State equality is achieved through the establishment and application of law and fairness is upheld by mutual obligations undertaken between states. In this sense, traditional international law is considered to be static and the means to maintain the *status quo*.[243]

Another fundamental principle of formal equality is reciprocity. Legal obligations under international law are traditionally framed as strictly reciprocal commitments binding all signatories in the same way, where each state can expect the fulfillment of the same obligations by all other states.[244] In other words, equal commitments and obligations based on the principle of reciprocity secure formal equality and fairness among states. Reciprocity is a central and fundamental element of obligations.

However, Cullet pointed out that equality was "an elusive concept since different versions of equality yield extremely different substantive outcomes."[245] Although the neutrality of the law has been premised on the legal equality of states, equality before the law, including rights

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[242] 田畑茂二郎 『国際法I（新版）』有斐閣 (1973), 333-336.
[243] 位田隆一「開発の国際法における発展途上国の法的地位－国家の平等と発展の不平等－」『法学論叢』 116巻1～6号 609-647頁 京都大学法学会 (1985): 644.
[244] Philippe Cullet, "Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations", *European Journal of International Law* 10.3 (1999): 563-564.
[245] Ibid., 553.

and opportunities, would not necessarily bring about equal outcomes.[246] If reciprocity of obligations is provided only based on the notion of formal equality among states, the result of such reciprocal obligations would not be equitable due to the differences in resources and capacity. This contradiction may hinder the achievement of substantive equality.

1.1.1.2 Substantive Equality – Droit International du Développement

After the Second World War, many colonial states gained independence. Despite their achievements at the political level, which includes regaining independence, attainment of international recognition, and participation with equal rights in international organizations, their economies were still under- or less-developed. There appeared to be "inequality of development." This kind of structural difference between states impaired homogeneity in the international community. In such a heterogeneous society, traditional international law, based on legal formalism and the *status quo*, can no longer satisfy the postulate of the equal sovereignty of states.[247] There was the need to take into account the "inequality of development,"[248] resulting from different levels of development.

Inequality of development should be modified by the law itself. Law aims at playing a positive role in order to attain "substantive equality" among sovereign states, by setting the goal at the level, not of the application of law, but of the "fruit" obtained by development.[249] As Flory pointed out, the international law of development implies "purposiveness and even a

[246] Ibid., 553-554.
[247] Edward Kwakwa, "Emerging International Development Law and Traditional International Law – Congruence or Cleavage?", *Georgia Journal of International and Comparative Law* 17.43 (1987): 453. See also, Kale, "The Principle of Preferential Treatment in the Law of GATT", 319.
[248] 位田,「開発の国際法における発展途上国の法的地位」, 614.
[249] Ibid., 615.

result"[250] and is dynamic, capturing the states with concrete differences and making the correction of inequality and the attainment of substantive equality among states its purpose. The international law of development responds to the major goal of eliminating inequalities of development and offers, as the means of achieving this goal, so-called "compensatory inequality"[251] which makes legal inequality more favorable to the weak.[252]

Under the international law of development, law attempts not to maintain the *status quo* which contains inequality of development, but rather to eliminate it and to be interventionist. This intervention involves legal norms with differentiation based on the level of development, applying different norms to states, so called "dual- or multi norms".[253] In this context, Magraw, who introduced three classifications of international norms, illustrated that differential norms were referred to as double standards or asymmetrical norms in that they provided states with different rights and obligations, deviating from an otherwise symmetrical system of reciprocal rights and obligations.[254] Using Magraw's classification, Halvorssen further argued "the differential norms of greatest interests are the ones that distinguish between developed and developing countries."[255]

Such differentiation is apparently based on the exception to the principle of reciprocity. In international law, derogation from reciprocity traditionally takes two forms: an unequal treaty imposed on a given state, and the shift from reliance on formal equality to a compensatory inequality, taking into account that more influential states are favored by a legal system

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[250] Maurice Flory, "A North-South Legal Dialogue: The International Law of Development", in *International Law of Development: Comparative Perspectives*, ed. Francis Snyder and Peter Slinn, (Abingdon: Professional Books, 1987), 11.
[251] 位田,「開発の国際法における発展途上国の法的地位」, 615.
[252] Kwakwa, "Emerging International Development Law and Traditional International Law", 453.
[253] Ida,「開発の国際法における発展途上国の法的地位」, 616.
[254] Daniel Magraw, "Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms", 1 *Colorado Journal of International Environmental Law and Policy* 69 (1990). He divides international norms into differential, contextual and absolute norms.
[255] Anita M. Halvorssen, *Equality among Unequals in International Environmental Law: Differential Treatment for Developing Countries* (Colorado: Westview Press, 1999), 69.

focusing on the formal validity of legal rules.[256] Differential norms or treatment under the international law of development should be based on mutually accepted non-reciprocity.[257]

1.1.1.3 Justification for Differential and More Favorable Treatment – Attainment of Equity

As discussed in the previous sections, traditional "formal equality" based on the concept of legal equality of states does not necessarily bring about substantive equality for states. After the era of decolonization in the 1960s, the need for differential treatment for less developed states to achieve substantive equality was increasingly recognized, taking into special consideration the inequality of development as well as the concept of compensatory inequality. While the previous arguments identified the basic and original concept of "equality" and "inequality," the principle of "equity" must be still discussed. It also plays an important role in the international legal order, allowing exceptions "in the name of fairness or reasonableness."[258] The definition of equity is still not very clear, but Schachter explained the relationship between equality and equity as follows:

> As one moves from the level of the ideal to practical social policy, equality is in itself too general a concept to support concrete policy choices. Choices must be made among the different kinds of equality: equality of rights, of opportunities, of conditions, and of outcome. And, these different kinds of equality may be incompatible in practice: indeed, this is likely to be the case when there are disparities in resources and capabilities. That is why, since the time of Plato it has been suggested that "equality among unequals" may be inequitable and that differential treatment may be essential for "real equality."[259]

His "real equality" could be interpreted as "equity", or substantive equality, to be achieved under the international law of development, as discussed above. While formal equality attempts to provide equal opportunities and obligations, real or substantive equality should be

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[256] Emmanuel Decaux, *La réciprocité en droit international* (Librairie Générale de Droit et de Jurisprudence: Paris, 1980).
[257] Cullet, "Differential Treatment in International Law", 556.
[258] Halvorssen, *Equality Among Unequals in International Environmental Law*, 28.
[259] Oscar Schachter, *Sharing the World Resources* 7 (New York: Columbia University Press, 1977), 6-7.

secured through "legal inequality" along with different treatment to compensate the inequality of fruit in development.

One of the principles underlining preferential treatment for developing countries was based on the idea that unequals should be treated unequally in order to obtain an equitable application of the principle of "substantive equality,"[260] which was asserted by Raul Prebisch, who was the first Secretary-General of the UNCTAD.[261] Cullet also pointed out that rules that treat all partners in the same way and provide equal rights and obligations as well as opportunities are suitable "as long as the partners have the same capacity to benefit from the standards in place."[262] He further identified, in many cases, that inequalities among partners or countries have a substantial influence on their capacity to benefit from a given regime. Gaps, especially in economic development, significantly influence the capacity of states to realize independence and to pursue the necessary conditions for substantive equality. Since inequalities seen in practice are independent of actions by states, there is a need to allow "exceptions which take into account some existing inequalities so as to bring about substantively equal result."[263] This leads to legal inequality or "positive discrimination"[264] in favor of developing countries. Moreover, relying on the principle of equality, Kaplinski also argues "[w]hat low-income countries require is not a level playing field – this will drive them into a race to the bottom. Instead what they need is a tilted playing field, but one which is inclined in their direction. Secondly, the tilt in this playing field should be directed not only

[260] Kwakwa, "Emerging International Development Law and Traditional International Law", 438.
[261] In the context of trade, he insisted on justification for differential treatment and his suspicions about one of the fundamental principles under the GATT, stating "[h]owever valid the Most-favoured-nation principle may be in regulating trade relations among equals, it is not suitable concept for trade involving countries of vastly unequal economic strength." Raul Prebisch, "Towards a New Trade Policy for Development", United Nations, *Report by the Secretary-General of UNCTAD* (1964), 66.
[262] Cullet, "Differential Treatment in International Law", 557-558. The same arguments are seen in Kale, "The Principle of Preferential Treatment in the Law of GATT", 313, and Tracy Murray, *Trade Preferences for Developing Countries* (Halsted Press: New York), 1977.
[263] Ibid., Cullet, "Differential Treatment in International Law".
[264] Wild D. Vervey, "The Principle of Preferential Treatment for Developing Countries", *Indian Journal of International Law* 23 (1983): 362.

against high-income economies, but also in many crucial cases against other low-income economies."[265]

Vervey identified that differential or preferential treatment for developing countries

> …aims at correcting the inequitable effects of the traditional twin liberal principles of freedom and legal equity – which, in a society in which the economically weak have to compete with the economically powerful on an equal footing, tend to favor the latter. As one of the most conspicuous legal offsprings of the fundamental of "solidarity," it constitutes a cornerstone of what the Charter of Economic Rights and Duties of States refers to as "collective economic security for development."[266]

In order to achieve collective economic security for development, there is an essential need for differential treatment for weaker / developing countries, to compensate differences or gaps in economic power. Such differentiation in international law not only enhances substantive equality among unequal actors but also provides "a framework for less confrontational relations among states," and can lead to the convergence of interests that states could find on certain issues.[267] Providing differential treatment for unequals can also foster balance and stability in international relations, which may be threatened by tensions among states.[268] International stability must be an important rationale for differential treatment under international law, including in the context of trade. However, in the meantime, it has to be noted that such differential treatment should function "not to create permanent exceptions but a temporary legal inequality to wipe out an inequality in fact."[269] This means that deviations in rules should be designed with a clear timeframe and differentiate among countries as to when to phase them out. The factors to assessing if a state is benefiting from differentiation and differential norms could include the level of GNI per capita, the level of economic

[265] Raphael Kaplinsky, *Globalization, Poverty and Inequality: Between a Rock and a Hard Place* (Cambridge: Polity, 2008), 249.
[266] Vervey, "The Principle of Preferential Treatment for Developing Countries", 362.
[267] Cullet, "Differential Treatment in International Law", 558.
[268] Schachter, *Sharing the World Resources*, 16.
[269] Ibid., Cullet, "Differential Treatment in International Law", 557. See also Decaux, *La réciprocité en droit international*.

development, the share of a country's trade of specific products, the importance of an industry for the state, and the geographical situation of a state.[270]

1.1.2 Fostering Participation and Implementation

Once all member states recognize that development of developing countries enhances the stability of an international regime and benefit all states, more cooperation and participation by member states to aim at the problems and difficulties should be expected. This perspective should be underlined by the principle of solidarity. Cullet asserted that solidarity and differentiation were closely related. He defined solidarity as "an expression by members of community that they have common interests and that they should contribute to their realization and furtherance."[271] While the principle of solidarity is a fundamental ethical element, differential treatment is "a practical application of the notion of solidarity."[272] Through granting weaker developing countries treatment with differentiated rights and obligations, including deviations, solidarity among states could be strengthened.

In addition, by providing differential and favorable treatment for developing countries, they would be more willing and able to actively participate and integrate into the international regime. If they have to bear the same obligations as those developed countries with highly advanced economies, many of them would be reluctant to participate for the reasons that they lack institutions, and the human and financial resources necessary to implement such onerous obligations. Conversely, allowing alleviation or deviation of the obligations, or even equal obligations with longer implementation periods for them, would ease the negative costs and risks that developing countries would have to take in implementing obligations. Enhancing such solidarity among states and the participation by developing countries will also contribute

[270] Ibid., Cullet, "Differential Treatment in International Law", 555-556.
[271] Ibid., 558.
[272] Ibid.

to the value and universality of a given regime.

Another beneficial aspect of differential treatment would be to promote more expeditious and effective implementation of obligations. Such measures include longer transitional periods and mechanisms for technical assistance. These more favorable measures would be provided with the recognition that insufficient financial and technical capacity prevents developing countries from effective implementation under the multilateral agreement or regime. It would be difficult and unrealistic to make all member states bear equal obligations to implement, especially in cases where such obligations require considerable burdens. Differential treatment, specifically in the stage of implementation, is necessary for international law and the regime to be responsive to national capacity and situation.[273]

1.1.3 To Achieve Equity in the Multilateral Trading System

As discussed above, it may be safely said that *de jure* equality may lead to *de facto* inequality. In the context of trade, although the GATT provided the legal framework for international trade between developed and developing countries and treated them equally, the system of trade regulation has not appropriately covered and successfully mitigated the gap between these two sides. All states that entered into tariff negotiation and signed agreements were assumed to have more or less equal bargaining power and positions, and consequently to be capable of benefiting from non-discriminatory and reciprocal concessions. The GATT framework and its application, which guaranteed *de jure,* i.e., formal equality of trade partners, could lead to the perpetuation or even deepening of the substantive inequality in the structure of trade relationships between those two groups with *de facto* unequal development

[273] Ibid., Cullet, "Differential Treatment in International Law", 563.

levels.[274] The legal order of world trade under the GATT did not ensure equitable benefits to developing countries and left them in fact with serious disadvantages.[275] The Haberler Report, circulated in 1958, stated that the developing countries had faced severe limitations to benefiting from world trade or even been adversely affected, and that this imbalance could not be corrected by the normal operation of trading rules alone, recognizing that special measures were needed to alleviate such situation.[276] Poorer and smaller countries should thus be treated more favorably in terms of market options than the richer and larger countries. Developing countries opposed to the MFN principle, as the Uruguayan representative stated, said that it was "not the proper means to combat underdevelopment because economic inequality among states can only be corrected through unequal treatment. Inequality cannot be put right by applying equal measures: this can only be done through differential treatment favoring some in order to obtain effective equalization in the end."[277]

During the negotiation history of the GATT system, developing countries claimed dissatisfaction with the MFN and reciprocity principles under the regime, arguing it did not consider differences in levels of development nor specific disadvantages and needs. This meant that there was recognition that the members of the GATT were not economically equal and, among unequal parties, the principle of reciprocity could not be applied. It thus offered "compensatory inequality" as differential treatment in order to achieve "substantive equality." Such recognition appeared as the application of "dual or multi- norms", embodied as preferential treatment for developing countries under the GATT rules.

The GATT regulations provided developing countries with non-reciprocal, differential and

[274] Butkiewicz, "Impact of Development Needs on International Trade Regulation", 197.
[275] Kabir-Ur-Rahman Khan, "International Law of Development and the Law of the GATT", in *International Law of Development: Comparative Perspectives*, ed. Francis Snyder and Peter Slinn, (Abingdon: Professional Books, 1987), 182.
[276] GATT, *Trades in International Trade* (1958).
[277] Cited in Kale, "The Principle of Preferential Treatment in the Law of GATT", 314.

more favorable treatment, allowing them exemption from the MFN obligations. The most explicit example was preferential market access to developing countries. Specifically, under the Generalized System of Preferences, developed countries granted preferential tariff to imports from developing countries, and the Enabling Clause contributed to the establishment of the legal basis for such preferential treatment.[278] The members of both developed and developing countries hoped such preferences would be enough to achieve "substantive equality." However, for more than half a century, most of the developing countries still have been left far behind, and in some cases their economies retrogressed. It should be pointed out that the preferential scheme did not consider the structural disadvantages of their domestic industries for export to developing countries, such as dependence on primary exports, supply-side constraints and lack of international competitiveness, and the impact of obligations required under the international trade law on national development policy. Regarding the effects of obligatory GATT regulations on their domestic policy, there was need for a waiver or relaxation of obligations relating to policy making or implementation. Yet the arguments for development needs during the history of GATT negotiations did not focus on such aspects, nor even identify the emergence of such needs.

After the establishment of the WTO, members had to accept greater commitments and obligations and accommodate the larger effect on national development policies of rules under the international trade regime. Bunn also argued the unfairness of trade rules under the WTO, and emphasized that such unfairness is caused by "the huge disparities in levels of income and development between countries" and from the "treatment of developing countries within the framework of the WTO."[279] As legislation and commitments under the WTO

[278] Paragraph 2(a) of Decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (L/4903, 28 November 1979).
[279] Bunn, "The Right to Development", 1462.

impose limits on the range of national development policies available to members,[280] providing only preferential market access appeared to be insufficient for developing countries to attain "substantive equality." Differential treatment under the WTO law, such as longer transitional periods and technical assistance, is obviously grounded in the insufficiency of preferential market access as well as the clearer recognition that unequals with different capacity should be treated unequally and that such differential treatment will improve implementation by developing countries. In addition, it should be noted that more participation and integration of developing countries into the multilateral trading regime would be of substantial benefit for developed countries. In other words, a common interest exists in providing differential treatment for developing countries to promote their greater participation and better implementation.[281] Upon the establishment of the WTO, members recognized that, as the preamble of the WTO Agreement states, "there is need for positive efforts designed to ensure that developing countries […] secure a share in the growth in international trade commensurate with the needs of their economic development."[282] Such "positive efforts" could include "positive discrimination", or so-called "international affirmative action"[283] to provide differential and more favorable treatment for disadvantaged countries.

It should be noted, finally, that the dual perception of developing and developed countries, which was considered as the basis of differential treatment under the international law of development, might not have been correctly understood even back in the 1980s. With the

[280] Chang, *Kicking away the Ladder*. See also Werner Corrales-Leal, M. Sugathan and D. Primack (2003) "Spaces for Development Policy", in *Revisiting Special and Differential Treatment* (Geneva: International Centre for Trade and Sustainable Development (ICTSD), 2003), Robert Hamwey, "Expanding National Policy Space for Development: Why the Multilateral Trading System Must Change", *Trade-Related Agenda, Development and Equity Working Papers* (South Centre, 2005) and UNCTAD, *Trade and Development* (United Nations Publication, 2006).
[281] Halvorssen, *Equality Among Unequals in International Environmental Law*, 68.
[282] Preamble of the Marrakesh Agreement on Establishing the World Trade Organization.
[283] Halvorssen, *Equality Among Unequals in International Environmental Law*, 28.

recognition of different capacity and levels of development among states, even the original concept of the international law of development could justify differentiation based purely on the differences among states. This means that, even since its emergence, the international law of development may have already been the catalyst for differentiation among developing country states that possess divergent features.

The need of differentiation is even more apparent in the current context. Within developing countries, there are differences in economic, financial, and institutional capacity. In particular, with the expansion of global trade, as discussed in earlier chapters, the gap between larger developing countries, so-called emerging economies, and smaller developing countries, such as LDCs and SVEs, has widened over the decades. Considering the fact that the latter are facing capacity constraints in enjoying benefits under the international trade regime, they should be treated differently and accorded more favorable treatment. The rationale for such differential treatment among developing countries should be the same logic applied in the 1980s in the international law of development, which is based on the recognition of different capacity and level of development. Applying the concept and theories indicated in the area of international law of development, "differentiated" compensatory inequality even within developing countries is needed for the sake of achieving "substantive equality" among them.

1.2 Comparison with "Common But Differentiated Responsibility" under the International Environmental Law

Under the international environmental law, a state's responsibility, including both rights and obligations, is to be determined based on the "polluter-pays principle." The principle asserts different historical responsibilities for environmental degradation, as well as different

capacities to solve the environmental problems. Taking into consideration the adverse effect developing countries have posed on the global environment, which is considered to be much less than industrialized economies, and their far weaker human, institutional and technological capacity to deal with global environmental problems, developing countries bear less responsibility within the concept of "common but differentiated responsibility (hereinafter CBDR)." Justification for CBDR posits the same conceptual foundation as the international law of development, including achievement of equity or substantive equality and the unequal treatment for unequals. These rationales can apply to S&D under the WTO law, as in the multilateral trading system the country adversely affecting world trade or trade between states should pay compensation, taking into account different economic and social capacity. Such adverse or distorting effects on trade will also vary widely according to the size of the economy. These can be the elements for how the degree and range of S&D should be determined under the WTO law. To this purpose, this section will introduce and analyze the concept behind the CBDR principle.

1.2.1 History of CBDR

While industrialization has brought substantial human development and better technology, it also has caused various significant environmental issues, such as greenhouse gases, deforestation and so on. Global climate change is the one of the most significant environmental problems for us to tackle. There is recognition that the global climate is of common concern and interest to humankind, and must be addressed by all nations, regardless of their individual culpability for the global climate crisis.[284] At the same time, it is also agreed that the degree and magnitude of responsibility for global warming should depend on

[284] Paul G. Harris, "Common But Differentiated Responsibility: The Kyoto Protocol and United States Policy", *N.Y.U. Environmental Law Journal* 7 (1999); 29.

countries' economic activities and the need to regulate them. Since its beginning, climate negotiations have witnessed significant divergence and intense confrontation between the industrialized and developing countries and even within those groups over the issues, such as who should take responsibility, in what measure, and under what conditions, in order to alleviate climate change.[285] The fact that the international community has been unable to cope with such conflicts in an "equitable" manner may have resulted in a significant loss of momentum that may undermine the two critical determinants of an effective international regime for climate issues, which are "universal participation and timeliness in achieving the necessary international cooperation."[286] International efforts to remedy the problem of global climate change focused on the principle of CBDR under international environmental law.[287]

The notion of CBDR was clearly expressed as a principle in the Rio Declaration on Environment and Development. Principle 7 of the Rio Declaration states:

> […] In view of *the different contributions to global environmental degradation*, States have *common but differentiated responsibilities*. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development *in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.*[288]

Principle 6 of the Rio Declaration reads:

> *The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable*, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.[289]

Further, the principle of CBDR can be also found in Article 3.1 of the United Nations

[285] Lavanya Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime", *Review of European Community & International Environmental Law* 9 (2000); 120.
[286] Ibid.
[287] Ibid.
[288] The Rio Declaration on Environment and Development, Rio de Janeiro, 13 June 1992. Emphasis added.
[289] Ibid. Emphasis added.

Framework Convention on Climate Change (FCCC), which was concluded at the Rio Conference in 1992. It reads:

> The parties should protect the climate system for the benefit of present and future generations of human kind on the basis of *equity* and *in accordance with their common but differentiated responsibilities and respective capabilities*. Accordingly, the developed country parties should take the lead in combating climate change and the adverse effects thereof. [290]

The chapeau to FCCC Article 4 also obliges parties to take into account their CBDR to fulfill the commitments under the FCCC.[291]

The principle of CBDR is that states should be accountable for the creation of global environmental problems in different measure, according to their respective historical and current contributions to environmental degradation and their capacities to address these problems.[292] While these two important elements and the justifications for them will be discussed in the next section, it should be noted that the purpose of adopting them as principles of CBDR under international environmental law is to bring all states together to cooperate in solving the global climate crisis.

The types of differential treatment established by the principle of CBDR, according to French, are following three: the use of differential standards; explicit references to the situation, needs and concerns of developing countries; and the provision of financial and technological assistance by the international community.[293] The first form of CBDR includes determining responsibility and obligations, based on and taking into account the different contributions and capacity in problem-solving of developed and developing countries. In

[290] Article 3 of FCCC, 1992. Emphasis added.
[291] Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime", 121.
[292] Cullet, "Differential Treatment in International Law", 577.
[293] Duncan French, "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities" *International and Comparative Law Quarterly* 49 (2000); 39-42.

some cases, only developed countries bear an obligation. This kind of differentiated standard aims at encouraging the participation of developing countries. However, at the same time, differentiated standards are also applied between developed countries.[294] Such differentiation should be an essential component for successful negotiation of the treaties and agreements. The second can be described as a more flexible approach to take into account the economic and social situation of states.[295] It includes providing the guidance on relevant factors to be considered in implementation by developing countries. The third can be identified as the establishment of an international environment fund and capacity-building activities for institutional consolidation and the fostering and development of relevant local and national capacity.[296]

1.2.2 Justification

The most fundamental principle in determining the degree of responsibility under international environmental law for global environmental problems is the so-called the 'polluter-pays principle.' The principle of CBDR builds on this concept. According to the principle, states should bear responsibility based on historical contribution to current environmental degradation, as Principle 7 of the Rio Declaration stipulates. At the same time, the different financial and technological capacity to remedy current environmental problems is another basic premise for the differentiated responsibility of states. These two premises for differentiated obligations are contained in the CBDR introduced above. How, then, can differentiated obligations borne by states be justified in the sphere of international environmental law? The following sections will discuss the rationales for differentiated

[294] Ibid., 40. For example, the 1994 Oslo Protocol on Further Reduction of Sulphur Emissions and the 1997 Kyoto Protocol provide for differentiated treatment among developed states.
[295] Ibid., 41.
[296] Ibid., 42, 44-45.

responsibility.

1.2.2.1 Historical Responsibility

Those who have benefited the most from the process that caused the problem should bear a greater burden for addressing the problem.[297] This is the premise of differentiated responsibility based on historical contribution. Applying the concept of equality under the international law of development introduced in the previous section, Shue argued:

> [W]hen a Party has in the past taken unfair advantage of others by imposing costs upon them without their consent, those who have been unilaterally put at a disadvantage are entitled to demand that in the future the offending Party shoulder burdens that are unequal at least to the extent of the unfair advantage previously taken, in order to restore *equality*. [298]

This is one means of achieving equity, and implies that industrialized countries have benefited disproportionally from the process of industrialization that led to the accumulated damaging of the global environment, particularly with greenhouse gases.[299] All states bear the responsibility for costs, because the global climate is a universal resource, but the degree of such responsibility should be tilted towards those who have become rich in the process. Chowdhury also notes that the "contribution to global environment degradation being unequal, responsibility … has to be unequal and commensurate with the differential contribution to such degradation."[300] The notion that those who have caused more damage and accrued more benefit out of it must pay more should be an easy justification to accept. In determining the degree of responsibility, the exploitation of non-renewable national resources

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[297] Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime", 123.
[298] Henry Shue, "Global Environment and International Inequality", *International Affairs* 75.3 (1999); 534. Emphasis added.
[299] Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime", 123.
[300] Subarata Chowdhury, "Common but Differentiated Responsibility in International Environmental Law: from Stockholm (1972) to Rio (1992)" in *Sustainable Development and Good Governance*, ed. Konrad Ginther, Erik Denters and Paul J.I.M. De Waart (Dordrecht: Martinus Nijhoff, 1995), 333.

and the adverse effects on the environment that states have had should be considered. It is also necessary to distinguish the responsibility states have to currently bear from theoretical responsibility. This means that while the element of historical contribution based on the polluter-pays principle holds, differentiated responsibility must take into account the different capabilities of countries with different economic and technological capacity to remedy the adverse effects.

1.2.2.2 Respective Capability in Problem-Solving

As discussed above, the differentiated responsibility for global environmental problems shall be in accordance with the "respective capabilities"[301] of individual states. Some states currently have a greater capability to tackle the causes of such problems and to remedy the consequences of damages.[302] This justification for differentiation is based both on the current reality of states' capacity and the concept of equity. Equity in this sense requires the consideration of the inequalities in the international community and the divergence in levels of economic development, in determining levels of commitments for different states.[303] As "different levels of development" is emphasized in the United Nations Environment Programme (UNEP) Report, it should be apparent that the most developed countries have the technological and financial capability to resolve environmental problems, and that those who are the most vulnerable to such environment degradation are in developing countries, particularly poorer and weaker countries. Differentiation in terms of capabilities can be interpreted as the application of different standards for commitments and obligations (the first type of CBDR), either requiring developed countries to meet individually set targets

[301] The United Nations General Assembly Resolution 44/228, United Nation Conference on Environment and Development, A/RES/44/228, 22 December 1989.
[302] French, "Developing States and International Environmental Law", 50.
[303] Ibid. and Rajamani, "The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime", 123.

according to their capabilities, or imposing wider or less-defined additional obligations on all developed countries.[304] It also takes the form of offering assistance to disadvantaged countries that do not have such capacity (the third kind of CBDR). In addition, different capabilities also influence implementation by each state under the regime. This leads to the argument that developing countries should be accorded differentiated commitments and assistance because their successful implementation should also be the interests of developed countries.

1.2.3 Applying the Concept of CBDR to S&D under the WTO

The principle of CBDR is apparently one of the concrete means to achieve "substantive equality" in international law of development and to differentiate obligations in accordance with the different capacities of states. Though there still remains room for potential challenges and further discussion, reviewing and analyzing the development of CBDR provides a significant basis for discussion on how to justify S&D under WTO law. With regard to CBDR, the determinants and justification are obvious. The polluter-pays principle holds with regard to the degradation of the environment, which is a resource shared by all world, and who should bear the burden is clear, providing the theoretical justification for differentiated responsibility.

On the other hand, in the sphere of multilateral trade system, it may be difficult to identify the common interest and who is to be blamed, which is a significant difference from the field of the global environment. Under international environmental law, environment protection and mitigation of environmental degradation are, in a sense, unilateral measures with little reciprocity between states, and it is a clear common interest to preserve a good global environment. Meanwhile, trade rules regulate commercial transactions between states and

[304] Ibid., 51.

reciprocity and reciprocal impacts always exist. Historically, unilateral measures which have an adverse effect have been restricted through the development of international trade law. In other words, the interests of a certain country or group of countries are not necessarily in the interest of others. Such an ambiguous reciprocal structure may make it extremely difficult for all states to merge their interests and to identify who bears responsibility. From a different perspective, trade liberalization and securing smooth and efficient trade are not merely costs or constraints to restrict a country's policy options, but could also bring benefit to states through implementing such responsibilities under the multilateral trading regime. Such benefits may include expansion of trade and improvement of economic efficiency, which will contribute to growth and development.

One of the concepts under international environmental law, that those who have caused the negative impact on global climate need to bear the responsibility, should be applicable to the international trade law. That is, responsibility should be taken by those who have adverse effects on world trade, and such responsibility should be differentiated and determined according to the negative impact the country makes by applying a particular trade measure. The form of responsibility in the international trade regime could be undertaking obligations to eliminate measures which distort trade, paying compensation to affected countries or accepting retaliation by them. In the meantime, if the adverse effect of a certain measure taken by a country is negligible, such a measure could be allowed or require no or little compensation. This leads to the need to find the *de minimis* standard for allowing certain countries to utilize basically inconsistent trade policy measures. Moreover, granting differentiated treatment by taking into account different capability also holds in international trade law. Developing countries apparently lack economic and institutional capacity to implement obligations equal to developed countries. Considering such constraints in

capability, technical assistance and differentiated obligations, including exemptions or reduced commitments, should be provided for disadvantaged developing countries.

2. Trade and Industrial Policies for Developing Countries

Most traditional economic arguments that are in favor of free trade are "based not on growth but on efficiency, *i.e.* liberalization leads to a change in the level of welfare rather than any change in the long-run rate of growth."[305] Modern economist Paul Samuelson showed that free trade was superior to autarky, and later demonstrated that free trade was also superior to any intermediate regime of trade restrictions.[306] However, the important assumptions for trade liberalization do not hold in the case of most developing countries, and in such cases, government intervention may be required. This section will look at the justifications for utilizing preferential tariffs and industrial policy, including the traditional argument for infant industry protection.

2.1 The Effect of Preferential Tariffs

In his 1964 report, Prebisch, who was the first Secretary General of UNCTAD, emphasized the important role of preferences. He discussed the two types of measures required to stimulate exports of industrial products from developing countries: channels to markets opened through the elimination of obstacles to the flow of exports, and the active promotion of exports to be undertaken both in the developing countries and in the

[305] Joseph E. Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (New York: Oxford University Press, 2005), 25.
[306] Paul A. Samuelson, "The Gains from International Trade Once Again", *The Economic Journal* 72.288 (1962): 829.

international forum.[307] Preferential treatment for the exports of developing countries was defined as "a temporary measure which, by opening up larger markets to the industries of developing countries, would enable them to lower their costs and thus compete on world markets without the need for continuing preference."[308] According to his report, it is a "logical extension of infant industry argument." In order for infant industries in developing countries to reach a high level of efficiency, those industries had to have access to wider markets. Otherwise, they would not be able to break out of the vicious cycle of low output and high cost. Such markets had to be found in the developed countries as well as in other developing countries, because their own domestic markets were not large enough to absorb the production required to achieve efficiency. Thus, developed countries, and developing countries as well, were to give preferences to imports from developing countries.[309] The granting of preferences to developing countries would not conflict with the objective of the GATT, of tariff negotiation, or of any other effort to bring down or remove the barriers to trade, he underlined. The idea is "not to create permanent margins of preferences that could be maintained only through retention of existing tariffs by the developing countries", but rather "that pending the elimination of obstacles to trade by the developed countries, free access should be granted to the developing countries."[310] He also suggested the possible criteria: per capita income, the size of the country, the share of agriculture and industry in total employment and output, and the impact of the primary export sector on the growth of the economy.[311]

Furthermore, the report discussed the differences between developing countries in relation to preferences. Prebisch affirmed that not all developing countries would be equally able to

[307] Prebisch, "Towards a New Trade Policy for Development", 65.
[308] Ibid.
[309] Ibid., 66.
[310] Ibid.
[311] Ibid., 67.

benefit from a preferential scheme on a uniform basis.[312] Although it would be a difficult problem to identify what kind of criteria could be applied, "to give different degrees or kinds of preferences to countries according to their per capita income or stage of development"[313] had a certain rationale. He argued the rationale for such a differentiation in providing preferences as follows:

> The productivity differential between the least and most advanced of the developing countries is far greater than the corresponding differential between the latter and the industrially developed countries. Consequently, the very same considerations that would justify the granting of preferences to developing countries in general would call for substantially larger preferences to the least developed than to the most developed among them.[314]

Even back in 1960s, he identified the huge differences among developing countries and justified differentiating between them. Thus, the argument for granting preferential tariffs demonstrates not only its own justification but also suggests the differentiation of developing countries in providing preferential treatment.

The economic benefit of preferences for developing countries has not been widely questioned. The main issue is whether the actual amount of these benefits can be large enough to cover the considerable legal costs of such a policy.[315] Hudec noted three situations that justify these preferences. First, even if the preference has no effect on the volume of a developing country's exports, it involves the reduction or elimination of a tariff, and this increases the return for the nation in any case where competition does not require the entire refund to be passed forward. Second, if producers in developing countries enjoy a comparative advantage over other suppliers, reduction of preferential tariffs would have the same positive trade effects as a reduction in the MFN tariff. Third, even if producers in

[312] Ibid., 73.
[313] Ibid., 72.
[314] Ibid., 72-73.
[315] Hudec, *Developing Countries in the GATT Legal System*, 151.

developing countries do not have a comparative advantage, any trade diversion caused by the preference would be beneficial to them.[316] He further stated that, from the developing country's perspective, trade induced by preferences would bring a higher return than is otherwise available from the production costs. In addition, trade diversion associated with preferences may also have positive long-term effects on the infant industry, helping a potentially efficient industry "get on to its feet."[317]

2.2 Industrial Policy in Developing Countries

The liberalization versus restriction or intervention debate is ongoing and a basis for the current trade regime as well as negotiations. Classical development economists followed the theories of Adam Smith, favoring laissez-faire economics and minimal government intervention. David Ricardo further emphasized the importance of capital accumulation and the law of comparative advantage.[318] His law of comparative advantage retains the premise of trade liberalization and the division of labor.

Guzman and Pauwelyn summarize the arguments for and against trade liberalization.[319] Economists who are proponents of free trade emphasize the theory of comparative advantage that enhances overall welfare in both importing and exporting countries. It also leads to the more efficient allocation of resources and benefits from economies of scale. On the other hand, economists who are against trade liberalization and favor the restriction or intervention by government argue that in most underdeveloped economies, there is a significant market failure. The free market fails to allocate resources efficiently, often associated with

[316] Ibid.
[317] Ibid.
[318] David Ricardo, *On the Principle of Political Economy and Taxation* (London: John Murray, 1817).
[319] Andrew Guzman and Joost Pauwelyn, *International Trade Law* (New York: Aspen Kluwer, 2009), 1-50.

information asymmetries, non-competitive markets, externalities and so on.[320] Where such market failure is identified, government intervention is necessary and justified.[321] Stiglitz emphasized the presence of market failure and the costs of imperfect information as basic characteristics of the organization of the economy and the real functioning of markets, especially in developing states. As markets themselves do not tend to maximize outcomes, there is a space for government intervention to improve them. Such government intervention to allocate resources is required to manage and address important shortcomings that would otherwise arise from a fully liberalized market.[322]

Stiglitz and Charlton argued that most of the underlying assumption associated with free trade often failed to recognize relevant and significant features of developing countries. They further pointed out that the welfare gains from trade liberalization with the assumption of full employment do not necessarily take place because of persistently high unemployment in most developing countries. In addition, they stated that welfare enhanced through trade liberalization with the assumption of perfect risk markets does not hold up because there is high volatility in international markets, risk markets are highly imperfect, and trade policy can reduce exposure to risk.[323] In developing countries, markets are often absent or, even when present, often do not work well, and prices accordingly are not able to perform critical coordinating functions.[324] Moreover, most of the key intermediate inputs are non-tradables. If a country can import intermediate goods and does not need to develop its own intermediate industries or rely on its own local demand, it can take advantage of the global market to attain the requisite economies of scale in tradable goods. However, because they are mostly non-

[320] Joseph E. Stiglitz, "Markets, Market Failures, and Development," *American Economic Review* 79.2 (1989): 197-203.
[321] Ibid. and Stiglitz and Charton, *Fair Trade for All*, 30.
[322] Joseph E. Stiglitz, *Regulation and Failure: in New Perspectives on Regulation* (David Moss & John Cisternino, 2009).
[323] Stiglitz and Charton, *Fair Trade for All*, 25-26.
[324] Ibid., 27.

tradables, there is a need for coordination, especially if there are significant scale economies in such products. Thus, to get the necessary scale, one may have to restrict competition from foreign producers, especially in the presence of market imperfections. The existence of such market failures suggests a need for government interventions. Another argument to justify the use of protective measures is that optimal tariffs can improve the country's terms of trade and can be collected as a part of the country's revenue. Some of these economists also support infant industry protection, particularly in underdeveloped economies, and place value on adopting strategic trade policy set by the government.

Asserting the need of government intervention, Rodrik avers that government industrial policy is essential to correct "coordination failure," defined as the lack of coordinating activities between market and individuals, and there exists a multiplicity of specialization to open the economy. He illustrated that with the existence of coordination failure, government intervention may help select the method of specialization and more desirable outcomes.[325] Rodrik also argues that it is impossible to ascribe specialization to comparative advantage; rather, it is the result of "random self-discovery attempt, followed by imitative entry."[326] Further, Klinger and Lederman show that market failures restrict self-discovery and the attempt at self-discovery is often associated with high entry barriers.[327] In such cases, government intervention to regulate and ease entry may be necessary to promote self-discovery.[328]

While the definition of industrial policy is not well established, it is described by the World Bank as "government efforts to alter industrial structure to promote productivity based

[325] Dani Rodrik, "Coordination Failures and Government Policy: A Model with Applications to East Asia and Eastern Europe", *Journal of International Economics* 40.1 (1996): 2.
[326] Dani Rodrik, "Industrial Policy for the Twenty-First Century", Discussion Paper No.4767 (London: Centre for Economic Policy Research, 2004), 10.
[327] Bailey Klinger and Daniel Lederman, "Discovery and Development: An Empirical Exploration of 'New' Product", World Bank Policy Research Working Paper 3450 (World Bank, 2004).
[328] Rodrik, "Industrial Policy for the Twenty-First Century", 11.

growth."[329] While a detailed discussion of infant industry protection will be presented in the next section, the many empirical and theoretical justifications above illustrate that government industrial policy as one form of its intervention plays an essential role in economic transformation and development where market and coordination failure exist. As Rodrik insists, the success of such industrial policy should be measured, not in terms of its size or how much intervention takes place, but what kind of intervention is made. Setting appropriate policy and getting intervention right is important.[330]

As many researchers and scholars have asserted, East Asian countries are often an example of using effective industrial policy measures, such as export subsidies and TRIMs as part of export promotion strategy. Export promotion with providing incentives to encourage exports indeed worked in such countries and they succeeded in sustained growth over more than three decades.[331] The use of industrial policy, despite the negative implications from the theoretical point of view, has empirical justification.

Another implication from the empirical evidence is that a country at a different stage of economic development might require different industrial policies. Already developed countries certainly used to utilize interventionist measures, including industrial tariffs and export subsidies, at the take-off stage or when they were attempting to create national champions to lead their economic development.[332] Specifically, developed countries and newly industrialized countries in East Asia, in the early stage of development, applied trade protectionist measures and found them fairly successful. Britain introduced legislation for industrial development in early 18th century. The legislation included the following measures:

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[329] World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (Washington, D.C.: World Bank, 1992).
[330] Rodrik, "Industrial Policy for the Twenty-First Century". See also Neto, *International Trade Subsidy Rules and Tax and Financial Export Incentives*.
[331] Bijit Bora, Peter J. Lloyd and Mari Pangestu, "Industrial Policy and the WTO", UNCTAD Study Series No.6 (2000), 16. See also Stiglitz and Charton, *Fair Trade for All*, 14.
[332] Chang, *Kicking away the Ladder*, Chapter 1.

raising duties on imported foreign manufactured goods, and extending export subsidies to new export items while increasing the existing export subsidies to some products. Especially in the case of Britain, high tariff manufacturing products were maintained even a couple of decades after the start of its Industrial Revolution.[333] A scholar referred to the experience of Britain, describing that its shift to a free trade regime had been achieved "behind high and long-lasting tariff barriers."[334] Germany is commonly known as "the home of infant industry protection, both intellectually and in terms of policies."[335] In the late 18th century, the state pursued various policies to promote new industries, in such as textiles and metals, by providing trade protection, export subsidies, capital investment and so on.[336] In the early 20th century, the United States also utilized forms of infant industry protection, such as import duties or the prohibition of imports, to guarantee initial losses until new industries became internationally competitive.[337] France and the Netherlands are not exceptions. Until the late 1960s, both countries used more interventionist and active trade and industrial policies. France applied "East-Asian-style" industrial policies so as to catch up, which resulted in succeeding a effective structural transformation of its economy.[338] The policy measures taken by the Netherlands included financial supports for large firms, encouraging the development in the aluminum industry through providing gas subsidized by the government, and the

[333] Ha-Joon Chang, "Kicking away the Ladder: The "Real" History of Free Trade", FPIF Special Report, Foreign Policy In Focus (2003), 4.
[334] Paul Bairoch, *Economics and World History: Myths and Paradoxes* (New York: Harvester Wheastheaf, 1993), 46.
[335] Chang, "Kicking away the Ladder", 7.
[336] Clive Trebilcock, *The Industrialization of the Continental Powers, 1780-1914* (London and New York: Longman, 1981), 136-152.
[337] Paul Conkin, *Prophets of Prosperity: America's First Political Economists* (Bloomington: Indiana University Press, 1980), 176-177.
[338] Peter Hall, *Governing the Economy: The Politics of State Intervention in Britain and France* (Cambridge: Polity Press, 1986).

development in key infrastructures.[339] Moreover, in Japan and the Newly Industrialized Countries in East Asia, interventionist trade and industrial policies definitely played a crucial role for their economic success. At the beginning of their substantial growth periods, starting from the 1970s in Japan and the late 1980s in other East Asian countries, they used more substantial and better-designed export subsidies and government investment measures to promote and encourage export industries, especially machinery.[340] Their policy measures shared similarities with those used before by other countries, including 18th century Britain and 19th century United States, but they were a lot more sophisticated and finer-tuned than the earlier experiences.[341]

As seen above, almost all developed countries that have achieved successful economic growth utilized certain forms of infant industry protection strategy when they were in catching-up stages, especially for industries to boost their productions and exports. As in other specific cases of using trade and industrial policies, the requests for extension of export subsidies and TRIMs exemptions under the WTO law demonstrate the need of such policy measures at a certain stage of industrial development. As explained in Chapter II, developing countries, aside from LDCs and Annex VII countries, were accorded an eight-year transitional period to use export subsidies under the SCM Agreement and were able to request an extension of the transitional period. With this mechanism of flexibility for developing countries, a number of countries have requested the extension, and as of late 2012, 19

[339] Jan L. Van Zanden, "The Netherlands: The History of an Empty Box", in *European Industrial Policy: The Twentieth Century Experience*, ed. James Foreman-Peck and Giovanni Federico (Oxford: Oxford University Press, 1999), 182-184.
[340] Alice H. Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (New York: Oxford University Press, 1989), and Richard Luedde-Neurath, *Import Controls and Export-Oriented Development: A Reassessment of the South Korean Case* (Boulder: Westview Press, 1986).
[341] Chang "Kicking away the Ladder", 11.

developing countries,[342] most of which are SVEs, have received approval. The requests clearly indicate the need for export subsidies as a trade and industrial policy for developing countries with small-sized economies.

Upon the establishment of the WTO in 1995, the TRIMs Agreement accorded a five-year transitional period to developing countries and required them to notify the TRIMs. Later, UNCTAD conducted a detailed assessment of several countries that made extension requests in 1999, among which were Argentina and Mexico. Both countries applied local content requirements and trade balancing requirements, especially in the automotive sector, that are prohibited under the TRIMs Agreement.[343] Argentina first introduced policy governing the automotive industry in 1979. The law permits the imposition of performance requirements, and such requirements were actually enforced, with concrete percentages for local content and trade balancing requirements, under a decree which came into force in 1991.[344] The country requested an extension of the transitional period for utilizing such TRIMs, and was accorded a two-year extension.[345] Mexico also applied the TRIMs, including local content and trade balancing requirements, under the Decree for Development and Modernization of the Automotive Industry which came into force in 1990.[346] The WTO was notified about the

[342] WTO, News Items, 23 October 2012, http://www.wto.org/english/news_e/news12_e/scm_23oct12_e.htm. The 19 members are; Antigua and Barbuda, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Fiji, Grenada, Guatemala, Jamaica, Jordan, Mauritius, Panama, Papua New Guinea, St. Kitts and Nevis, St. Lucia, Saint Vincent and the Grenadines, and Uruguay.
[343] UNCTAD, "Elimination of TRIMs: The experience of selected developing countries", United Nations Publication (2007), 18.
[344] WTO, Notification under Article 5.1 of the Agreement on Trade-Related Investment Measures – Argentina, G/TRIMS/N/1/ARG/1, 10 April 1995.
[345] WTO, Extension of the Transitional Period for the Elimination of Trade-Related Investment Measures Notified under Article 5.1 of the Agreement on Trade-Related Investment Measures – Argentina, Decision of 5 November 2001, G/L/497, 9 November 2001.
[346] WTO, Notification under Article 5.1 of the Agreement on Trade-Related Investment Measures – Mexico, G/TRIMS/N/1/MEX/1/Rev.1, 10 May 1995.

Decree and measures in 1995. Mexico requested an extension of transitional period under the TRIMs Agreement in 1999, and was granted five years.[347]

These cases show that, even in the late 20th century, newly industrialized countries needed such measures in order to protect and promote domestic industries. They utilized the TRIMs with the intention to expand targeted domestic industries which had already succeeded in taking-off, through protecting them from competition with foreign products.

From the careful reassessment of the above cases, GDP per capita can be seen as a rough indicator.[348] That is, the level of an economy which can be scaled with GDP per capita corresponds to the policy measures taken by countries to bolster industrialization through trade. For example, when developed and newly-industrialized countries in Europe and Asia applied protectionist measures for industrialization, their GDP per capita was around $2,000. Those of France and the Netherlands in 1965 were $2,012 and $1,708, respectively.[349] In 1970, Japan's GDP per capita was $1,974, and in 1980 those of Asian Tigers South Korea and Taiwan were $1,674 and $2,363.[350] In contrast, Argentina and Mexico in 1991 and 1990,when they actually started utilizing TRIMs, were at $5,733 and $3,660, respectively.[351]

Although these cases are several examples among many, they still give us some indications of the relationship between the size of economy and trade and industrial policy measures. Primary government interventionist policies, including import duties and export subsidies, were used when the country's economy was in an earlier stage, such as below $2,500 GDP per capita, or with a small-sized economy. On the other hand, TRIMs were

[347] UNCTAD, "Elimination of TRIMs", 47.
[348] Though the SCM Agreement refers to GNI per capita for categorizing Annex VII countries, the indicator here for a country's industrial development uses GDP per capita, because the production of domestic industries should be considered.
[349] In current $US. World Bank Data, available at http://data.worldbank.org/indicator/NY.GDP.PCAP.CD/countries/AR-XJ-XT?page=6&display=default.
[350] Ibid. For Taiwan: IMF, *World Economic Outlook Database* (April 2013).
[351] Ibid.

applied when the country was at a more advanced stage, with a higher range of GDP per capita, such as $3,000-6,000. Though these numbers are rough references and not the only element to be considered, GDP per capita can be seen as one of the objective indicators for the reassessment of the need for certain trade and industrial policy measures.

Moreover, the fact that some LDC members gave up specific S&D in the course of accession negotiations is also worth attention. For example, Laos, which acceded to the WTO in early 2013, failed to secure the policy option to use TRIMs as S&D allowed for LDCs, and committed to eliminating all inconsistent TRIMs without any transitional period.[352] Cambodia and Vanuatu, which acceded to the WTO in 2004 and 2012 respectively, during the accession negotiation, also gave up LDC-specific S&D to be exempt from the obligations under the TRIPS. The report of the working party on their accession stated that they committed to implementing the obligation under the TRIPS Agreement with a very short or no period of transition,[353] whereas they could have relied on the transitional period extended only for LDCs up to July 2013, with possible further extension.[354] These countries gave up S&D despite their eligibility partly because the need or even the potential value of such measures as part of trade and industrial policy was not recognized by their governments. It also was in part because accession to the WTO was the first priority and the governments failed to effectively insist on keeping such S&D against the pressure of their negotiation counterparts. Renouncing the eligibility of certain S&D was certainly an unreasonable decision to be made upon their accession and inevitably led to the irrevocable loss of effective policy options. In addition, when WTO members discussed the issue of TRIPS and public health, developing African

[352] WTO, Report of the Working Party on the Accession of Lao PDR to the World Trade Organization, WT/ACC/LAO/45, 1 October 2012, paragraph 151-152.
[353] WTO, Report of the Working Party on the Accession of Cambodia to the World Trade Organization, WT/ACC/KHM/21, 15 August 2003, paragraph 206, and Report of the Working Party on the Accession of Vanuatu to the World Trade Organization, WT/ACC/VUT/17, 11 May 2011, paragraph 122.
[354] See Chapter II Section 4.2.5.

countries raised concerns about the practical utility of compulsory licenses. They argued that compulsory licenses available under the TRIPS Agreement to provide cheaper generic medicines for the domestic supply[355] did not help them at all because there was no pharmaceutical industry which had capacity to produce generic medicines. Eventually, the relevant provision of the TRIPS Agreement was amended in 2005[356] to exempt developing countries with no production capacity from this obligation and enable them to import generic medicines produced in a third country.[357] These cases also show that LDCs and low-income countries did not find some policies, *i.e.* TRIMs and discretion on the IPR protection, necessary S&D or feasible to effectively utilize. It can be said that, for LDCs with little well-established domestic industries with which to attract foreign investment or to enjoy the flexibility on IPR protection, rather more primary protectionist measures may be necessary and practical.

These historical experiences justify the use of trade and industrial policy measures, partly based on the so-called "catch-up" theory. It is more than evident that the industrial or trade policies utilized in the past by newly industrialized countries reliably contributed to their economic development. Within the context of trade policy aimed at industrialization, the range of policy options is not too broad, but rather can be classified into limited categories under trade law. This means that trade and industrial policy measures, including export subsidies and trade-related investment measures, which were considered necessary and effective by current developed countries when they were at the level of economic development of several decades ago, would also be necessary and effective for developing

[355] Article 31 (f) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter the TRIPS Agreement).
[356] WTO, Amendment of the TRIPS Agreement, Decision of 6 December 2005, WT/L/641, 8 December 2005.
[357] WTO, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Decision of 30 August 2003, WT/L/540, 2 September 2003.

countries that are currently at a level of economic development comparable to where industrialized countries were in the past. For example, in a case where a developing country is behind in economic development and at the stage of waiting for take-off, it may need the measures to protect domestic infant industries or to give them some sort of support to expand production. When a country attempts to promote foreign investment and foster the growth of exporting industries through it, and at the same time promotes the domestic parts and components producers who can be the suppliers to these industries, it may be appropriate to utilize trade-related investment measures. As demonstrated by historical experiences, necessary and effective policy measures to achieve economic growth through trade differ, depending on the level or stage of development.

From such a perspective, the role of trade and industrial policy is also different according to a country's level or stage of economic development. Developing countries need some suitable and effective policy instruments at each stage to realize industrialization, and such policy measures should be made available for them under any international regime. Trade and industrial policies – in a broader sense, government intervention – should be permitted to promote such transformation through scaling up the economy and upgrading technology, as most of the industrialized economies have historically done on their own economic development path. In order to allow developing countries in need to utilize necessary and adequate industrial and trade policy instruments at each level of development, granting S&D under the WTO Agreement is both reasonable and necessary. More importantly, permitted S&D related to trade and industrial policy measures should recognize and identify the necessary policies in accordance with the given level of economic development, and should be differentiated in terms of eligibility among developing countries when granting S&D relating to trade and industrial policies.

2.3 Theory of Infant Industry Protection

In theory, the assumption of government intervention is that the markets in developing countries face a large number of imperfections and distortions, that properly designed and managed intervention by the government can improve the economic situation, and that the governments of developing country should intervene by means of trade protection "because they do not have the sophistication to use more refined policy instruments."[358] According to List, government intervention would therefore be necessary to support socioeconomic transformation to an industrial economy. As another school of classical development economists also highlighted regarding the negative impact of free trade, only the dominant powers benefit from such a system, and developing economies are left behind in competition with already industrialized powers with larger economies.[359] This observation led to the "infant industry argument", positing that "production costs for newly established industries within in a country are likely to be initially higher than for well-established foreign producers of the same line, who have greater experience and higher skill levels."[360] The traditional infant industry argument justified tariffs or subsidies, depending on the production of industries which have an equivalent effect on output, on the basis of externality.[361]

Intervention in infant industry occurs when new industries that may be potentially efficient can be identified but the market is not ideal to make the necessary investment. The same argument can be applied to existing industries facing difficulties. Intervention by governments can be optimal and enhance national welfare when it succeeds in redirecting

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[358] Hudec, *Developing Countries in the GATT Legal System,* 146.
[359] Freidrich List, *The National System of Political Economy*, translated by Sampson S. Lloyd, with an Introduction by J. Shield Nicholson (London: Longmans, Green and Company, 1909).
[360] Richard E. Baldwin, "The Case Against Infant Industry Tariff Protection", *Journal of Political Economy* 77.3 (1969): 296.
[361] Bora *et al*, "Industrial Policy and the WTO", 4. See also Patrick Messerlin, "Enlarging the Vision for Trade Policy Space: Special and Differentiated Treatment and Infant Industry Issues", *NAMA Negotiations in the Development Round* (Nathan Associated Inc., 2006), and USAID, "Infant Industry Protection and Trade Liberalization in Developing Countries", Research Report (Washington, 2004).

investment to a more efficient utilization of resources and the efficiency gain exceeds the cost of intervention.[362] Meade pointed out that infant industry protection should relate to technological externalities associated with the learning process.[363] There should be no blanket intervention, and externality and assistance have to be linked with the economic performance of industries. It must be temporary and eventually phased out.

Government intervention cannot be argued separately from the issue of whether the infant industry protection policy is appropriate. First, it is very difficult or almost unrealistic to assume that the government can precisely identify the industries in which government assistance will help achieve take-off in the industry and bring something beneficial for the economy. The government of a developing country tends to have limited capacity to make an appropriate choice of industry and to respond to economic change, including both opportunities and crises.[364] Second, protectionist measures themselves, such as tariffs and subsidies, do not provide incentives for industries to promote better knowledge and technology.[365] Enterprises are not always able to use assistance to pursue potential efficiency. Third, and most potent, protectionist measures tend to bring more political pressure. Recipients have strong incentives to invest heavily in lobbying to secure benefits.[366] Therefore, the government faces difficulty in terminating the measures even if there is no more benefit and increasing costs.

It is still possible to have a situation where the government is able to cope with these issues and conduct successful intervention policies. There have been cases in which governments have applied those policies for a certain period, such as Japan in the 1950-60s

[362] Hudec, *Developing Countries in the GATT Legal System,* 147.
[363] James E. Meade, *Trade and Welfare* (New York: Oxford University Press, 1955), 256. See also Baldwin, "The Case Against Infant Industry Tariff Protection".
[364] Ibid., 148.
[365] Baldwin, "The Case Against Infant Industry Tariff Protection", 304.
[366] Hudec, *Developing Countries in the GATT Legal System,* 149.

and Latin American countries in the 1970-80s, led by import substitution theory. However, over time in most countries, governments ended up investing more in losers than could be recouped from winners. Therefore, it is critical to possess precise knowledge and skills to identify an exit strategy.

2.4 Trade and Industrial Policies as S&D

As discussed above, trade and industrial policies are necessary to encourage transformation to an industrialized economy, and government intervention plays an important role to correct market and coordination failure, especially in developing economies. Experiences in East Asia and also currently industrialized countries, such as Britain, the United States, and Japan, illustrate the role of government industrial policy and its contribution to economic growth. However, industrial policies which used to be available, such as some types of import restrictions, export subsidies, local content requirement associated with trade related investment measures and so on, are no longer permitted for developing countries under the WTO Agreements. Chang argues that while many industrialized countries and developing countries have succeeded in economic growth by applying restrictive import measures as government industrial policy, the WTO now prohibits the use of such interventionist policy instruments that definitively contributed to economic development in industrialized countries decades ago. In other words, the WTO cut off the way developing countries could develop.[367] He thus insists that developing countries that are a few stages away from industrialization should be allowed to utilize certain policy instruments that primarily foster their industry. Furthermore, if small, poor countries further lower or eliminate the tariffs or other barriers for imported products that would compete with the domestic

[367] Chang, *Kicking away the Ladder*.

industries, industries with weak competitiveness that might have potential to develop cannot survive the competition from stronger foreign products. Industries like these may lose opportunities to grow, or may even be forced to close down. In this context, protectionist measures, including tariffs, seem to have some rationale. Lee also advocated the use of protectionist policy, arguing that developing countries should be allowed to offer trade protection to their infant industries, even if previous import commitments have been undertaken. In doing so, developing countries should be exempt from prolonged negotiations, as well as relieved from the "burden of compensation or threat of retaliations."[368]

Hoekman *et al.* recognize a specific case of the use of interventionist policies for the poorest countries that have few resources and low institutional capacities.[369] They argue that interventionist trade policies may offer a good "second-best" option to achieve their development objectives.[370] According to Novel and Paugam, the "cost/benefit analysis of trade distorting policies" in developing countries suggests the economic rationale for differentiation. Derogations from international trade rules as S&D should primarily benefit the most vulnerable countries that have been deprived of alternatives to trade policy instruments.[371]

Considering the arguments by Chang and Lee, the infant industry protection argument as well as the historical evidence introduced in the previous sections, utilization of trade and industrial policies, including tariffs and TRIMs, can be justified and should be allowed even in the current multilateral trading system, especially to protect infant industry and to promote

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[368] Yong-Shik Lee, *Reclaiming Development in the World Trading System* (New York: Cambridge University Press, 2006), 65-66.
[369] Bernard M. Hoekman, C. Michalopoulos and A. L. Winters, "More Favorable Treatment of Developing Countries: Towards a New Approach in the WTO", World Bank, Policy Research Paper 3107 (2003).
[370] Ibid., 8.
[371] Anne-Sophie Novel and Jean-Marie Paugam, "Why and How Differentiate Developing Countries in the WTO?: Theoretical Options and Negotiating Solutions", in *Reviving the Special and Differential Treatment of Developing Countries in International Trade*, ed. Jean-Marie Paugam and Anne-Sophie Novel (2006), 162.

exports. The WTO law should therefore grant developing countries the room and flexibility to use such policies, and more importantly, S&D under the WTO Agreement should be revisited and made meaningful in order for developing countries to benefit from such flexibility so as to achieve economic transformation and development. In the meantime, such flexibility for trade and industrial policies should be allowed according to the level or stage of economic development, because the targeted industries and the necessary policy response for economic transformation will be different depending on where the economy stands. As historical experiences illustrate, in the primitive or take-off stage of development, emerging countries need primary industrial policy, such as infant industry protection, including tariffs, for the import substitution objective, and export subsidies for export promotion. The economies in a relatively more developed stage may not need such policy but seek incentives to promote technological innovation and investment. In such cases, S&D on TRIMs and TRIPS may have value for them. This kind of differentiation on policy flexibility based on the level of economy and development is critical for meaningful S&D achieving smoother economic transformation towards a higher stage of industrialization.

Chapter V

Justifications for S&D under the Concept of Policy Space and Criticisms of the Current Situation

In this chapter, reasons and theories discussed in the previous chapters will be organically integrated under the concept of policy space. The analysis of confrontations among developing countries, introduced in Chapter III, illustrated the need of differentiating developing countries in providing S&D and of considering the adverse effect on other countries caused by the specific policy measure to be permitted as S&D. Each component of the theoretical and empirical justifications discussed in the last chapter has significant implications. Under the international law of development, granting differentiated treatment, *i.e.* S&D in the WTO context, is justified, and the differentiation of eligible developing countries is necessary in order to achieve substantive equality. The dual perception of developed and developing countries has not been applicable historically under the international law of development. The historical evidence of trade and industrial policies also shows that S&D that allows developing countries to apply policies as a form of government intervention is justified. The necessary and suitable policy measures to be permitted as S&D should differ depending on the level of economic development. These logical outcomes will be integrated under the concept of policy space, which will illustrate why the current S&D is not effective for eligible developing countries and how S&D should be provided and improved in order to achieve substantive equality among states and substantial economic development through utilizing trade and industrial policies.

1. The Concept of Policy Space

With increasing political and economic integration through globalization, a growing number of international trade agreements now restrict the national "policy space" of both developed and developing countries. Access to development-oriented policy options and approach to them considerably varies among countries because of their own national policy constraints. These constraints arise from lack of financial, human, administrative, institutional and infrastructural resources that are needed to achieve desired and appropriate development objectives. Hence, many developing countries often fail to ensure the sustainability of policies over the period of implementation. Particularly LDCs have difficulty in carrying out policy implementation due to human and institutional constraints. This section introduces the origin and definition of "policy space" and its applicability in providing justification for S&D and showing the desirable direction of S&D in the multilateral trading system.

1.1 Origin and Definition

The concept of "policy space" in the negotiation forum of international trade was initially described by the Communication from Venezuela in 1999. As one dimension of the Doha Development Round, "the spaces for policies" include "a range of policy instruments that could be used by developing countries to modify their trade patterns in order to gain and sustain competitiveness."[372] In 2002, though it did not provide clear definition of policy space, UNCTAD recognized the reduction of policy space to nourish competitive enterprises and promote technological upgrading since the Uruguay Round, and mentioned the need for

[372] Communication from Venezuela (1999), WT/GC/W/279, paragraph 2.

greater policy space for developing countries to build up local industries and reduce barriers to their exports.[373]

As described in various parts of the Doha Declaration and the Decision on Implementation-related Issues and Concerns, trade-related policymaking and negotiations should help developing countries' further pursuit of using trade, and trade integration, to achieve sustainable development. In Corrales-Leal's view, if trade liberalization through the multilateral system is to be made more supportive of sustainable development, developing countries must have the autonomy to make use of active policies and relevant policy instruments to promote supply-side capacities, enhance learning processes and pursue competitiveness. When this autonomy entails diversifying production towards higher value-added goods, supporting infant industries, promoting greater inter-firm linkages, or shifting into the production of goods and services with higher knowledge intensity, "*all developing countries – regardless of their level of development – require more 'spaces for development policy' to be able to make trade work for development*."[374]

Rodrik also pointed out that "a trade regime that puts development first would accept institutional diversity and the right of countries to erect and protect their own institutional arrangements – so long as they do not seek to impose them on others," mentioning the importance of policy autonomy for developing countries as "flexibility to implement their development policies."[375] He argued that once the principle is accepted and internalized in trade rules, the priorities of poor countries and the industrial countries would be compatible and mutually supportive. The WTO could manage the interface between different national

[373] UNCTAD, *Trade and Development Report* (United Nations Publication, 2002), *X-XI*.
[374] Werner Corrales-Leal, M. Sugathan and D. Primack, "Spaces for Development Policy – *Revisiting Special and Differential Treatment*", Working Draft, 16 May 2003, International Centre for Trade and Sustainable Development (ICTSD) (2003), 4. Italics in the original.
[375] Dani Rodrik, "How to Make the Trade Regime Work for Development" (Cambridge: Harvard University, 2004), 4, 5.

systems rather than reduce national institutional differences. If issues are viewed in only market-access terms, developing countries will remain unable to defend their need for flexibility.[376]

The concept of policy space was most clearly defined in the context of international community at the Eleventh Session of UNCTAD, held in Sao Paulo in 2004. The Consensus from this session defines "the space for national economic policy" as "the scope for domestic policies, especially in the area of trade, investment, and industrial development" which "is now often framed by international disciplines, commitments and global market considerations."[377] In order for developing countries to achieve development goals and objectives, an appropriate balance between national policy space and international disciplines and commitments should be taken into account.

Hamwey described "national policy space" by identifying "endogenous" and "exogenous" policy space.[378] The decrease of policy space has been recently recognized and discussed as an issue in trade negotiations. Specifically, the WTO Agreements contain the provisions which prohibit developing countries from adopting various policy instruments designed to promote economic growth, industrial development and diversification of their national economies.[379] The financial assistance arrangements by international institutions almost always include conditionality which also has the same effect. The playing field shaped by international trade regulations which have "ostensibly equivalent rules"[380] for all members may only allow much narrower policy space for developing countries than developed ones due to the differences in initial conditions and capacities in implementing national policies. Hamwey emphasized the need to recognize and address this disparity for ensuring a level

[376] Ibid., 5.
[377] Sao Paulo Consensus, Eleventh Session of UNCTAD, TD/410, 25 June 2004, paragraph. 8.
[378] Hamwey, "Expanding National Policy Space for Development".
[379] Ibid., ix.
[380] Ibid.

playing field in international trade.[381] He argued that developing countries have lost the right to implement policies to protect and promote vital industries because such action would contravene commitments they have made in international agreements. He states that "[t]he narrowing set of national policy options permissible under a growing array of international agreements is increasingly referred to in international debates as a major constraint on national policy space."[382]

Kumar and Gallagher further elaborate the concept of policy space in the context of the use of industrial policy and the WTO. They illustrate that developing countries may need the policy space to protect and nurture their infant industries and use pro-active government policies to develop their economies by broadening and deepening their industrial structure while raising the standards of living of their people.[383]

The challenge here is to introduce flexibility when it is needed, while at the same time strengthening the multilateral trading system. Hoekman defined "policy space" as "implying flexibility for all developing countries as currently (self-) defined in the WTO whether to implement a specific set of (new) rules, as long as this does not impose significant negative (pecuniary) spillovers."[384] He suggested one way to allow developing countries flexibility of trading policies, which is to accept as part of the consultations explicit consideration of a "spillover test" – the extent to which a specific policy has negative effects on other countries, with a lower threshold for the impact on lower-income countries.[385] His argument implies not only the importance of employing the *de minimis* standard in examining whether a certain

[381] Ibid.
[382] Ibid., 1.
[383] Nagesh Kumar and Kevin P. Gallagher, "Relevance of 'Policy Space' for Development: Implications for Multilateral Trade Negotiations", ICTSD Programme: policy space and special differential treatment (2006), 10-11.
[384] Hoekman, "Operationalizing the Concept of Policy Space in the WTO", 412.
[385] Ibid. See also Bernard M. Hoekman, "Making the WTO More Supportive of Development", *Finance and Development* 42.1 (2005): 17-18.

policy measure is permissible as S&D under the trading rules, but also the need to introduce different degrees of *de minimis*, taking into account the negative impact on low-income developing countries, which are vulnerable to external influences in trade.

However, the intention should not be to make the WTO a development organization. The objective is, instead, to ensure that the WTO provides an enabling mechanism to foster greater and more effective integration of developing countries into the multilateral trading system. The WTO is a binding contract: commitments are enforceable. This gives the WTO its value, which includes greater certainty regarding national policy for trading partners. Allowing for "policy space" – or leeway for countries to pursue policies that would otherwise be subject to multilateral discipline – might increase uncertainty and could reduce the willingness of major trading countries to make commitments.

Larger developing countries are more likely to cause relatively greater negative spillovers or adverse impacts on trading partners, whether developed or developing. These spillovers should be assessed in an effective way to differentiate between countries in terms of the extent to which they can invoke "policy space" for development purposes. In this sense, differentiation of developing countries in providing S&D should be reasonable in terms of assessing the negative effect of a certain policy measures. Relying on Hoekman's argument above, allowing flexibility on a country-specific basis would be beneficial to encourage the greater engagement of poor countries in the multilateral trading system.

1.2 Availability of Policy Space on S&D

The space to employ a number of these policy instruments has been squeezed by the multilateral trade negotiations. In particular, as argued in the literature, the Uruguay Round Agreements on industrial tariffs, TRIPS, TRIMs, GATS, SCM, and among others have

significantly circumscribed development policy space without addressing a number of distortions in the policies of developed countries. Given this experience with the Uruguay Round, developing countries resisted the launch of a new round of negotiations at Doha. They tended to see the rounds of WTO negotiations as processes that would further curtail their development policy space without giving them any meaningful benefits, including market access, in return. Developing countries insisted that they needed to preserve policy flexibility and attempt to recover the space which has been eroded in the previous rounds through the use of S&D. Such strong demand from developing countries has resulted in the current round, which is dedicated to the development aspect and mandated to review the effectiveness and meaningfulness of S&D.

The concept of policy space can offer measurements to assess the degree of erosion in policy flexibility, as well as the function of current S&D and the future direction for its improvement. As the obligations of developing countries increase under the various agreements they have signed, the institutional space available for them to take independent policy action to support their vital industries has been shrinking. It is feasible here to define the role of S&D by applying the concept of policy space as the space for domestic policy options.

1.3 Constraints on Policy Space – Defining and Visualizing the Concept

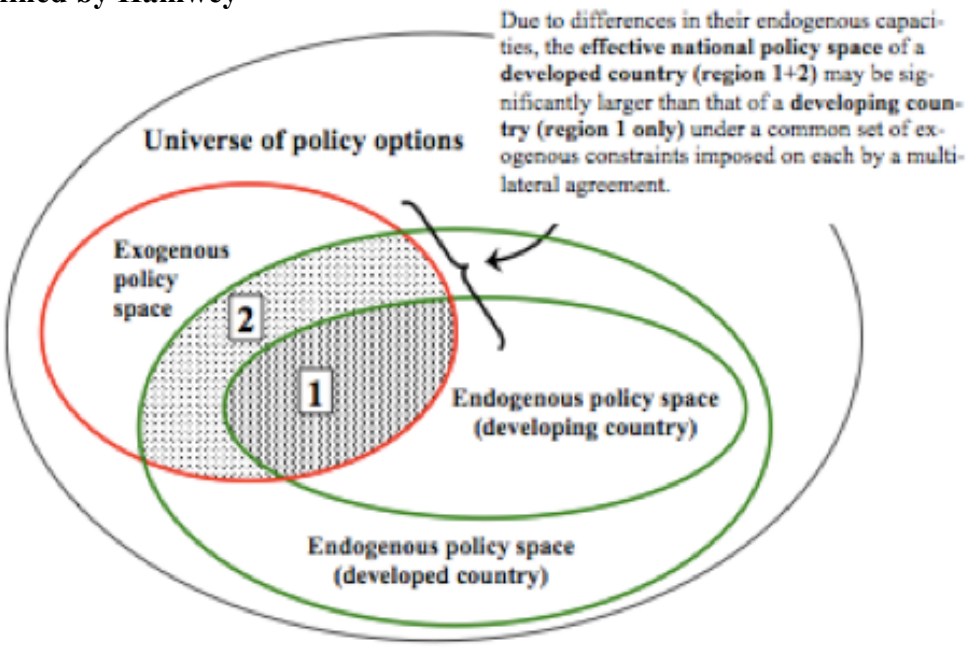
In order to make an accurate assessment of the impact of international agreements and regulations on country's policy space, it is useful to capture national policy space as "a sub-space of the universe of policy options available to a country in an ideal world without constraints."[386] What is unclear is how both domestic policies and international regulations

[386] Hamwey, "Expanding National Policy Space for Development," ix.

and arrangements should be formulated in a manner that is mutually supportive and not too restrictive for country's national policy space. Page emphasizes economic development and includes external and internal economic constraints in examining available policy space. Those international regulatory and economic constraints interact. If a country is too poor or too institutionally weak to have a policy to encourage particular sectors through domestic subsidies or industrial policy, which are unconstrained, it may need to use tariff policy or other measures.[387]

The analysis in this study will apply the concept of policy space defined and elaborated by Hamwey, identifying the constraints on policy space from both exogenous and endogenous aspects. Figure 5-1 below shows how Hamwey defines a country's effective national policy space.

Figure 5-1: Developed and Developing Countries' Effective National Policy Space as Defined by Hamwey



Source: Hamwey, "Expanding National Policy Space for Development" (2005)

[387] Sheila Page, "Policy Space: Are WTO Rules Preventing Development?", Overseas Development Institute, Briefing Paper 14 (2007), 2.

He defines both endogenous and exogenous policy spaces which are shaped by the constraints in each sphere. The effective national policy space illustrated by him is the area of overlap of both endogenous and exogenous policy space, as shown below. Although both developed and developing countries face the common set of exogenous policy space, developing countries' endogenous policy space is apparently bigger than that of developed countries due to the differences in domestic capacities, and consequently the effective national policy space of developing countries becomes substantially smaller than that of developed countries.

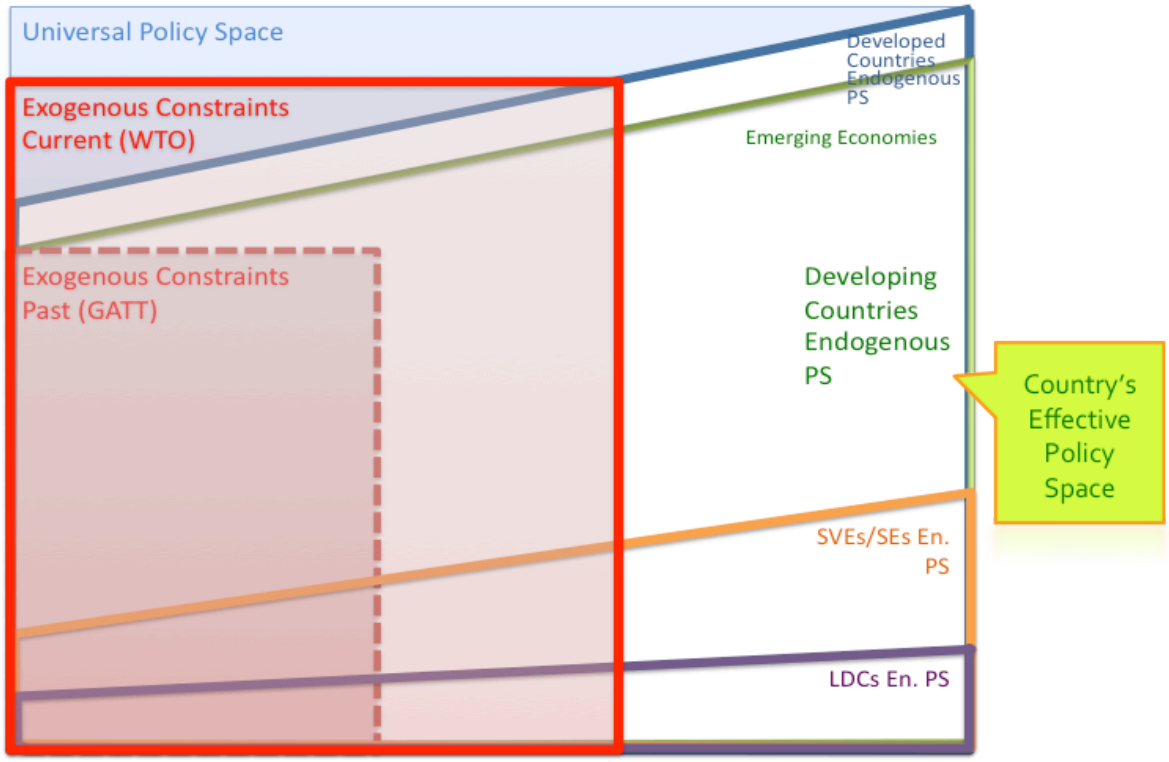
Hamwey's definition of policy space is notable in the way that he identifies both endogenous and exogenous constraints which shape two policy spaces, and the effective policy space in the area of overlap.[388] He recognizes the difference in endogenous capacities between developing and developed countries, which is well-expressed by the difference in the size of endogenous policy space and that of a country's effective policy space. However, with his figure, it is difficult to ascertain what exogenous policy space consists of. Rather, it should be easier to understand how exogenous "constraints" limit the country's policy space. In addition, his figure of policy space does not clearly explain which factor makes the difference in endogenous policy space.

This study also relies on Hamwey's division of constraints on national policy space into two: the country's "effective national policy space" is defined as the region within the permitted "endogenous" policy space and cut out of "exogenous" constraints, which is shown in Figure 5.2. Though the details will be discussed in the following sections, international agreements and regulations, *i.e.*, exogenous constraints, define one boundary line of country' national policy space, and national capacities and conditions, *i.e.*, endogenous constraints,

[388] Ibid.

define the other. Figure 5.2 illustrates how a country's effective policy space is determined by both constraints and how the size of countries' effective national policy space varies over time as endogenous capacities and conditions change. The figure below is developed by the author using Hamwey's schematic of policy space.

Figure 5-2: Determinants of Policy Space



Specifically, in relation to endogenous policy space, the magnitude of endogenous policy space stretches up and down in accordance with the level of economic development of the country, provided that the country can enjoy more policy choices as national conditions improve and it overcomes endogenous constraints. For example, as the country's economy grows up and has more financial capacity to utilize costly policy measures, its endogenous policy space expands towards the ceiling of policy space. Such expansion can also result from

enhancing institutional and administrative capacity as well as human resources. As emerging economies have recently achieved substantial economic growth and improvement of various capacities with regard to trade, their endogenous policy space has become considerably closer to that of developed countries. On the contrary, endogenous policy space of LDCs and small economies remain very much limited and smaller, given the constraints explained above.

With regard to exogenous constraints, instead of putting them into exogenous policy space and partly locating them outside of the endogenous policy space, the figure above applies them in a manner where they limit and reduce the country's effective policy space within the range of endogenous policy space (the square area in red), as countries cannot take certain policy measures which fall within the square of exogenous constraints. In addition, the figure also illustrates that exogenous constraints have substantially expanded as a result of the establishment of the WTO. The WTO Agreements cover much broader areas, including certain investment measures, IPR and so on, which has imposed larger constraints on member countries. The boundaries of exogenous constraints outlined by the international agreements widen and/or their number increases over time, especially in the context of international trade regulations. The consequence for many developing countries, especially weaker ones, is that the degree of their effective national policy space gradually but substantially reduces.

In addition, taking into account the two determinants for policy space explained above, the outermost square of the figure above expresses the variety of policy measures that countries can utilize in the context of trade. Each policy measure can be located in the square of policy space, considering the coverage of international trade regulations and a country's capacity to implement such measures. In other words, where a measure is located in the figure illustrates the nature and distinction of each measure, such as whether the measure has been prohibited since the GATT era or upon the establishment of the WTO, whether the measure is practically

available for developing countries at the lower level of economic development, and so on. The details about determinants which shape country's policy space will be explained in the following sections. For example, import duties which exceed the bound rate are located within the exogenous constraints of the GATT and also within the country's endogenous policy space. This is because import duties fall within the coverage of the GATT, and member countries are not allowed to apply higher tariffs than their commitments, and because the use of tariff does not require excessive financial resources or administrative capacity. On the other hand, general subsidies which are not actionable under the SCM Agreement can be located outside of the exogenous constraints of the WTO, which means such measures should be available for member countries. However, general subsidies usually require substantial financial resources, which in practice makes small and poor developing countries give up on such policy choices. Given this fact, general subsidies should lie in the upper area of developing countries' effective policy space, at least in the levels above those of SVEs and LDCs. Thus, the figure of policy space above illustrates the location of policy measures, taking into account exogenous and endogenous constraints. The following sections will introduce and examine what constitutes each constraint and how they have an effect on restricting the range of policy space.

1.3.1 Exogenous Constraints

Exogenous constraints consist of various international agreements which have a restrictive effect on a country's policy options, including the prohibition of certain policy measures, as well as real or potential pressures from trading partners. The most illustrative among these is the requirement that national policies should not be inconsistent with the international commitments and obligations under various international agreements, including global,

multilateral, regional, sub-regional, and bilateral, regarding economic, social and environmental issues.[389] There are many instances of exogenous constraints resulting from international agreements and regulations. For example, under the SCM Agreement, national policies to subsidize industrial producers are restricted.

1.3.1.1 Legal Constraints from International Agreements

Developing countries have faced particular difficulties in enforcing certain industrial policies aimed at economic development. There has been a noticeable tendency that multilateral, regional, or bilateral agreements restrict and discipline national industrial policies. These disciplines impose constraints on the ability of developing countries to implement certain types of industrial policies. Rodrik presents a detailed view of these constraints in Table 5.1.[390] Foremost in the hierarchy is the rules of the WTO, which are more far-reaching and intrusive than those under old GATT system.[391] Previously, membership in the multilateral trading system had few or no entry requirements for poor countries. He pointed out that the balance of payments and infant industry exceptions allowed countries to adopt any and all industrial policies. Under the WTO, however, there are several restrictions. For example, export subsidies are now WTO-inconsistent (for all but the LDCs), as are local content requirements, other performance requirements on enterprises that are linked to trade, and quantitative restrictions on imports. Such prohibitions and limitations imposed by the WTO rules shape the exogenous constraints (the line in red in Figure 5-2).

[389] Hamwey, "Expanding National Policy Space for Development," 3.
[390] Rodrik, "Rethinking Growth Policies in the Developing World," 48.
[391] Ibid., 32.

Table 5.1: Restrictions Imposed by WTO Agreements on the Ability of Countries to Undertake Industrial Policies

Source: Rodrik (2004)

Restriction	How the restriction is defined	Under what condition it applies
WTO		
Most Favored Nations	A product made in one member country is treated no less favorably than "like" good that originates in another country.	It applies unconditionally, although exceptions are made for the formation of free trade areas or custom unions and for preferential treatment of developing countries.
National Treatment	Foreign goods, once they have satisfied whatever border measures are applied, be treated no less favorably, in terms of internal taxation, than like or directly competitive domestically produced goods.	The obligation depends on whether or not a specific tariff commitment was made, and it covers taxes and other policies, which must be applied in a non-discriminatory fashion to like domestic and foreign products.
Reciprocity	Mutual or correspondent concessions of advantages or privileges, in the commercial relations between two countries.	The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and the barriers to the trade of less developed contracting parties (however, this condition is not legally binding).
SCM	Prohibits export subsidies by countries with incomes above $1000 per capita and lays out rules for the use of countervailing measures to offset injury to domestic industries caused by foreign production subsidies.	Provision related to developing countries: If the subsidy is less than 2% of the per unit value of the product exported, developing countries are exempt from countervailing measures (whereas the figure is 1% when a product from and industrial country is subject to investigation).
TRIMs	Prohibits the use of a number of investment performance-related measures that have an effect on trade: local content and trade-balancing requirements.	The agreement requires mandatory notification of all non-conforming TRIMs and their elimination within 2 years for developed, within 5 years for developing countries and within 7 years for least-developed countries.

Since the early 1990s, an increasing number of developing countries have signed regional or bilateral agreements, including with developed countries and regions, which complement multilateral trade negotiations in the WTO. Regional or bilateral agreements with large

developed countries offer substantial benefits to developing country members, as they usually provide greater market access than multilateral agreements, and often include a wider range of products than traditional trade preference schemes such as the GSP.[392] On the other hand, greater integration involves additional steps towards regulatory disciplines, and thus further constrains the *de jure* ability of developing countries to adopt appropriate national regulatory and development policies.[393]

The rules and commitments, as well as the exemptions provided under a number of trade agreements at the various levels, constitute a complex legal structure that offers different interpretations and practices. Since the rules and commitments under the multilateral trading regime restrict the *de jure* ability of developing countries to adopt national development policies, the applicability of policy instruments for further productive and technological development is limited. More specifically, it is concerned that these rules and commitments could in practice prohibit the use of policy measures that were effective and instrumental in the development of today's mature industrialized countries.[394] As far as this is the case, the rules and commitments reduce the governments' flexibility to pursue their development goals. Another concern is that while these rules and commitments, in *legal* terms, are equally binding for all countries, they might, in *economic* terms, impose more binding constraints on developing country members because of the differences in their structural aspects and levels of economic and industrial development.[395]

[392] UNCTAD, *Trade and Development Report* (2006), 167.
[393] Ibid.
[394] Ibid.
[395] Ibid.

1.3.1.2 External Pressure from Trading Partners and Donor Countries

Even though they are not prohibited under international agreements, some policy options for developing countries may be affected by pressure from bigger trading partners and donor countries. For example, bigger trading partners could put economic and political pressures on developing trading partners not to impose particular measures, exercising their market power. Another instance can be the conditionality associated with the assistance by international financial institutions or donor countries to implement certain policy reforms, or not to utilize particular policy instruments that should be allowed under international agreements and may have a positive impact on their development.

1.3.2 Endogenous Constraints

In addition to the exogenous constraints introduced above, national, or endogenous, constraints define a boundary which limits the extent of "endogenous policy space" within a larger universal policy space.[396] Such endogenous constraints consist of budgetary or financial constraints, lack of or insufficient supply-side capacity, constraints on policy making, trade negotiation capacity, and on dispute settlement capacity, which will be explored in the following sections. More importantly, because the size of endogenous policy space varies depending on the magnitude of available resources associated with the level of country's economic development, developed countries and emerging economies possess considerably larger endogenous policy space than smaller developing countries, as shown in Figure 5-2.

[396] Hamwey, "Expanding National Policy Space for Development".

1.3.2.1 Financial Constraints

This type of constraint is the most obvious. As represented by the size of their economies, developing countries face substantial financial constraints. This constraint is connected with, for example, limited revenue and export earnings, high national debt, and lack of flexibility with regard to the financial assistance that would be available for government expenditures. Some or all these constraints adversely affect the application of certain policy measures, including even permitted agricultural subsidies or non-specific domestic subsidies. Developing countries with limited financial resource are not able to rely on such costly policy choices, even though some are allowed under the given rules. Due to such financial constraints, the space available for developing countries thus becomes considerably smaller than that available to developed countries.

1.3.2.2 Supply-Side and Production Capacity

Developing countries with small economies, especially LDCs, also face major constraints in supply side and productive capacity. These countries are often characterized by dependence on exports of primary commodities, low levels of technology, vulnerability to external shocks, a lack of economic infrastructure, a small industrial base, low value addition and weak global competitiveness.[397] All these factors significantly undermine a country's productive capacity. Specifically, supply side constraints can range from poor public infrastructure, including transportation and facilities, to weak policy and institutional framework to promote industries, and to low skills and labor productivity. Although the importance of addressing supply side constraints and building productive capacity in developing countries has been widely recognized in international fora, such constraints still

[397] UN, Briefing Paper 1 "Productive Capacity", The Fourth United Nations Conference on the Least Developed Countries, April 2011.

prevail and prevent them from effectively integrating into the international trade regime and benefiting from global trade.

The lack of supply side capacity hinders not only the efficacy of lower tariffs through trade liberalization, but also the effective utilization of preferential access to developed markets. Even though developing countries have been granted preferential market access with lower tariffs on their exports, they have not fully utilized this because, in some cases, there are few or no exporting industries. Even when there are, the industries are not able to compete in the global market even with preferential tariffs. In this context, developing countries may waste available export opportunities, which in practice leads to the loss of policy space.

1.3.2.3 Policy Making and Trade Negotiation Capacity

Developing countries have wide-reaching constraints on human resources as well for many reasons, including simply less population and lack of opportunities for higher education and training. Such constraints influence the institutional and administrative resources and capacity of the governments of developing countries. Often the decision-making process and delivery mechanism within the government may not be efficient and effective. Moreover, because there is a lack of linkage between important domestic industries and the government, the mechanism to integrate national commercial interests into policy making and negotiation on trade does not function well. The lack of domestic foundations and capacity often results in trade policies being driven externally by donors and international organizations.[398] Consequently, developing countries are incapable of developing clear goals and positions in trade negotiations, which has resulted in them accepting onerous obligations and commitments beyond their abilities, as happened especially in the Uruguay Round. Some of

[398] Razeen Sally, "Trade policy making in developing countries and their participation in the WTO: differences and divergence", Global Dimensions, London School of Economics (2001), available at https://www.lse.ac.uk/collections/globalDimensions/research/tradePolicyMaking/.

them have failed to benefit from the international trade system to date and still remain underdeveloped.

In addition to the insufficiency of national policy making capacity, many developing countries do not even have their own permanent mission and Geneva-based officers who possess experience and knowledge of trade regulations and rules, negotiating skills and so on. Their missions often do not coordinate well with the relevant ministries back home. Addressing the need to build trade policy making and negotiation capacity, training for government officials and technical assistance have been provided by international organizations and donor countries. Yet, all the constraints described above restrict developing countries from effectively participating in multilateral trade negotiations. Considering such disadvantages to efficient policy making and the full understanding and expertise on trade law and negotiation, developing countries' endogenous policy space is significantly limited, compared to those of developed countries with highly qualified experts and experience in trade negotiation.

1.3.2.4 Dispute Settlement Capacity

There is likely to be many "missing cases"[399] when it comes to WTO dispute settlement activities related to the trading interests of developing countries. The poorest countries, such as LDCs, are almost completely disengaged in the enforcement of their rights through participation in formal litigation under the WTO dispute settlement system. Although larger developing countries, like China, Brazil and India, have started to use the dispute settlement

[399] Used by Chad P. Bown and Bernard M. Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector", *Journal of International Economic Law* 8.4 (2005): 863.

mechanism, LDCs have been mostly absent, whether as a complainant, respondent or third party.[400]

Bown and Hoekman argue that an appropriate and active participation by the membership in the WTO dispute settlement system can generate positive externalities towards ensuring free trade if one country's litigation efforts lead to the removal of a trade barrier imposing adverse impact on the other member's right of market access rights.[401] They emphasize the importance of the enforcement of existing rights especially for developing countries that are not yet fully integrated into the multilateral trading system.[402] If the WTO dispute settlement system fails to enforce existing commitments and market access obligations, it may cause "a damaging feedback effect."[403] Poorer and weaker developing countries may become reluctant to implement their commitments under the WTO agreements or to undertake new commitments in the current trade negotiation, if they believe that they cannot legally ensure their rights through dispute settlement.[404]

Developing countries significantly vary in terms of the size of their economies and the role of law in their domestic systems. Nonetheless, according to Shaffer, they generally face following three primary challenges when they are to effectively participate in the WTO dispute settlement system: a lack of legal expertise in WTO law and the capacity to organize information concerning trade barriers and opportunities to challenge; limited financial resources, including for the hiring of outside legal counsel to effectively utilize the WTO legal system, which are fairly costly; and fear of political and economic pressure from important members, in particular the United States and EC, that exercise market power and

[400] Ibid.
[401] Ibid., 862
[402] Ibid.
[403] Ibid.
[404] Ibid.

undermine developing countries' ability to bring WTO claims against such much larger trading partners.[405]

Besides the political and economic pressures from certain members, Bown and Hoekman also pointed out the risks that keep developing countries from engaging the WTO dispute settlement system as complainants. Specifically, poor developing countries are more likely to rely on for financial and development assistance or preferential market access provided by the richer and larger trading partners that could be potential respondents. The associated vulnerability and sensitivity to possible and additional WTO retaliation through dispute settlement may cause them more reluctance to challenge.[406]

In addition to claim capacity, developing countries face the lack of legal capacity and institutions when they are brought into the dispute settlement as a respondent. The fear of being challenged and losing the dispute may prevent them from imposing development-oriented policies potentially compatible with the WTO rules, and it may substantially increase unwillingness to even consider these policies. If they can respond and defend the policy in an effective way, the risk involved with implementing development-friendly policies could be lessened. Thus, capacity building in terms of defending "policy space" for development is critical so as to expand the range of possibility to implement such measures.

Many developing countries – especially the poorest ones – are at a disadvantage in the WTO dispute settlement system and almost completely avoid using WTO litigation. The lack of participation by large parts of the WTO membership in such a crucial "public good" may

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[405] Gregory Schaffer, "The Challenges of WTO Law: Strategies for Developing Country Adaptation", *World Trade Review* 5.2 (2006): 177.

[406] Bown and Hoekman, "WTO Dispute Settlement and the Missing Developing Country Cases", 863. They also stated that "on the import side, potential developing country complainants are typically small consumers that are unable to affect world prices. Under the current 'retaliation-as-compensation' approach, this implies that they lack the capacity to impose the large political-economic welfare losses on potential respondent countries that would generate the internal political pressure in those countries that may be a necessary element to induce compliance with adverse DSU rulings."

pose a danger to the long-term predictability function of the WTO, and could eventually undermine the usefulness of the entire process.[407] This may lead to the shrinking the potential "policy space" for developing countries to pursue more development-friendly policies. Although they are learning to use the WTO dispute settlement system more effectively, developing countries need to get a greater strategic sense of how to use the system. The greater involvement and participation in the WTO dispute settlement system is much more about securing the long-term predictability of trading concessions and interests in the international legal system, and the cumulative evolution of the principles under international economic law that should be valued for years to come.

2. Justifications for S&D under the Concept of Policy Space

2.1 Integration of Theoretical and Historical Justifications under Policy Space

Justifications from the review of the international law of development and historical experiences of industrial and trade policies discussed in Chapter IV aimed at responding to the questions of why S&D has been provided and on what bases members have agreed to provide S&D to developing countries. By revisiting the origin of S&D, from the notion in the international law of development, the infant industry protection argument and the role of trade and industrial policies, the original value and role of S&D expected under the GATT regime can be clearly illustrated. This will enable us to find the way to improve S&D and make it effective and meaningful.

The concept of policy space can integrate justifications from theoretical and historical perspectives, and illustrate why the differentiation of developing countries is necessary and

[407] Victor Mosoti, "Africa in the First Decade of WTO Dispute Settlement", *Journal of International Economic Law* 9.2 (2006): 26.

how S&D should be improved. International law of development affirms the difference among sovereign countries in terms of capacity as well as the level of economic and social development.[408] In order to achieve "substantive equality" among such unequal actors, differentiated treatment, including more favorable treatment for the disadvantaged, is justified. The concept of policy space, in the context of the multilateral trading system, can more clearly portray substantive inequality among countries and therefore can more strongly make the case that it is necessary to grant S&D to expand the effective policy space of developing countries. Also, the reassessment of historical experiences of several developed and newly-industrialized countries demonstrates that the industrial and trade policy measures necessary and suitable for each country may depend on the level of economic development. This argument suggests that there are differences in location for each policy measure which could be permitted as S&D, in the figure of policy space (Figure 5-2), and that such differences correspond to the country's level of economic development.

Taking into account the examination in Chapter IV as well as the history and current situation of S&D introduced in Chapter II, the figures of policy space for each S&D can be illustrated as they are below. Each figure is drawn from the one shown in the previous section. It provides a unique visualization of why providing each S&D can be justified, how the current S&D is ineffective for correcting and compensating substantive inequality, and thus how S&D can be improved and operationalized to ensure effective policy space for developing countries.

[408] Abdulqawi Yusuf, *Legal Aspect of Trade Preferences for Developing Countries: A Study in the Influence of Development Needs on the Evolution of International Law*, 1st ed (Boston: Martinus Nijhoff, 1982), 27.

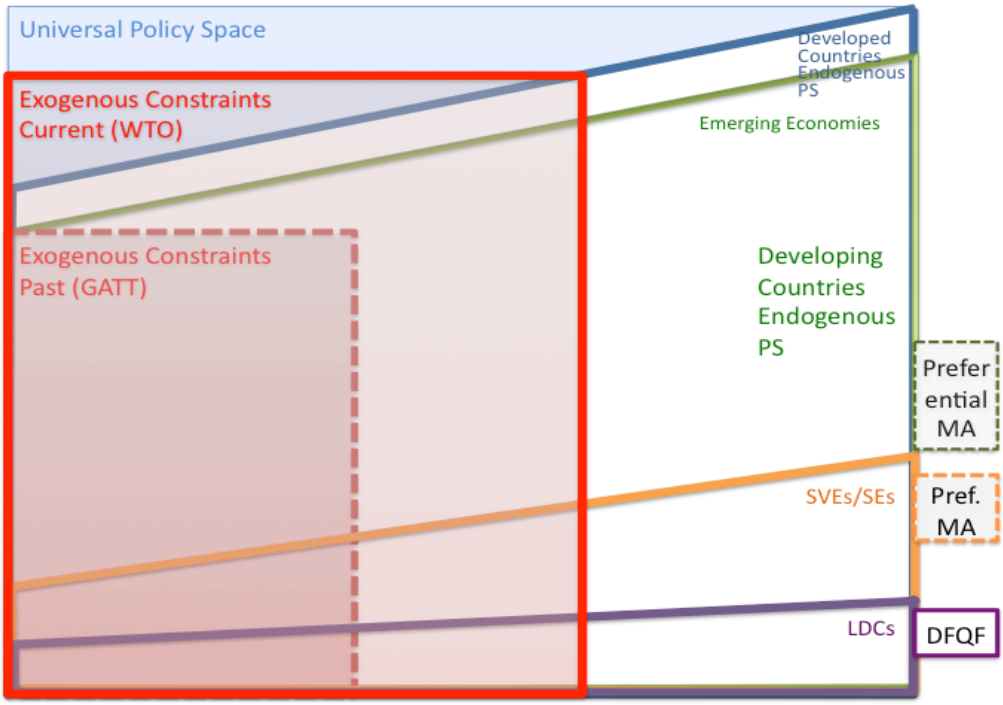
2.2 Integration of S&D under Policy Space

The following sections will explain and describe where each S&D is located in the figures of policy space elaborated below. Each square of S&D lies in different places based on its function and practical factors. As S&D provides better conditions for certain developing countries, or allows them to utilize measures that are basically prohibited under the GATT or WTO rules, each S&D should be drawn in the white squares and located mostly within and, in some cases, outside the border of exogenous constraints, which leads the expansion of developing countries' effective policy space.

2.2.1 Preferential Market Access

As preferential market access S&D is permitted and granted developing countries under the current regime, it should lie outside the exogenous constraints of WTO rules. However, such preferential market access is not a measure developing countries can autonomously take but the one given by partners. Therefore, the square of preferential market access S&D should be located outside the range of policy space. Other policy flexibility types of S&D should be inside the current exogenous constraints under the WTO, as they are technically prohibited but allowed as exceptions only for certain developing countries. While market access types of S&D do not directly expand developing countries' policy space, it is complementary S&D that allows them to make the best use of measures to promote their exports as well as policy flexibility type of S&D provided under the current WTO rules.

Figure 5-3: Policy Space and Preferential Market Access



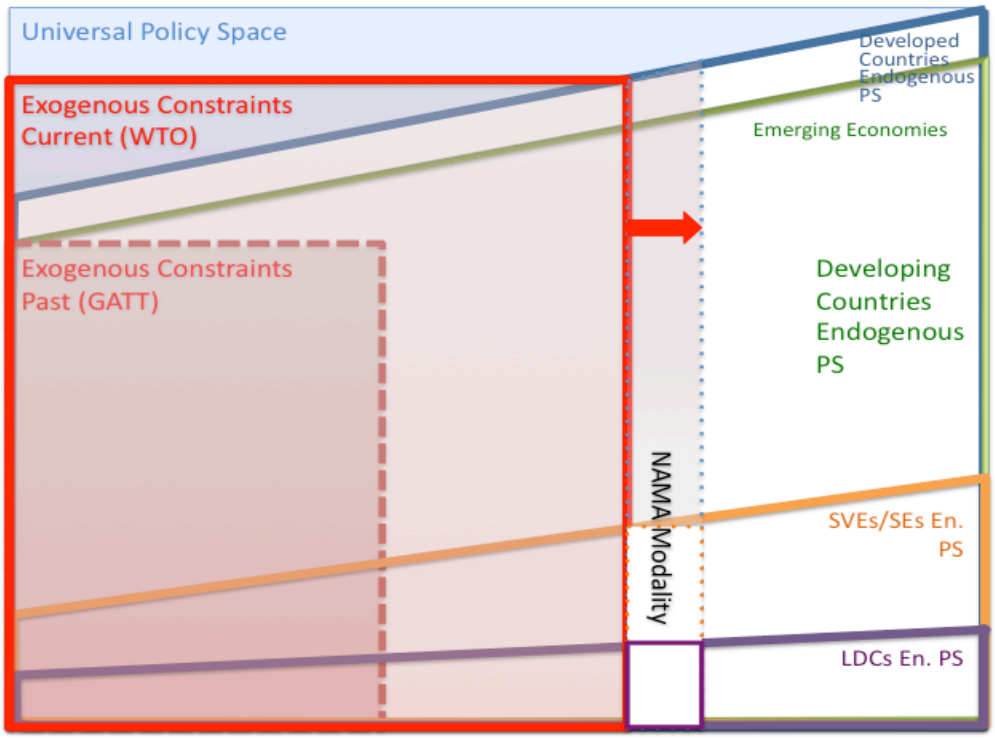
2.2.2 NAMA Modality

Negotiation on NAMA modality is ongoing, and the outcome still depends on future decisions. In addition, the commitment under NAMA modality negotiation is a further reduction of tariffs to be implemented in the future, so S&D in this context means exemption or flexibility in such further tariff reduction. Hence, the square of NAMA modality S&D should be located outside of the square of current exogenous constraints because it will entail further and new commitments for members which will reduce the range of their effective policy space. The square of NAMA Modality should be expressed with a dotted line and not in the white area for both developed and developing countries in general because the commitments under NAMA Modality have not been adopted by members yet, and, apart from LDCs, most of the developing countries would also have to make substantial commitments to

reducing tariffs. On the other hand, because members agreed in 2004 to expect no commitment in tariff reduction under NAMA modality from LDCs,[409] S&D for LDCs is in white and bounded by the bar line. Therefore, LDCs will not have to give up policy space by making further commitments in tariff reduction and their effective policy space will not be reduced, whereas other developing and developed countries have to give up their effective policy space to some extent.

In addition, SVEs also submitted a proposal requesting special treatment to allow them exemption from making further tariff reductions. If the request is accepted by members, the effective policy space of SVEs also would not be decreased. Nonetheless, the outcome and final consequences, including that of S&D, will depend on whether the negotiation on NAMA Modality in the current round can be concluded.

Figure 5-4: The Policy Space and NAMA Modality

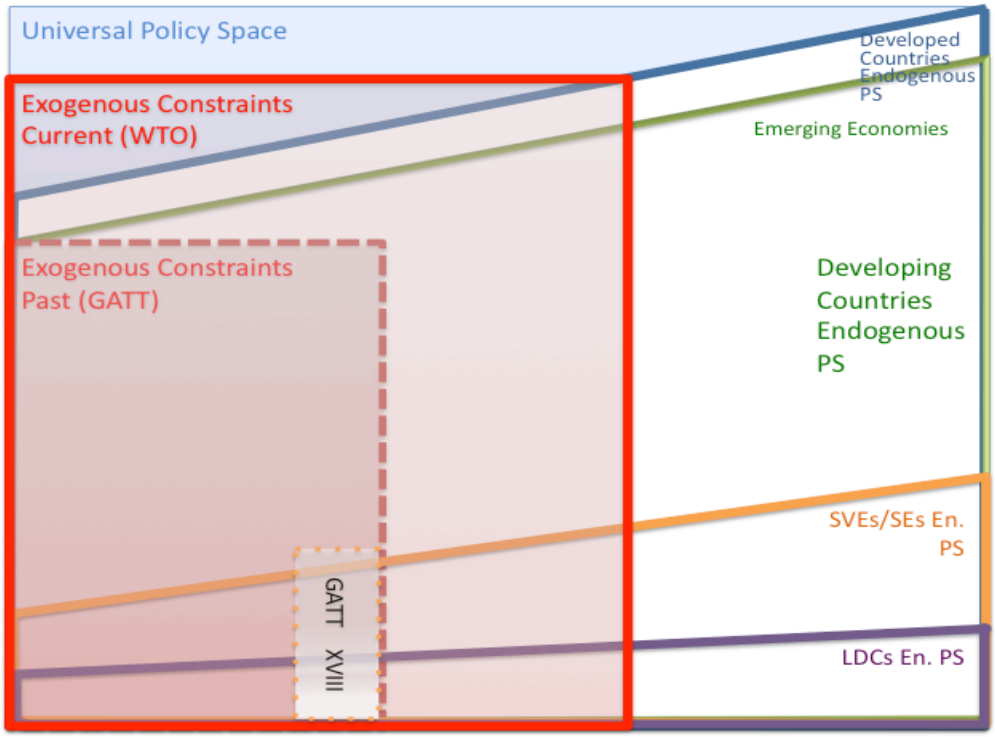


[409] WTO, Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, WT/L/579. See Section 4.2.1 of Chapter II.

2.2.3 GATT XVIII

S&D under GATT XVIII is located within the exogenous constraints, and stays at the bottom of policy space, which means it is still available even for LDCs because the provision allows developing countries which meet the eligibility to utilize prohibited industrial policy measures. These include import restrictions and local content requirements, and do not require any financial capacity. Hence, the square may stretch up, covering SVEs and some of the small developing countries. Yet, as pointed out in Chapter II and by a number of scholars, the procedures and requirements under the article are quite complex, and the possible retaliation or compensation required upon enacting a permitted measure keeps developing countries away from the actual use of this S&D.[410]

Figure 5-5: The Policy Space and GATT XVIII



[410] See Chapter II, Section 2.5.2.2 and 4.2.2. See also Kodama, "Is GATT Article XVIII Section C Still Alive?".

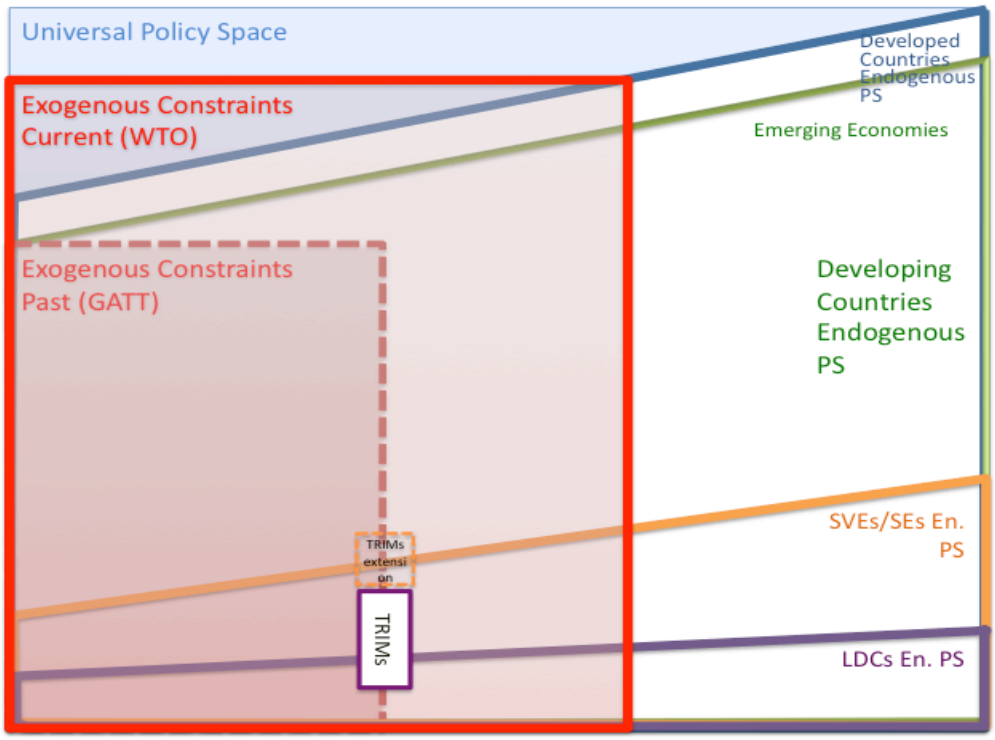
Therefore, the square of GATT XVIII in the figure above remains grey, especially towards the top, because relatively larger developing countries, compared to LDCs and SVEs, may not satisfy the eligibility requirements, or may face a higher possibility of retaliation. Nevertheless, although the article does not provide definite exemption for certain categories of developing countries, LDCs and small economies would be more likely to meet the eligibility requirements stipulated under the article, and the request or release by LDCs should be acceptable. Because of this practical assumption, the square of GATT XVIII becomes whiter as it hits the endogenous policy space of LDCs.

2.2.4 The TRIMs Agreement

The regulation on TRIMs falls within the purview of Article III and Article XI of the GATT.[411] Hence, the square of S&D under the TRIMs Agreement is located on the border of exogenous constraints of the GATT. Because LDCs have no obligation to eliminate the TRIMs, as agreed in the Hong Kong Ministerial Declaration, S&D for LDCs should be drawn as a white square. However, practically speaking, such investment measures allowed as S&D may not be available or effective for LDCs and some of SVEs that are eligible for deviation and extension of transitional periods, if there is no domestic industry to attract foreign investment or the industry is not attractive or mature enough to meet investor's demand. In those countries, there are often few domestic industries which can supply parts and components to foreign-invested companies. In cases like this, they would choose not to utilize such investment measures, perhaps until they can establish domestic industries with enough supply capacity. The square of S&D under the TRIMs for LDCs should therefore lie at least partly above the endogenous policy space of LDCs.

[411] Article 2.1 of the TRIMs Agreement.

Figure 5-6: The Policy Space and S&D under the TRIMs Agreement



In addition, the extension of transitional periods is available for developing countries that have notified their TRIMs. Currently, all notified TRIMs have been eliminated, according to the WTO.[412] As developing countries, other than LDCs, are not allowed to introduce new TRIMs, the space available for them has been lost. Therefore, under the TRIMs Agreement, the only current S&D is the total exemption for LDCs covering existing and new TRIMs, which is drawn in white in the figure above.

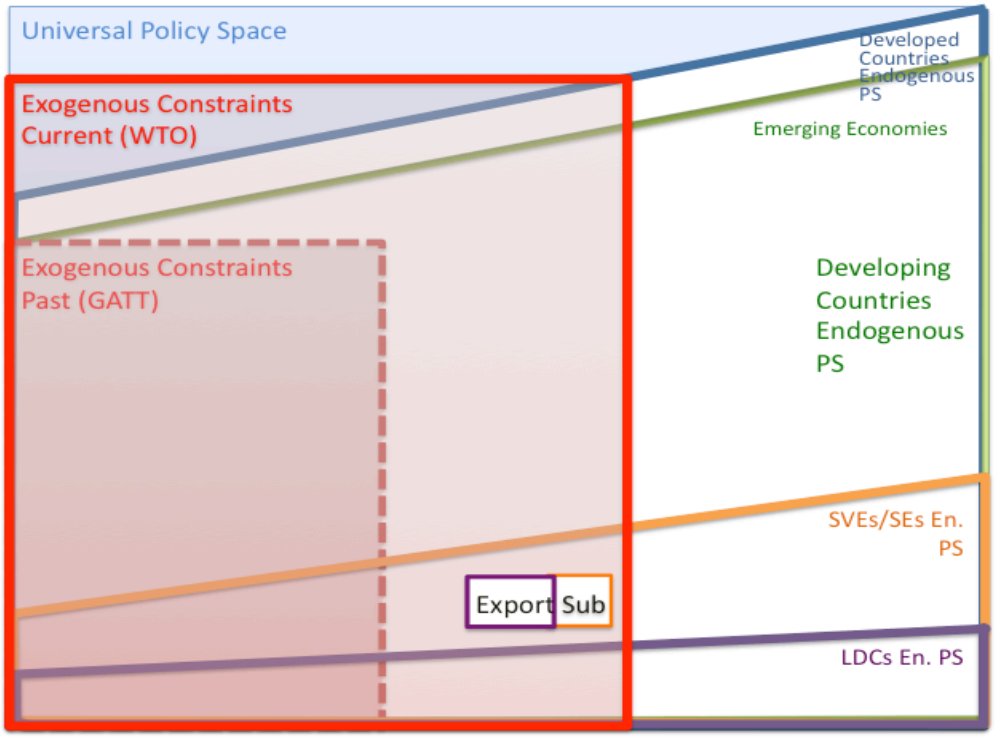
2.2.5 The SCM Agreement – Export Subsidies

As pointed out by some scholars and in the earlier section, export subsidies permitted as S&D under the SCM Agreement for LDCs and limited numbers of other developing countries

[412] WTO Analytical Index, Article 5.3 of TRIMs Agreement.

are in many cases not applicable for them due to financial and industrial constraints.[413] Therefore, the square of export subsidies S&D should be located above their endogenous policy space, but within the white cell, as drawn in the figure below. The disparity between the square of S&D and a country's endogenous policy space means that such S&D is not effective in practice for eligible countries because it is out of their policy choices. The figure precisely illustrates the reason why S&D regarding the use of export subsidies under the SCM agreement is not meaningful and effective for them.

Figure 5-7: Policy Space and Export Subsidies

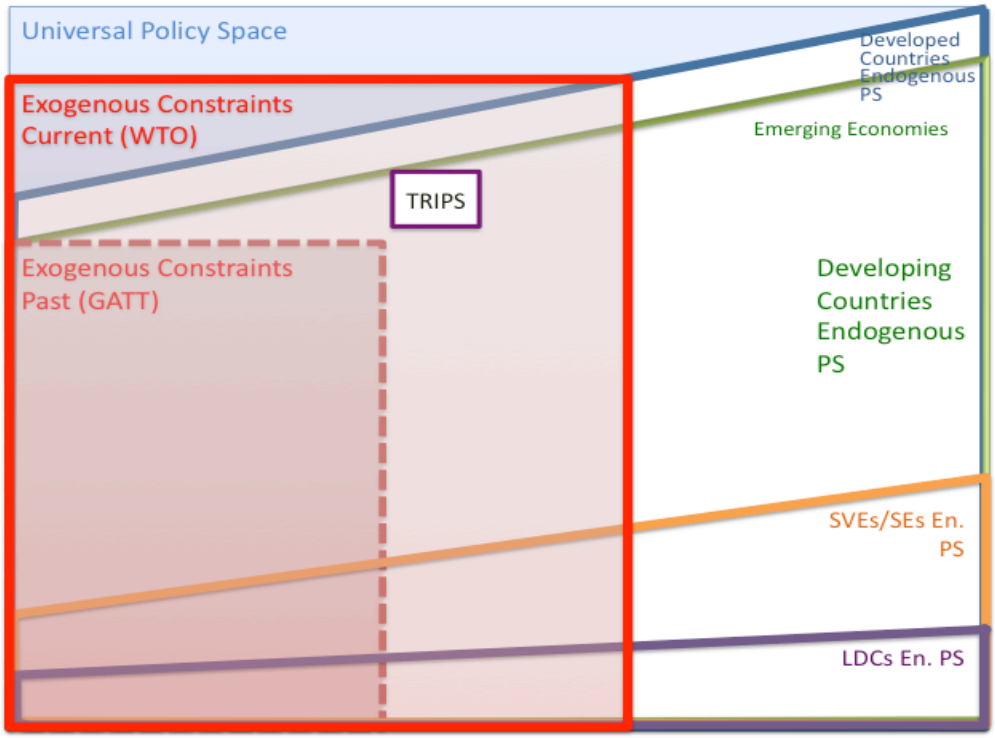


[413] Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*, 3rd ed (New York: Oxford University Press, 2009), 550. See also Section 1.3.2.1 of Chapter V.

2.2.6 The TRIPS Agreement

As explained in Chapter II, the TRIPS Agreement granted LDCs and other developing countries a general transitional period to comply obligations under the agreement. While the transitional period for developing countries expired in 2000, the period granted for LDCs has been extended twice, in 2005 and 2013, and LDCs can enjoy flexibility until July 2021.[414] Hence, the current S&D under the TRIPS Agreement is only available for LDCs. Because the TRIPS Agreement itself and the obligations under it have emerged since the establishment of the WTO, and not in the GATT era, S&D provided only to LDCs should lie outside and vertically above the past constrains under the GATT and within the current constraints under the WTO.

Figure 5-8: Policy Space and S&D under the TRIPS Agreement



[414] IP/C/40 and IP/C/64. See Section 4.2.5 of Chapter II.

Shown in the figure above, the disparity between the square of S&D and LDCs' endogenous policy space is significant. The figure illustrates why S&D under the TRIPS Agreement is not meaningful for LDCs, in addition to the fact that, as discussed in the previous chapter, many LDCs do not possess satisfactory conditions and capacity to enjoy such flexibility.

3. Criticisms on the Effectiveness of Current S&D

The figures in the previous section explain why the existing S&D is not meaningful for developing countries, including LDCs. Most of the squares of S&D for LDCs and other small-sized or low-income developing countries lie above the range of their endogenous policy space, which means those S&D are not practically available to them. Moreover, some of technically available S&D, such as GATT XVIII, are also not useable because of their complex requirements and hesitance regarding compensation and retaliation. Those S&D need to be made available by bringing them back into the endogenous policy space. In order to compensate the disadvantages of developing countries, the multilateral trading rules have provided them with S&D for the purpose of expanding their effective policy space. However, it is ironic that, as argued in the previous section, most S&D accorded to LDCs and other developing countries lie beyond their endogenous policy space, which means they are not at all practically available or effective for them. This is because they lack financial, institutional, human, technical and industrial resources, and such constraints suppress their effective policy space. In light of this, let us look at the figure of policy space again and examine why existing S&D provisions are not meaningful or effective for developing countries.

First, preferential market access by itself does not bring practical and meaningful expansion of policy space, if those developing countries have not gained export

competitiveness or have not established export industries, regardless of the preferential tariffs. As pointed out earlier, market access types of S&D are to complement the policy flexibility of developing countries so as to maximize the positive effect of such measures for expanding exports. Even the most preferential market access for LDCs, that is DFQF, may not be very beneficial for them if the products they focus on are excluded from the coverage or, even if covered, the products have not gained international competitiveness in the foreign markets.

Second, and most obviously, the utilization of export subsidies is not available to most poor developing countries due to lack of financial resources. As shown in the figure above, the policy option to provide export subsidies is beyond their endogenous policy space. Although the SCM Agreement permits LDCs and a few other developing countries to use prohibited export subsidies, they are countries with limited financial capacity and may not be able to provide effective fiscal incentives for domestic export industries. S&D for export subsidies under the SCM Agreement is therefore found to be ineffective for eligible developing countries in many instances.

Third, S&D under the TRIMs Agreement is not effective in practice for LDCs if they have no domestic industry which can be attractive for foreign investors. Even if they can attract foreign investment to a particular manufacturing industry, they may not have well-established domestic industries which can supply parts or raw materials to the targeted activity. In fact, there have been very few cases where the governments of LDCs have notified the TRIMs to the WTO.[415] The extension provision of the TRIMs has also rarely been utilized by small-sized or low-income developing country members. This is most likely because they did not even notify the TRIMs and did not clearly understand the importance and necessity to keep

[415] See UN LDC Portal; http://esango.un.org/ldcportal/web/10447/-/new-survey-results?groupId=19799&redirect=http%3A%2F%2Fesango.un.org%2Fldcportal%2Ftrade%3Fp_p_id%3D101_INSTANCE_41xhsGBvY59x%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-9%26p_p_col_count%3D1.

open the policy option to use the TRIMs. Without notification and extension request, the use of the TRIMs is no longer available for such developing countries, except for LDCs that have been accorded the extension of the transitional period. These facts prove that S&D under the TRIMs Agreement is in practice neither available to them nor effective.

Fourth, S&D under the TRIPS Agreement is not meaningful, largely because there may be few or no well-established high-tech industries in most of LDCs in which they can fully utilize patented technology invented in developed countries. However, such S&D may still have the benefit for LDCs of receiving a waiver from the legislative costs of establishing and maintaining effective IPR regimes. As discussed in the previous chapter, in some LDCs and other low-income developing countries, the provisions under the TRIPS Agreement allowing their domestic industries to produce generic medicines for the purpose of public health cannot be effectively utilized, simply because they do not have any capacity to produce them.[416] Once some countries gain such production capacity, they may no longer be categorized as LDCs, which means that S&D granted for LDCs would not be available to them anymore. In such cases, the exemption from the obligation as S&D under the TRIPS Agreement is in fact neither practical nor meaningful.

Finally, the only S&D that may be still technically available and not directly subject to endogenous constraints is GATT XVIII. However, the article has not been utilized for decades due to the unclear eligibility, complicated and onerous requirements, and threat of possible compensation.[417] Therefore, as illustrated in the figure above, most of S&D provided for LDCs and other developing countries are not useable or meaningful for them. Hoekman and Kostecki indeed pointed out the reason why provision of the above S&D, including

[416] See Section 2.2 of Chapter IV.
[417] For detailed discussion on utilization of GATT XVIII, see 児玉 [Kodama], 「GATT第18条Cの援用可能性に関する考察」["Is GATT Article XVIII Section C Still Alive?"].

export subsidies and others, was agreed upon was that there was no possibility for eligible developing countries to have adverse impacts on world trade, because such S&D was not in practice feasible for them due to financial and industrial constraints.[418] It is now of the utmost importance to make those S&D practically available to them by easing and simplifying eligibility requirements, bearing in mind why the existing S&D is not meaningful at all, as well as which policy measure is effective for developing countries at each level of economic development.

In addition, some LDC members that have newly acceded to the WTO have given up certain S&D during the accession negotiation, partly because there was a pressure by a large negotiating partner to renounce such S&D and partly because at the time of negotiation the country did not recognize the need to protect domestic industry or fully understand the significance of utilizing such policy instruments.[419] However, taking into account the historical evidence on trade and industrial policies discussed in Section 2 of Chapter IV, any kind of policy options allowed as S&D can be necessary and may become meaningful later, even though LDCs and other small-sized or low-income developing countries are considerably behind in economic development and not at the stage where they need to utilize such policy options. Given this fact, the effort to close the gap between S&D and a country's effective policy space is as critical as keeping options as S&D available for their future needs.

4. Improving S&D Effectiveness Using the Concept of Policy Space

The utilization of certain policy instruments surely contribute to improving economic performance of developing countries, not only in terms of greater participation in trade

[418] Hoekman and Kostecki, *The Political Economy of the World Trading System*.
[419] Laos, one of Asian LDCs which acceded in early 2013, gave up on S&D to use TRIMs as was agreed in the 2005 Hong Kong Ministerial Conference.

expansion and better integration into the global economy, but also in terms of their successful transition to industrial development. It is necessary to identify and comprehend those policy options and instruments already existing in the agreements, or those which could be newly introduced, under conditions where they do not contradict the WTO fundamental principles and commitments. The project to make S&D effective, precise and operational, taking into account the concept of policy space and the current situation as outlined in the figures, is fully consistent not only with the objectives of the multilateral trading system, but also with the possibility to develop favorable domestic environments for international trade and investment in both developing and developed countries. This concept of "development dimension" would ensure the better use of opportunities for developing countries to integrate into the global trading system and, thus, strengthen the system itself.

Providing S&D for developing countries is supported by theoretical rationales. Integrating the notion of the international law of development and the historical evidence of trade and industrial policies, the concept of policy space justifies compensation for each group of developing countries to the degree effective policy space is lost or disadvantaged in order to achieve substantive equality and economic growth through industrial development. As discussed earlier in this chapter, according to the schematics used, the range of effective policy space differs due to the difference in endogenous policy space, which consequently means the necessary degree of compensatory inequality is also different. Therefore, such compensation should be differentiated depending on the gap of effective policy space resulting from various endogenous constraints. In addition, the figures show the relation between S&D and the level of economic development at which a country can practically utilize a certain measure. The fact that each S&D lies at different degrees and locations in the

figures means the availability of each S&D is also different for countries at each level of development. Hence, differentiating eligible developing countries for each S&D is necessary.

The concept and figure of policy space, integrating important rationalizations for providing differential treatment and in differentiating developing countries, provides the direction to how to improve and operationalize S&D under the WTO Agreements. Differentiated compensation for the smaller effective policy space of developing countries should be done in the following two ways: to expand their endogenous policy space by providing assistance to build endogenous capacity, and to make existing S&D available in practice for eligible developing countries. While both ways positively interact and complement each other, the proposed approach in the next chapter will focus on the latter, given the limitation of this study. In this context, clarifying eligibility and procedures on the basis of rule- or agreement-specific sets of criteria is critical and feasible.[420] Such an approach enables S&D provisions and applications to fit the specific needs of eligible developing countries and to be practically effective and operational. The next chapter will discuss how to determine eligible countries in providing S&D.

[420] Hoekman and Kostecki, *The Political Economy of the World Trading System*, 552.

Conclusion – Towards More Rational and Effective S&D

The preceding two chapters discussed the justification for differentiated treatment under the multilateral trading system through a theoretical and historical approach. The international law of development justifies differential treatment for the purpose of achieving substantive equality. With different capacities and contributions, countries should bear different responsibilities and obligations. In addition, under the international law of development, countries with disadvantages should be compensated by providing preferential treatment, which can be called "compensatory inequality." CBDR is one example of the practical and concrete application of differential treatment, and also demonstrates the theoretical rationale to accord differential treatment in accordance with historical responsibility and different capacity. The historical evidence of trade and industrial policies shows that the use of government intervention in industrial policy can be justified, especially under the conditions developing countries often face, and that necessary and meaningful policy instruments vary and depend on the level of economic development. The figures of policy space in the previous chapter (Figure 5-3 to 5-8) represents the current situation of and challenges for S&D, illustrating why the existing provisions under the WTO law are not meaningful for eligible developing countries. It then reiterates the need for differentiation in providing S&D in order to effectively compensate for the disadvantages of each developing country. The figure also demonstrates how to improve S&D and to operationalize and make them meaningful for developing countries.

The analysis of confrontations among developing countries, discussed in Chapter III, has explained the reason why the existing S&D provisions have been limited to LDC WTO members. Furthermore, together with the figure of policy space, we see that S&D accorded to

LDCs are not effective or meaningful because they are not practically available due to financial and institutional constraints. The current picture of S&D needs to be substantially improved. With the goal of solving the ineffectiveness of S&D, it also reiterates the need to minimize adverse effects in allowing S&D, and the justification to differentiate among developing countries in providing effective S&D.

Along with the traditional critiques of S&D introduced in Chapter II, the new figure of policy space in the previous chapter shows why the existing S&D provisions are not meaningful at all for eligible developing countries. Most S&D are largely displaced from developing countries' endogenous policy space, which means they are not available for them. In order to improve and correct this current situation and to close the gap between available S&D and their endogenous policy space, developing countries should be differentiated when providing S&D, and needed S&D should be provided in accordance with the level of economic development. To do so, objective and clear criteria are critical. Moreover, it is necessary to introduce new rules on the burden of proof in the agreements on TRIMs and TRIPS with respect to the presumption of no or negligible adverse effect resulting from given policy measures; in other words, to adopt the standard of *de minimis*. The SCM Agreement allows LDCs and other small developing countries to utilize prohibited export subsidies because, in the first place, it is assumed that those countries have no substantial adverse impact on world trade by applying distorting export subsidies. Such an '*ex-ante' de minimis* standard can be adopted in other agreements, referring to the objective criteria, such as export share or import share in world trade as well as GNI per capita. Allowing policy flexibility in new applications of S&D under each agreement can be simplified and clarified by introducing such a *de minimis* standard.

Developing countries have become substantially diversified, especially since the establishment of the WTO, in terms of commercial and economic interests as well as political influence. As we saw in Chapter III, differentiation of developing countries under the current WTO Agreements does not fit the actual situation in the multilateral trading system, and the UN criteria used for LDC classification does not fully reflect the challenges of those who are left behind and most in need of development through trade. As a number of scholars have suggested, there is a need for greater differentiation in providing S&D for developing countries.[421] Not only would such differentiation strengthen the effectiveness and justification of S&D, Lee *et al*. further argued that differentiation of developing countries would enhance the clarity and rationality of the system itself.[422]

Regarding the existing proposals on differentiation by creating sub-categories within developing country members, more than a few scholars have suggested the category of "LDC plus."[423] While the criteria are not uniform and definite, they generally try to rely on indicators such as a minimum level of per capita income and size to be defined as LDCs.[424] Meyer and Lunenborg (2011) also apply an upper limit based on a certain population threshold, following the indicators used by Norway in its DFQF scheme.[425] Another possible reference could be a category based on the negotiation group in the DDA. The most probable one is the group of Small and Vulnerable Economies (SVEs), which has fluctuating coalition members depending on the issues being negotiated. They submitted a number of proposals in

[421] Hart and Dymond, "Special and Differential Treatment and the Doha "Development" Round", 409. See also Lee, Horlick, Choi and Broude, *Law and Development Perspective on International Trade Law*, 117.
[422] Ibid.
[423] Matthias Meyer and Peter Lunenborg, "The Evolution of Special and Differential Treatment and Aid for Trade", Draft Research Paper, (Geneva: ICTSD, 2011); Hoekman *et al.*, "More Favorable and Differential Treatment of Developing Countries".
[424] Keck and Low, "Special and Differential Treatment in the WTO", 27.
[425] Under the Norwegian GSP Scheme, eligible non-LDCs, that have a population of less than 75 million include: Cameroon, Democratic Republic of Congo, Ghana, Cote d'Ivoire, Kenya, Kyrgyzstan, Democratic Republic of Korea, Moldova, Mongolia, Nicaragua, Papua New Guinea, Tajikistan, Uzbekistan, and Zimbabwe. See http://www.toll.no/templates_TAD/Article.aspx?id=146952&epslanguage=en.

various areas of negotiation and requested more favorable S&D, especially on tariff reduction in NAMA and preferential market access.

Whether such differentiations and categorizations are feasible should be the most critical question. However, the answer here is yes. The evidence is the following: as mentioned above, there are some negotiation groups, such as SVEs, and the proposals they submit are based on their common interests; and there are some categories or criteria provided under specific agreements, such as Annex VII of the SCM Agreement and the criteria of export share under Article 27.6 of the SCM Agreement. No one could fail to differently treat SVEs with economies of very limited size, such as St. Lucia and Honduras, and the biggest developing countries, or emerging economies, such as Brazil and China. In addition, the differentiation of developing countries is even beneficial for other both developed and developing country members because rationally limited coverage and eligibility for S&D must result in less adverse effects on providers of preferential market access and trading partners. In addition, tailored S&D for those who request it can make S&D more precise and meaningful for countries in need in each category.

In his book, Alavi also affirms the rationale for differentiation, stating that "[d]eveloping countries agree that not all issues are beneficial to developing countries and not all developing countries will gain from all issues. This justifies specific S&D proposals which could ease the pressure and burden on those developing countries that may lose in the short-term."[426] Such a contribution will ultimately go a long way to meet the mandate under paragraph 44 of the Doha Ministerial Declaration.

[426] Alavi, *Legalization of Development in the WTO*, 102-103.

The Appellate Body of the *EC – Tariff Preferences* case affirmed the differentiation of developing countries in the practice of providing them with preferential market access. It even dismissed the reasoning by the Panel of the case and permitted the EU to distinguish among developing countries in granting preferential tariffs based on distinctions which reflect their "specific development, financial or trade needs."[427] The Appellate Body stated that such needs "are *not* necessarily common or shared by all developing countries" and "may thus entail treating different developing country beneficiaries differently."[428] It clarified that "the existence of a 'development, financial [or] trade need' must be assessed according to an *objective* standard. Board-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such standard."[429] However, at the same time, as Pauwelyn pointed out, objective and reasonable criteria are needed in order to distinguish among different countries depending on the subject matter, so as to "avoid divide and rule strategies and a race to the bottom."[430]

Differentiating among developing countries can be also justified through a reassessment of the dual perception between developed and developing countries under the international law of development and the infant industry protection argument, as discussed in Chapter IV. Most scholars envision both the international law of development and the infant industry protection argument as a dual structure consisting of two actors, *i.e.* developed and developing countries. In fact, back in the 1960s and 1970s, when the heterogeneity of developing countries became apparent, the dynamics of negotiation in the multilateral trading system were based on

[427] Joost Pauwelyn, "The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes", *Review of European & International Environmental Law* 22 (2013): 11.
[428] Appellate Body Report, *EC – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 20 April 2004, para.162.
[429] Ibid., para.163. Emphasis in the original.
[430] Pauwelyn, "The End of Differential Treatment for Developing Countries?", 12.

confrontation between developed and developing countries, especially over preferential treatment for the latter. However, the international law of development at least was not simply established upon dualism, but held the inherent catalyst to justify and develop differentiation of developing countries. It justified and permitted differentiated treatment, as "compensatory inequality" given to the actor unequal and disadvantaged in capacity and economic and social development, in order to achieve substantive equality.[431] Up to the 1980s, when developing countries became diversified in many ways, especially in economic development, the objectives were divided when seeking "equality" between developed and developing countries. In other words, differentiated treatment was considered justifiable because there was an apparent inequality that needed to be corrected when comparing developing countries with developed countries. This notion was one of the rationales for S&D in the GATT era. In that period, duality seemed to possess enough justification for them to gain preferential treatment, because even developing countries themselves could never expect that they would become so diverse.

In the meantime, the creation of the LDC category, which coincides with the emergence of the international law of development, could be also explained and justified by applying the new and significant aspects of potential differentiation. As introduced in Chapter II, historical analysis illustrates that the LDC category was established through a top-down process arising from the recognition of the importance of development for the poorest countries in the international community.[432] At the same time, however, this event could be theoretically and normatively justified based on the argument above. Thus, the creation of the LDC category resulted from two crucial aspects: the history of top-down processes and the justification of differentiation under the international law of development.

[431] Yusuf, *Legal Aspects of Trade Preferences for Developing Countries*.
[432] Section 1.3 of Chapter II.

In turn, under the WTO regime, developing countries have become even more diverse and such dualism is no longer applicable. Although groups of developing country members do not form legal subcategories within the group of developing countries, it is clear that more preferential S&D has been accorded to LDCs only. A new dual structure between LDCs and other developing countries can now be observed. This phenomenon may be called "the new dualism" in the contemporary context. Then again, this perception also does not fit the current situation, where the diversification of developing countries is so noticeable. As pointed out earlier, the international law of development contains the basic notion of differentiation. This means that dualistic perception both in the GATT and the WTO contexts did not and does not accurately capture the real situation as well as the theoretical interpretation. The catalyst of differentiation under the international law of development would logically distinguish between developing countries whose economies are bigger and whose level of development is higher, and those of small economies. Therefore, the differentiation of developing countries proposed in this study should be feasible in the multilateral trading regime and can be justified.

The infant industry protection argument, on the other hand, justifies protectionist policy measures which are not supposed to be permitted under the multilateral trading rules, when a government is able to prove that a domestic industry is too weak and underdeveloped to compete with foreign products but is a targeted industry with the potential to develop. Put another way, whether the applicant country has developing country status or not is not necessarily required. The essential element to justify the measure is the "infancy" and "development potential" of the industry. In fact, given the fact that developed countries also used to utilize such policy measures to protect infant industry in the GATT era, the presumption of eligibility for developing countries when such interventionist measures are

permissible with the existence of market failure is not applicable. Thus, there is no catalyst for differentiation of developing countries in the infant industry protection argument, and neither can dual perception be applied. Meanwhile, the historical evidence of trade and industrial policies still give a reason for differentiating among developing countries in providing policy flexibility. Together with the figure of policy space, it illustrates that necessary policy measures for industrial and economic development depend on the level of the country's development, as corresponds with the vertical axis on the right side as well as where each square of S&D lies in Figure 5-2.

In addition to the reassessment of the above two arguments, the analysis of confrontations among developing countries, introduced in Chapter III, provides a new perspective on the current situation of trade negotiation to explain why preferential and differential treatments are only supplied to LDCs. In short, because developing country members have been engaged in negotiation using the concept of the fixed pie and the zero-sum game, the provision of preferential treatment for other sub-categories of developing countries has failed. Together with the concept of policy space, the analysis of the current situation justifies the necessity to differentiate among developing countries members in the multilateral trading system. Moreover, it can also illustrate the reason why S&D currently provided has been not effective or meaningful, as discussed in the previous chapter.[433]

In order to make S&D more accurate and meaningful, taking into account the analysis and assessment made so far through revisiting justifications and integrating them into the concept of policy space, it is critical to differentiate developing countries with objective and concrete criteria for S&D eligibility under each measure and agreement. As the analysis over the

[433] See Section 3 of Chapter V.

confrontations among developing countries in Chapter III suggested, the degree of adverse effect would be the essential criteria for determining what S&D is to be allowed and for which countries. It has been also illustrated that the degree of adverse effect should vary depending on the measure to be allowed as S&D. As demonstrated by the analysis and integration under the concept of policy space in Chapter V, the nature and function of S&D as well as the level of economic development at which a developing country would be able to utilize certain measures as S&D substantially differ from one measure or agreement to another. Therefore, the concrete criteria for differentiation should be also differentiated under each measure and agreement in accordance with the findings above. More specifically, in order to identify and precisely measure the adverse effect caused by the concerned measure, the criteria to be considered should include not only economic indicators, such as GNI per capita, but also those to measure adverse effects, which should be also different for each agreement. For example, though the exemption under Annex VII of the SCM Agreement is only based on the criteria of GNI per capita, this criterion is not entirely accurate to use for export subsidies S&D because GNI per capita itself depends also on the size of the population. In permitting deviation from eliminating export subsidies, what should matter is the adverse effect of export subsidies allowed as S&D on world trade or trading partners,[434] which can be measured and assessed by both GNI per capita and the export share of the product in world trade, *i.e.* export competitiveness[435] referred in the SCM Agreement. The export share of a concerned product can be also used for examining adverse effect, as well as the standard of *de minimis*. Meanwhile, in allowing for S&D under GATT XVIII and the TRIMs Agreement, the criteria should refer to GNI per capita and the import share of the

[434] The criterion of adverse effect is in fact referred to as one of the requirements to claim actionable subsidies under Article 5 of the SCM Agreement.
[435] Article 27.6 of the SCM Agreement.

product in world trade.[436] Import share would be an especially important criterion in considering the degree of adverse effect which might be caused by the concerned measure. The range and extent of possible compensation, if necessary, should be determined according to the degree of such adverse effect. Clarifying and simplifying the eligibility and requirements with specified criteria could also lead to establish the standard of the *de minimis* effect in the consideration of possible compensation.

Differentiation of developing countries with clear and objective criteria, as proposed above, will minimize the adverse effect of policy measures allowed to a certain category of developing countries and, at the same time, maximize the effectiveness of S&D provisions. Such differentiation will also strengthen the justification to provide S&D to eligible developing countries. Again, the figure of policy space shows that the size of a country's effective policy space varies according to their level of economic development, and that existing S&D provided to LDCs and other developing countries are not practically available to them. The proposals above intend to close the gap between the existing S&D and the eligible developing countries, by bringing the square of S&D within the range of their endogenous policy space. They will be feasible because proposed criteria and S&D will allow only countries and measures that meet the *de minimis* standard for adverse effect,[437] and also because they can be controlled by relevant WTO bodies and members.

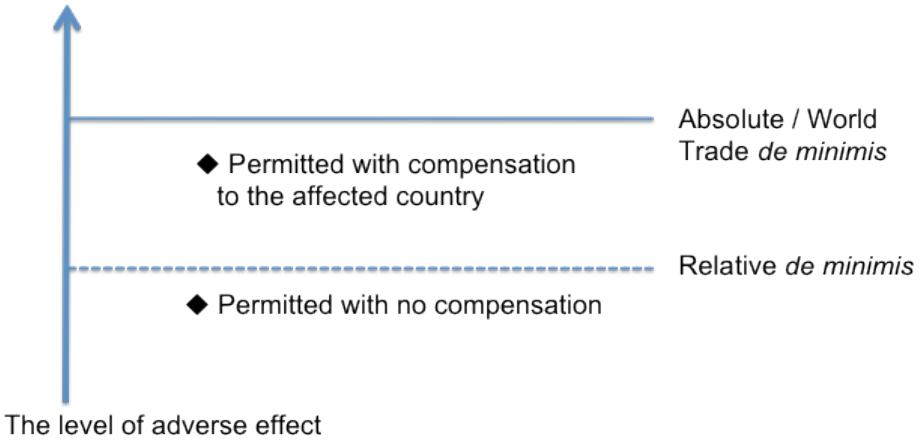
Furthermore, given the fact that the loss of trade or development opportunities by other countries are of great concern in deciding whether certain S&D should be permitted, the standard of *de minimis* may not be sufficient. Because affected countries also vary in

[436] In order to ensure the measure is consistent with its objective to boost the economy, it may also be important to consider the positive effect of the measure on national economy, in the case of GATT XVIII and the TRIMs. Taking into account the measurements used in the GATT Panel on GATT XVIII, as well as in the examination of extensions of transitional periods under the TRIMs Agreement, the share of the targeted industry in the domestic market, and the expected positive impact on the consolidation of the industry could be included.

[437] See Section 3 of Chapter III.

economic size and commercial interests, certain S&D would have different impacts on countries with different capacities and interests. Hoekman has pointed out that the magnitude of negative spillovers, that is adverse effect, "that could be imposed by small developing countries in world trade on OECD countries would be small."[438] On the other hand, although small economies would not inflict substantial harm on large trading partners, "the impact of their policies on other small developing countries may be significant."[439] He therefore suggested a lower threshold to raise "spillover objections," including the use of the dispute settlement mechanism.[440] As his argument and proposed solution make the right point, this study also relies on what Hoekman has argued, and proposes the need to introduce a so-called 'dual' *de minimis* standard: the absolute *de minimis* and relative *de minimis*.

Figure 6-1: 'Dual' *De Minimis* Standard of Adverse Effect



The absolute or world trade *de minimis* should be set as the level of adverse effect that is considered to have no harm or negligible from the world trade perspective. The relative *de*

[438] Hoekman, "Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment", 417.
[439] Ibid., 416.
[440] Ibid.

minimis should be the level that could be permitted by other affected developing countries with similar economic size and shared trade interests. Because such affected developing countries are more vulnerable and sensitive to the adverse effect resulting from a certain policy measure taken by the developing country, the level of the relative *de minimis* should be lower than the absolute or world trade *de minimis* (see Figure 6-1).

Even when a certain S&D meets the absolute or world trade *de minimis* and can be granted to the eligible developing country, it could still have adverse effects on other developing countries that share the common commercial interests. Whereas affected developing countries should be limited to ones with similar economic size and/or substantial trade-related interests, the country that applies the policy measure, as S&D, would need to make compensation for adverse effects taking into consideration economic size of the affected country. In that case, the country which intends to claim compensation should bear the burden to prove the existence of adverse effect caused by the concerned policy measure. The possibility of having to pay compensation might put pressure on the eligible developing country which seeks to utilize S&D. However, a certain trade or industrial policy measure applied as S&D could be worth paying provisional compensation to implement if a targeted industry expands its exports and leads the country's economic development in the near future. This kind of compensation mechanism would enable the eligible developing country to secure the great – the future benefit to be brought by the industry – by paying the small – the provisional compensation. This will have great significance and play an important role in permitting S&D with possible adverse effect on other countries.

The need to differentiate between developing countries in providing S&D should be repeated in practice. More concretely, it is essential to carry out differentiation under the

country- and measure-specific combined approach, through designing clear and objective criteria for the purpose of each specific S&D measures and identifying the group of developing countries needing such policies. The more specific the thresholds are, the more S&D measures can effectively achieve their development targets.[441]

The new application of S&D with a more sophisticated differentiation among developing countries would strengthen the justification to provide S&D itself. This has been shown through the application of the concept of policy space, which will also enable the WTO to implement a mandate to strengthen S&D and to make them more precise, effective and operational. Both developed and developing country members also need to recognize the reality of divergence and the potential positive development impact of improved differentiation for developing countries. Such differentiation could especially be welcomed by developed countries, as well as small developing countries that have submitted requests for differentiated treatment and the recognition of their specific category. The approach of focusing on and minimizing the adverse effect caused by S&D measures proposed in this study would enable members to agree upon developing country differentiation by mitigating confrontations between or among developing countries and lessening the resistance to providing S&D. The approach aims to create momentum for the adoption of new applications of S&D with more sophisticated differentiation, through expanding acceptance not only by developed but also by developing country members.

The criticisms of S&D that a number of scholars have made focus on insufficiency and ineffectiveness, arguing that most S&D have been provided with uniform application for all developing countries despite different levels of development, that most of them have expired, and that they were granted as transitional measures until obligations under the WTO

[441] Paugam and Novel, "Why and How Differentiate Developing Countries in the WTO?", 13.

Agreement were met. S&D was therefore not aimed at promoting real economic development through world trade. In contrast, this study, founded on these criticisms, proposes a concrete approach to making S&D better suited to the era of diversification among developing countries and improving its effectiveness, through reexamining why S&D have been applied in a uniform manner and not been effective or meaningful for developing countries. This element constitutes an importance contribution to the establishment of a legal framework which promotes the development of marginalized countries through global trade.

Another significant contribution of this study is in suggesting how the WTO can establish a mechanism to promote the substantial development of countries that have been left behind, and as a result, to revitalize and enhance the universal value of the organization governing international trade. Achieving better and the more effective integration and substantial growth of LDCs and small-sized or low-income developing countries into the global trade regime will contribute to expanding world trade and boosting the world economy. It is beneficial not only for all members, but also for the multilateral trading system itself at this stage. Furthermore, the approach to S&D proposed in this study provides a meaningful reference for other preferential agreements or arrangements, including bilateral agreements and regional integration, which have signatories that are unequal actors and require differentiated treatment between or among member countries.

Finally, although this study has analyzed and made proposals focused only on two out of three types of S&D, those of market access and policy flexibility, it should be noted that technical assistance and capacity building are essential aspects of the substantial development of developing countries. It is of upmost importance to clearly recognize the role and compatibility of each type of S&D and their positive interactions for development, and to

provide balanced S&D so as to promote beneficial and effective economic growth in developing countries.

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