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Nkosi, Thembisile Maureen

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The meaning of 'developing country' under WTO Law

by

Thembisile Maureen Nkosi

Under the supervision of

Professor Franziska Sucker

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

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Declaration

I, Thembisile Maureen Nkosi, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through Turnitin and have attached the report to my submission.

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Abstract

From the General Agreement on Tariffs and Trade 1947 to its successor the World Trade Organization the principle of self-selection has been the method of determining development status. This has led to a proliferation of developing countries within the WTO, thus creating an imbalance of rights and obligations between Members. This current situation threatens the very existence of the WTO; hence this research paper proposes a legal definition of the term 'developing country' based on the interpretation of WTO law.

Most literature available focuses on the lack of a definition of the term developing country and what this means for the WTO. However, it appears that finding a meaning of the term is an exercise yet to be undertaken by most scholars of international law and international economic law alike. Thus, by considering factors used by other intergovernmental organizations to classify countries and analysing the provisions of Art XVIII (1) of the General Agreement on Tariffs and Trade 1994 this research paper shows that a developing country is a country with insufficient resources and one that is near the beginning of its economic growth.

Keywords: World Trade Organization, Self-Selection Principle, WTO Reform, Developing Country, Special & Differential Treatment

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I INTRODUCTION

In the World Trade Organization (WTO) Agreements, Members refer expressly to least developed countries (LDC's)[1] and developed countries,[2] and indirectly to all other countries commonly referred to as developing countries.[3] The status of a Member as one of each has implications for that Member's WTO obligations in terms of recourse to Special and Differential Treatment (S&DT). S&DT are WTO rules aimed at stimulating economic growth in less developed countries whilst integrating these countries into the WTO.[4]

Developing countries and LDC's benefit from S&DT, whilst developed countries do not. For example, Art XXXVI (4) of the General Agreement on Tariff and Trade 1994 (GATT) requires increased access to developed countries' markets for products originating from developing countries, while Art XXXVI (8) requires developed countries to not expect reciprocity for concessions they make in trade negotiations to reduce or eliminate barriers to the trade of developing countries. Furthermore, Art 9(2) of the Agreement on Safeguards permits developing countries to apply a safeguard measure for a period of up to ten years, whilst developed countries can only apply it for a maximum period of eight years.

LDC's, a subcategory of developing countries, are given even more S&DT i.e. they receive additional benefits to those received by all developing countries by reason of their special circumstances. For example, Art 27 (2) (a) of the Subsidies and Countervailing Measures Agreement allows LDC's to grant or maintain export subsidies, whilst denying the same benefit to developed countries and granting it to developing countries subject to certain conditions. Moreover, Art 24 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) requires developed and developing countries to exercise restraint in bringing legal proceedings under the procedures of the DSU against LDC's.

As a result, the developing country status has become contentious. The reason being some WTO Members like the United States and the European Union believe that some self-

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[1] Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) Art XI (2) 1867 U.N.T.S 154 (WTO Agreement).

[2] General Agreement on Tariffs and Trade 1994 (15 April 1994) Art XXXVI (8) 1867 U.N.T.S 190 (GATT).

[3] Ibid at Art XVIII (1) & XXXVI.

[4] Regis Y Simo 'Developing Countries and Special and Differential Treatment' in Kholofelo Kugler & Franziska Sucker (eds) *International Economic Law (southern) African Perspectives and Priorities* (2021) 257.

designated developing countries such as China and South Korea have experienced sufficient economic growth that they ought not to receive S&DT reserved for developing countries with less developed economies.[5] Moreover, and as shown later in this report, development status is a topic that features largely in current WTO reform debates for the reason mentioned above, as well as that some Members believe that the manner in which it is currently determined is a hinderance to the attainment of the WTO's objectives..

As there is no definition of developing country within the WTO, Members self-designate themselves as a developing country, whilst Members who fall within the LDC category are stipulated by reference to those recognised by the United Nations.[6] Given the contention about the benefits of receiving S&DT, it is likely that several developed countries will soon challenge the self- designated developing country status of some Members. As the panel would have to clarify whether the specific Member is in fact a developing country in terms of WTO law, in this report I propose the meaning of the term developing country in WTO law.

For this purpose, in the first part of this report I discuss LDC's as a special category of developing countries. In the second part I deal with the self-selection principle for non LDC's and the debate regarding access to S&DT for these countries. In the third part I ascertain the ordinary meaning of developing country. In the fourth part I discuss country classifications by other intergovernmental organizations, and the fifth part contains a detailed analysis of the provisions of Art XVIII (1) of GATT which suggest what a developing country may be. The sixth part contains my recommendation for restricted S&DT, and in the last part I show how the meaning of developing country proposed in this report can be incorporated into WTO law. A conclusion follows thereafter.

II LEAST DEVELOPED COUNTRIES AS A SPECIAL CATEGORY OF DEVELOPING COUNTRIES

Article XI (2) of the Marrakesh Agreement Establishing the WTO (WTO Agreement) stipulates that 'the least developed countries recognised as such by the United Nations 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

[5] Infra note 33 and 34.

[6] Article XI (2) of the WTO Agreement.

capabilities'.[7] LDC's, a subcategory of developing countries, are defined by reference to the UN's list which is included in WTO law and thus LDC's are clearly stipulated and change as the list changes. As of 19 December 2024, there are 44 LDC's on the list, with 32 located in Africa, eight in Asia, three in the Pacific and one in the Caribbean.[8]

The LDC category was established in 1971 by the UN General Assembly following a consensus by the international community that the most disadvantaged developing countries required special attention.[9] LDC's are defined as low-income countries with severe structural impediments to long-term economic growth.[10] The UN Committee for Development Policy (CDP) established three criteria for identification of LDC's which are GNI per capita, the Human Assets Index (HAI) and the Economic and Environmental Vulnerability Index (EVI).[11] GNI per capita measures the financial resources a country has.[12] The HAI and the EVI measure structural impediments to long term economic growth.[13] In the case of the HAI, the structural impediments are an unhealthy and illiterate population.[14]In the case of the EVI they are an economy that is vulnerable to trade shocks and an environment that is vulnerable to natural disasters.[15]

Furthermore, the CDP has established inclusion and graduation thresholds for each criterion. The inclusion threshold for GNI per capita is a total of three years' GNI per capita which is used by the World Bank to identify low-income countries,[16] and the graduation threshold is set at twenty per cent above the inclusion threshold.[17] The inclusion thresholds for the HAI and EVI criteria are currently set at 60 or below and 36 or above respectively.[18]

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[7] Article XI (2) of the WTO Agreement.

[8] United Nations 'List of Least Developed Countries (as of 19 December 2024)' available at *https://www.un.org*, accessed on 8 May 2025.

[9] United Nations General Assembly Res 2768 (XXVI) (18 November 1971).

[10] United Nations 'Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures' 5 ed available at *https://www.un.org*, accessed on 27 August 2025.

[11] Ibid at 7.

[12] United Nations op cit note 10 at 7.

[13] United Nations op cit note 10 at 7.

[14] United Nations op cit note 10 at 8.

[15] United Nations op cit note 10 at 8.

[16] United Nations op cit note 10 at 65.

[17] United Nations op cit note 10 at 65.

[18] United Nations op cit note 10 at 67 and 77.

Graduation thresholds are set at ten per cent above the inclusion threshold for the HAI criterion and ten per cent below the inclusion threshold for the EVI criterion.[19]

The CDP conducts reviews of the LDC criteria and list every three years with the intention to modify the criteria where necessary, identify countries that are eligible for inclusion in and graduation from the category.[20] To be included in the category a country must satisfy all three criteria, at the established inclusion thresholds.[21] However, to graduate from the category a country need only satisfy two of the criteria at the established graduation thresholds.[22]

Despite this, a country can still graduate from the category if its income is twice the normal graduation threshold even if it has not met the threshold for graduation for the other two criteria.[23] The reasoning behind the income only graduation is that the income such countries have at their disposal will allow them to face their structural challenges without requiring international support.[24] A decision whether a country should be included in or graduated from the category is made by the General Assembly, based on the CDP's recommendation which must be supported by the Economic and Social Council.[25]

Another important point to bear in mind is that for a country to be included in the category the approval of its government is required.[26] However, such approval is not required for graduation.[27] Furthermore, a country need only meet the inclusion criteria once in one review to be included in the category,[28] but it must meet the graduation criteria twice in two consecutive reviews to qualify for graduation from the category.[29] Lastly, a decision to include a country to the category takes effect immediately, whilst a decision to graduate it from the category becomes effective only after three years.[30]

As indicated in the introduction, LDC's are entitled to extra benefits that are not available to other developing countries. In addition to those already mentioned, others include Art 2 (d)

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[19] United Nations op cit note 10 at 67 and 77.

[20] United Nations op cit note 10 at 3.

[21] United Nations op cit note 10 at 7.

[22] United Nations op cit note 10 at 7.

[23] United Nations op cit note 10 at 7.

[24] United Nations op cit note 10 at 10.

[25] United Nations op cit note 10 at 3.

[26] United Nations op cit note 10 at 10.

[27] United Nations op cit note 10 at 12.

[28] United Nations op cit note 10 at 7.

[29] United Nations op cit note 10 at 7.

[30] United Nations op cit note 10 at 7.

of the Enabling Clause which requires special treatment for LDC's whenever measures are taken in favour of developing countries, Art 6 which provides that LDC's shall not be expected to make concessions that are inconsistent with their unique situation or problems, and Art 8 which requires other countries to consider the serious difficulty LDC's face in making concessions given their unique economic conditions and their development, financial and trade needs.

III SELF SELECTION FOR NON LDC DEVELOPING COUNTRIES AND THE DEBATE REGARDING ACCESS TO S&DT

Development status is currently determined through the principle of self-selection i.e. that is each WTO Member decides for itself whether it is a developed or developing country.[31] The WTO inherited the self-selection principle from its predecessor the General Agreement on Tariffs and Trade 1947 (GATT 1947),[32] and thus it forms part of custom and practice within the WTO.

Once a Member self-selects as developing, it automatically becomes entitled to S&DT. As a result, a debate has ensued regarding the introduction of criteria to determine who is developing i.e. who can access S&DT. In what follows I delve into the arguments made by both sides to the debate, after which I provide my assessment of these arguments.

(a) Proponents of reform

One of the most vocal proponents of reform of the way the WTO determines development status is the US. The US has complained mainly about the developing country status of China citing amongst others, the fact that China is the largest exporter of goods globally, that it has the second largest economy in the world, and that it is the largest producer and exporter of high technology products.[33]

Another proponent of reform is the EU. The EU has also decried the developing country status of China and South Korea amongst others, citing their share of global exports and the

[31] World Trade Organization available at *https://www.wto.org*, accessed on 1 September 2024.

[32] Regis Y Simo op cite note 4 at 258.

[33] WTO GC An Undifferentiated WTO: Self-declared Development Status Risks Institutional Irrelevance. Communication from the United States (14 February 2019) WTO Doc WT/GC/W/757/Rev.1.

significant disparities between their economies and those of other developing countries as reasons.[34] According to the US and the EU the fact that these advanced developing countries have access to S&DT to the same extent as their lesser developed counterparts is unfair to developed countries who have to bear all obligations. Moreover, it has diminished the benefits of S&DT to poorer developing countries.

(b) Opponents of reform

Developing countries on the other hand insist that the self-selection principle is the correct and only way for the WTO to determine development status. In support of their position they cite the relentless development divide between developed and developing countries,[35] and other challenges faced by most developing countries such as capacity constraints which hinder their ability to effectively implement negotiated outcomes at domestic level.[36] These they argue, render access to unconditional S&DT the only viable means to ensure that they derive benefits from the world trading system whilst simultaneously being integrated into it.[37]

These arguments were also echoed by China in its proposal on WTO reform addressed to the WTO General Council (GC) on 13 May 2019.[38] In this communication China proposed ways in which the WTO can improve S&DT for the benefit of developing countries including by providing tangible and targeted technical assistance and by reviewing S&DT provisions to ensure their effectiveness in line with Members' undertaking in the Doha Ministerial Declaration.[39]

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[34] European Union 'WTO Modernisation – Future EU Proposals on Rulemaking, Concept Paper' available at *https://circabc.europa.eu*, accessed on 5 May 2024.

[35] WTO GC The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness: Communication from China, India, South Africa, the Bolivarian Republic of Venezuela, Lao People's Democratic Republic, Plurinational State of Bolivia, Kenya, Cuba, Central African Republic and Pakistan (4 March 2019) WTO Doc WT/GC/W/765/Rev.2.

[36] Ibid.

[37] WTO Doc WT/GC/W/765/Rev.2 (2019) op cit note 35.

[38] WTO GC China's Proposal on WTO Reform: Communication from China (13 May 2019) WTO Doc WT/GC/W/773.

[39] Ibid.

(c) Observations

I find the arguments made by the proponents of reform convincing in that the WTO is a rules-based system.[40] This means Members' conduct is governed by rules and all Members must abide by the rules according to their classification. However, the currently observed binary classification applicable to all Members except LDC's fails to consider the different levels of economic development amongst developing countries. This allows more advanced developing Members to pick and choose the rules they want to abide by i.e. by invoking S&DT as and when it suits them.

As for the argument made by developing countries that the development divide between their economies and those of developed countries persists, I find it to be a weak argument because the issue does not lie in the differences between the economies of developed and developing countries but rather in the differences between the economies of developing countries themselves. As such, their insistence on unconditional S&DT for all self-declared developing countries not only works to the detriment of developed countries but also to that of economically weaker developing countries thereby delaying their economic growth.[41]

Moreover, in as much as capacity constraints are an issue in most developing countries, they do not all have the same capacity constraints or experience them to the same degree because of their different levels of development.[42] Hence, I find China's proposal that the WTO provide targeted technical assistance to be a contradiction in that for technical assistance to target specific needs, differentiation between developing countries is a prerequisite to determining what needs each of them has. The proposal regarding the review of S&DT to ensure its effectiveness is addressed below.

In addition to the above arguments made by both sides to the debate, I note the arguments made by some scholars. For example, Fan Ciu noted that developing countries are of the view that their access to S&DT should be secured by making it justiciable before the Dispute

[40] The rules are negotiated and agreed upon by all Members and are contained in the various agreements.

[41] For example, China and India are some of the largest providers of agricultural subsidies. However, since they classify as developing, they are not required to reduce these subsidies which are harmful to agricultural exports from other developing countries. See Keith M. Rockwell 'Why the development debate at the WTO has become a crisis' available at *https://www.hinrichfoundation.com,* accessed on 6 June 2025.

[42] For example, China cannot claim to have technological constraints, whilst South Africa cannot claim to have the same infrastructural constraints as Rwanda or Ghana.

Settlement Body (DSB).[43] He argues that legally non-binding S&DT can be attributed to the lack of a definition of developing country.[44] I find that access to S&DT does not require legal enforcement to be effective, rather it requires willingness on the part of S&DT grantors to grant it. Thus, giving meaning to the term developing country would allow for differentiation amongst developing countries i.e. those who meet all criteria versus those who meet some of the criteria, thereby determining the extent to which each developing country group can access S&DT. I find that this would bring about fairness and transparency into the world trading system thus paving the way for S&DT grantors to want to grant S&DT. I also find that S&DT would benefit more developing countries if granted willingly by S&DT grantors as opposed to when it is forced upon them via the DSB, even if that were possible.[45]

Notwithstanding this controversy, development status is still determined through the self-selection principle because there is still no definition of developing country in WTO law. However, Members who dispute that a self-declared developing country is entitled to benefit from certain S&DT provisions can challenge that country's developing status before the DSB.[46] This is because the term 'developing country' appears in WTO law[47] and is thus subject to panel interpretation. In what follows I endeavour to establish the meaning of this term.

IV ORDINARY MEANING OF DEVELOPING COUNTRY

According to the *Oxford Advanced Learner's Dictionary* (OALD) the term 'developing country' means a country that is 'poor and trying to make its industry and economic system more advanced'.[48] Moreover, the word 'poor' means 'having little money or little of something',[49] and the word 'advanced' means 'at a late stage of development'.[50] While a 'late

[43] Fan Ciu 'Who are the Developing Countries in the WTO' (2008) 1 *Law and Development Review* 150-1.

[44] Ibid.

[45] DSB decisions are binding only on the parties to the dispute, they do not affect the entire Membership.

[46] Regis Y Simo op cit note 4 at 258.

[47] For example, see the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.

[48] Diana Lea, Jennifer Bradbery, Victoria Bull, Leonie Hey, Stacey Bateman, Kallah Pridgeon & Garu Leicester (eds) *Oxford Advanced Learner's Dictionary* 10 ed (2020) 424.

[49] Lea, Bradbery & Bull et al op cit note 48 at 1193.

[50] Lea, Bradbery & Bull et al op cit note 48 at 22.

stage of development' can be determined, 'little money' is a vague term. Thus, the ordinary meaning of developing country is inconclusive.

V COUNTRY CLASSIFICATIONS BY OTHER INTERGOVERNMENTAL ORGANIZATIONS

Intergovernmental organizations like the World Bank, the International Monetary Fund (IMF) and the UN have developed their own ways of classifying countries. The UN only classifies LDC's which have already been discussed.[51] The IMF, in its annual surveys in which it analyses and projects the state of the global economy in the near and medium term based on current trends, classifies countries into two categories which are advanced and emerging and developing economies.[52] However, neither of these categories have been defined nor has any criteria been used to classify countries under each of them. As a result, this section only focuses on the World Bank's classification system.

The World Bank's mandate is to promote lasting economic growth and to reduce poverty.[53] In executing this mandate, the World Bank provides loans, amongst other services, to low- and middle-income countries for economic development projects.[54] To determine which countries are low and middle income, the World Bank classifies countries into four categories using income. The current four categories are low-income countries, lower - middle income countries, upper - middle income countries and high-income countries.[55]

Low-income countries are those with a GNI per capita of US$1 135.00 or less, lower - middle income countries have a GNI per capita between US$1 136.00 and US$4 495.00, upper - middle income countries have a GNI per capita between US$4 496.00 and US$13 935.00, and high - income countries have a GNI per capita above US$13 935.00.[56] Although the World

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[51] See section II above.

[52] International Monetary Fund 'World Economic Outlook Database – Groups and Aggregates' available at *https://www.imf.org*, accessed on 27 May 2025.

[53] World Bank Group available at *https://www.worldbank.org*, accessed on 5 May 2025.

[54] Through the International Bank for Reconstruction and Development for developing countries and creditworthy low-income countries and through International Development Association for low-income countries, see *https://www.worldbabk.org*, accessed on 1 May 2025.

[55] World Bank 'World Bank Country and Lending Groups' available at *https://www.worldbank.org*, accessed on 23 August 2025.

[56] Ibid.

Bank does not expressly refer to developed and developing countries in its classification, I find that such terminology is implied because only low and middle income countries are eligible for loans and other types of development assistance from the World Bank.[57] Moreover, the World Bank recorded that at least 50 per cent of the world's most poor people live in middle income countries[58] whilst low income countries account for most in the remaining 50 per cent.[59] Thus, this suggests that these countries are developing, and that high income countries are developed.

Despite that the World Bank determines a country's development status based on income, this method of classification does not automatically apply within the WTO because WTO law does not directly incorporate the World Bank's classification system into it, as is the case with the UN's classification of LDC's.[60] Moreover, non WTO law is not directly applicable in the WTO, except during dispute resolution proceedings when the panel clarifies provisions of WTO agreements.[61] Nevertheless, I find that income as a classification factor does provide guidance on what the term developing country means in WTO law. Thus, for this reason I consider it in my analysis of one of the phrases of Art XVIII (1) of GATT.

VI ARTICLE XVIII OF GATT

Prior to analysing Art XVIII (1) provisions, I first deal with some of the reasons why the WTO has not defined the term developing country and what the implications of this are. I also observe how WTO panels have treated development status. As mentioned earlier developing countries make up the majority of the WTO's Members. Moreover, a closer observation of them reveals big differences in their economies i.e. South Africa reported a GNI per capita of US$6,100 in 2024, while Brazil's was US$9,950 and Nigeria's was US$1,250.[62] India's population size is

[57] World Bank op cit note 54.

[58] World Bank 'World Bank Development Report 2024, Economic Growth in Middle – Income Countries Concept Note' available at *https://thedocs.worldbank.org*, accessed on 1 September 2024.

[59] World Bank 'Poverty and Inequality Spring 2024 Update' available at *https://thedocs.worldbank.org*, accessed on 1 May 2025.

[60] See section II above.

[61] Articles 31 (3) (a) and (c) of the Vienna Convention on the Law of Treaties 1155 U.N.T.S 331.

[62] World Bank Open Data 'GNI per capita, Atlas Method (current US$) available at *https://data.worlbank.org*, accessed on 28 August 2025.

bigger than that of any other developing country[63] and China's exports exceed those of any other developing country.[64] Thus, first I find that one of the reasons for a lack of a definition is the heterogeneity amongst developing countries.

Secondly, I also find another reason to be the lack of a consensus on what the term development means.[65] Does it encompass only economic, social or political aspects of development or is it all the above? Thirdly, I find the fact that the GATT 1947 was not designed to address development issues as another reason. As noted by Thomas J. Schoenbaum, developing countries were a minority at the inception of the GATT 1947,[66] and it was not until 1965 that contracting parties adopted Part IV of the GATT entitled 'Trade and Development' which deals specifically with the needs of developing countries.[67] This suggests that the concerns of developed countries dominated during the early years of the multilateral trading system, a legacy that was passed onto the WTO.

To add to this conundrum, one must also consider the implications of the WTO's failure to define the term, the most obvious being ineffective S&DT provisions. Developed countries are reluctant to grant preferential treatment to developing countries because of their number. The second is a complex accession process. This process has become cumbersome for acceding Members as developed countries use it to limit recourse to S&DT.[68] The third is fragmentation of WTO law in that when negotiations at multilateral level fail, Members with an interest in the trade subject in question take them at plurilateral level instead.[69]

Given the above, the next question that arises is how do WTO panels treat development status? In *European Communities (EC) – Conditions for the Granting of Tariff Preferences to Developing Countries*, the EC operated a GSP Scheme with five preferential tariff arrangements (PTAs). The first PTA, the General Arrangements (GAs), benefitted all

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[63] Worldometer 'Countries in the world by population (2025)' available at *https://www.worldometers.info,* accessed on 25 August 2025.

[64] WTO Doc WT/GC/W/757/Rev.1 op cit note 33.

[65] Kele Onyejekwe 'GATT, Agriculture and Developing Countries' (1993-1994) 17 *Hamline Law Review* 88.

[66] Thomas J. Schoenbaum 'The WTO and Developing Countries' (2005) 54 *The Journal of Social Science* 11.

[67] Ibid at 12. See also *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* infra note 72 para 107.

[68] Sonia E Rolland '"Developing Member" and Least Developed Country Status at the GATT and WTO: Self-Designation versus the Politics of Accession' in Sonia E Rolland *Development at the World Trade Organization* (2012) 83-7.

[69] For example, the Joint Initiative on e-commerce negotiations which may result in a plurilateral agreement being concluded thus excluding other Members.

developing countries who were selected as beneficiaries of the GSP Scheme. However, the other four PTAs only benefitted some of the developing countries who were beneficiaries of the GAs. Thus, the GSP Scheme differentiated between its beneficiaries, with some receiving more benefits than others.

This caused India, one of the developing countries who only benefitted under the GAs, thus receiving lesser benefits than other developing countries, to initiate a dispute against the EC. The relief sought by India was a finding that one of the PTAs, the Drug Arrangements (DAs), was inconsistent with Art 1(1) of GATT (the Most Favoured Nation provision) and unjustifiable under paragraph 2(a) of the Enabling Clause (which permits developed countries to grant preferential tariff treatment to developing countries).

Before arriving at its decision that the DAs were inconsistent with Art 1(1) of GATT and unjustifiable under paragraph 2(a) of the Enabling Clause, the panel had to interpret the term developing country as appears in paragraph 2(a) of the Enabling Clause, as well as the term 'non-discriminatory' as appears in footnote 3 to the same paragraph. The panel concluded that the term "non-discriminatory" meant that identical tariff preferences had to be provided to all developing countries without differentiation, except as regards the implementation of a priori limitations.[70] Moreover, the panel also concluded that "developing countries" in paragraph 2(a) means *all* developing countries except as regards the implementation of a priori limitations'.[71]

The EC appealed this decision and brought a secondary appeal in which it claimed that the panel erred in finding that the DAs are not justified under paragraph 2(a) of the Enabling Clause. The EC claimed that the panel arrived at this finding based on its erroneous interpretations of the terms 'non-discriminatory' in footnote 3 to paragraph 2(a) and 'developing country' in paragraph 2(a) of the Enabling Clause. The Appellate Body (AB) dismissed the secondary appeal but agreed with the EC that the panel's interpretations were incorrect. Accordingly, the AB ruled that the requirement that a GSP Scheme be "non – discriminatory" is met if the GSP Scheme provides identical treatment to all beneficiaries with the same "development, financial and trade needs" that the treatment aims to address.[72]

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[70] WTO Panel Report (WTO PR) *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (circulated 1 December 2003) WT/DS246/R 7.161

[71] Ibid para 7.174

[72] WTO Appellate Body Report (WTO AB/R) *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (circulated 7 April 2004) WT/DS246/AB/R 173.

Moreover, it also found that the term "developing country" in paragraph 2 (a) of the Enabling Clause means "all" similarly situated GSP beneficiaries.[73]

As seen from this case, neither the panel nor the AB applied the criteria in Art XVIII (1) to interpret the term 'developing country'. However, what is worth noting about the interpretation of the AB is that it permits differentiation between developing countries for S&DT purposes. Despite the panels' disregard of Art XVIII (1) provisions in their interpretations, I find usefulness in them in so far as the search for a meaning is concerned and for this reason, I consider them below.

Whilst there is no definition of developing country in WTO law, Art XVIII of GATT which is entitled 'Governmental Assistance to Economic Development' contains provisions which shed some light on what the term means. Article XVIII (1) identifies countries whose economies meet two requirements, that is they can only support low standards of living and are in the early stages of development. Moreover, upon further reading of the whole Art XVIII it is clear that its purpose is to allow countries whose economies meet both requirements, as signified by the word 'and' between the two phrases, to adopt otherwise GATT inconsistent measures provided such measures are aimed at stimulating growth of their economies and that the conditions prescribed by Art XVIII are met.

Thus, Art XVIII is a form of S&DT which is not directed exclusively at LDC's; hence I find that it is directed at developing countries in general because that is the only category of countries that is entitled to S&DT within the WTO. Although Art XVIII (1) provides some clues to the meaning of developing country, the phrases 'economies that can only support low standards of living' and 'economies in the early stages of development' are not defined anywhere in Art XVIII. Consequently, a clarification of both phrases in accordance with the customary rules of interpretation of public international law, as required by Art 3.2 sentence two of the DSU is necessary. These customary rules are codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT.) In clarifying both phrases, I examine their text, context, the object and purpose of GATT as reflected in Art XVIII and if necessary, resort to any relevant supplementary means of interpretation.

(a) What are 'economies that can only support low standards of living'?

[73] Ibid para 175 to 176.

According to Art 31 (1) of the VCLT, when interpreting a treaty, an interpreter is required to exercise good faith, give the terms of the treaty their ordinary meaning in the context in which they are used, whilst bearing in mind the object and purpose of the treaty. In line with these provisions, recourse must first be had to the ordinary meaning of the phrase.

(i) Ordinary meaning

The first sentence of Art XVIII (1) provides that Members 'recognise that the attainment of the objectives of this agreement will be facilitated by the progressive development of their economies…'.[74] The second sentence, which concerns the subject matter under discussion, states 'particularly of those contracting parties the economies of which can only support low standards of living…'.[75]

The first sentence is concerned with the steadily growth of all economies, whilst the second one emphasizes the steadily growth of economies that can only support low standards of living. The term 'low standards of living' has no special meaning. Thus, according to the OALD standard of living refers to 'the amount of money and level of comfort that a particular person or group has'.[76] The word 'low' in reference to a standard of living means 'below the usual or expected standard'.[77] Therefore, the phrase economies that can only support low standards of living refers to economies whose financial and other resources fall below the usual or expected standard. But what does this mean?

Apart from the dictionary meaning of standard of living, there is neither a common definition nor criteria for it.[78] However, it is accepted that the concept has to do with human well-being and includes both monetary and non-monetary aspects that are relevant to human well-being.[79] The United Nations Development Programme (UNDP), which is an organ of the

[74] Article XVIII (1) of GATT.

[75] Article XVIII (1) of GATT.

[76] Lea, Bradbery & Bull et al op cit note 48 at 1524.

[77] Lea, Bradbery & Bull et al op cit note 48 at 935.

[78] A combination of factors ranging from GDP, GNI, education, life expectancy, employment, access to goods and services can be used to measure a standard of living.

[79] Jani Kinnunen, Armenia Androniceanu & Irina Geogescu 'The Role of Economic and Political Features in Classification of Countries-in Transition by Human Development Index' (2019) 23 (4) *Informatica Economica* 26-7.

UN tasked with poverty eradication, amongst other things, uses the Human Development Index (HDI) to measure human well-being[80]. The HDI is composed of three criteria which are standard of living, education and health.[81] The first criterion measures the monetary aspect of human well-being, whilst the last two criteria measure the non-monetary aspects.[82]

Each criterion has an indicator that is used to measure the level of human well-being in it.[83] For instance, standard of living is measured using GNI per capita, health uses life expectancy at birth, and education uses expected years of schooling for children of school going age and average years of schooling for adults aged 25 years and older.[84] Once the HDI value for each criterion has been calculated, all values are added together and divided by three to get the overall HDI value of that country.[85]

Based on the HDI value of a country, the UNDP places the country into one of four categories which are low human development, medium human development, high human development and very high human development.[86] The HDI is compiled annually,[87] making it possible for countries to move between categories as their economic and social circumstances change.

Using the HDI as a guide, I argue that the usual or expected standard is that of countries that fall within the very high human development category. The reason being that most countries in the other three categories are characterised by several economic and social problems such as high levels of poverty, crime, unemployment and societal inequalities that do not exist in countries in the very high human development category.[88] Thus, these countries fall

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[80] United Nations Development Programme 'Human Development Index' available at *https://www.undp.org*, accessed on 5 May 2024.

[81] United Nations Development Programme 'Human Development Report 2023/2024 technical notes' at 3 available at *https://hdr.undp.org*, accessed on 5 May 2024.

[82] Ibid.

[83] United Nations Development Programme op cit note 81 at 3.

[84] United Nations Development Programme op cit note 81 at 3.

[85] United Nations Development Programme op cit note 81 at 4.

[86] United Nations Development Programme op cit note 81 at 4.

[87] United Nations Development Programme op cit note 80.

[88] India, South Africa, Brazil, and China all have varying elevated levels of poverty, South Africa has elevated levels of crime and unemployment, and both Brazil and South Africa have the most unequal societies in the world. For further study see Scott Rozelle & Matthew Boswell 'Complicating China's Rise: Rural Underemployment' (2021) 44:2 *The Washington Quarterly* 61, G.S Mathavan 'A Study on Effect of Population Growth on Economic Development in India' (2021-2022) 3 *Indian Journal of Law and Legal Research* 2, Juliana Pereira 'Income

short of the usual or expected standard and therefore qualify as economies that can only support low standards of living.

(ii) The context

For purposes of context, I have considered the first paragraph of the preamble to GATT, Art XVIII (2), and Art 55 of the Charter of the UN.

The first paragraph of the preamble to GATT

The first sentence of the first paragraph of the preamble to GATT contains the words 'with a view to raising standards of living'.[89] The second sentence provides, 'ensuring full employment and a large and steadily growing volume of real income and…'.[90] I find that provisions in the second sentence confirm that the standard of living embodies both monetary and non-monetary aspects i.e. the word 'income' representing the monetary aspect and the word 'employment' representing the non-monetary aspect.

Moreover, I find that these provisions confirm that for the standard of living to rise employment must be widespread as represented by the word 'full' before the word employment, and that income must increase as represented by the words 'a large and steadily growing volume of' before the words real income. I further find that education, employment and income as components of the standard of living concept[91] are interrelated in that education leads to good employment opportunities and ultimately to a rise in income.

Article XVIII (2)

Inequality and Social Mobility in Brazil' (2024) 8 (2:2) *International Journal of Sociology* 13 at 17, Rahul Mehta 'Education Investment and Human Capital Development in India' (2024) 9 (1:5) *Journal of Poverty, Investment and Development* 51 at 53, Data Pandas 'Wealth Inequality By Country 2025' and 'Unemployment by Country 2025' available at *https://www.datapandas.org*, accessed on 23 March 2025.

[89] Preamble to GATT.

[90] Preamble to GATT.

[91] See discussion under 'ordinary meaning' where HDI uses education as one of its components.

The second sentence of Art XVIII (2) contains the words 'to raise the general standard of living of their people'.[92] I find that these words confirm that the unit of measurement of a standard of living is the whole population of a country.

Article 55 of the Charter of the UN

The Charter of the UN is the founding document of the UN which embodies, among other things, the objectives of the UN. It has been signed and ratified by most countries who are also Members of the WTO making it binding on them. Article 55 (a) of the Charter of the UN is referred to because it deals with the same subject matter as the phrase being interpreted i.e. the standard of living. Thus, I find that Art 55 (a) is a relevant rule of international law applicable in relations between WTO Members as envisaged in Art 31 (3) (c) of the VCLT and as such, it constitutes context for purposes of interpretation of this phrase.

In Article 55 (a) of the Charter, members of the UN have undertaken to promote 'high standards of living, full employment and conditions of economic and social progress and development'.[93] I find that the use of the words 'full employment' immediately after the phrase 'high standards of living' shows that widespread employment is one of the ways to achieve high standards of living. Thus, this confirms that employment can also be used as a factor to measure living standards.

As seen above, the provisions used as context for this phrase do not define what a standard of living is. However, they do provide clues as to how it can be measured. I find that these clues are consistent with the ordinary meaning of this phrase.

(iii) Object and purpose

In determining the object and purpose of GATT through Art XVIII (1), I start with the title of Art XVIII as a whole. As mentioned earlier, the Art is entitled 'Governmental Assistance to Economic Development'. This title already suggest that the Art is concerned with the growth of economies.

[92] Article XVIII (2) of GATT.

[93] Article 55 para (a) of the Charter of the United Nations (24 October 1945) 1 U.N.T.S XVI.

However, and upon reading Art XVIII (1), one recognises that it is especially concerned with the growth of specific economies, that is economies that can only support low standards of living, and which are in the early stages of development. This suggests two things; one is that these economies are different from others hence they are singled out by these provisions and the other is that their difference from others lies in their lack of growth or insufficient growth which according to Art XVIII (1) is a hinderance to the attainment of the objectives of GATT. Thus, I find that the object and purpose of GATT as reflected in Art XVIII (1) is the growth of economies referred to therein. Furthermore, I find that the meaning of the phrase 'economies that can only support low standards of living' is consistent with this object and purpose in that economies that have either not experienced any growth at all or have only experienced insufficient growth are likely to have resources that fall short of the usual or expected standard.

Supplementary means of interpretation are dealt with at the end of the entire legal analysis because the content is the same for both phrases. Thus, having analysed the first phrase, I find that its ordinary meaning is consistent with its context and the object and purpose of GATT as contained in Art XVIII (1). In the next section I explore the meaning of the second phrase.

(b) What are 'economies in the early stages of development'?

(i) Ordinary meaning

The second sentence of Art XVIII (1) requires economies that can only support low standards of living to also be 'in the early stages of development'. According to the OALD the word early means 'near the beginning of a period of time, an event etc.'[94] The word stage means 'a period or state that something passes through while developing or making progress'.[95] The word development means 'the steady growth of something so that it becomes more advanced or stronger'.[96] I find that economies in the early stages of development thus means economies that are near the beginning of their economic growth.

[94] Lea, Bradbery & Bull et al op cit note 48 at 489.

[95] Lea, Bradbery & Bull et al op cit note 48 at 1519.

[96] Lea, Bradbery & Bull et al op cit note 48 at 424.

(ii) The context

For purposes of context, I consider the preamble to GATT, Art XVIII (2) and (3), and Ad Article XVIII (2) of Annexure I of GATT.

The preamble to GATT

The last sentence of the first paragraph of the preamble to GATT contains the words 'developing the full use of the resources of the world…'.[97] According to the OALD the word full means 'complete' and 'to the highest level or greatest amount possible'.[98] This suggests that the resources of the world are not in full use because they are not all in use or they are not all used to their maximum. Moreover, upon reading the whole of the first paragraph one can deduce that the reason why that is so is because not all economies are fully developed. Thus, I find that the resources that are either not in use or are not used to their maximum are those of economies near the beginning of their growth.

Article XVIII (2) and (3)

The first sentence of Art XVIII (2) recognises the need for countries whose economies meet the requirements of Art XVIII (1) to take GATT inconsistent measures necessary for them to implement their economic growth policies, for as long as such measures are likely to foster the attainment of GATT's objectives. The second sentence extends the benefit granted to these countries in the first sentence by granting them additional benefits to, amongst other things, impose tariffs for purposes of protecting the establishment of a particular industry.

The second sentence of Art XVIII (3) recognises that there may be circumstances where no measure consistent with GATT provisions is practicable to allow a contracting party undergoing a process of economic development to grant the governmental assistance required to promote the establishment of particular industries with the aim of raising the general standard of living of its people. I find the ordinary meaning of 'economies in the early stages

[97] Para 1 of Preamble to GATT.

[98] Lea, Bradbery & Bull et al op cit note 48 at 641.

of development' to be consistent with the 'newly established industries' referred to in both these Articles because economies in advanced stages of development are more likely to have well established industries.

Ad Art XVIII (2) of Annexure I of GATT

The first sentence of Ad Art XVIII (2) states that 'the phrase in the early stages of development is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to…'.[99] According to the OALD the word industrialise means to 'develop industries'.[100] Thus, I find the ordinary meaning of this phrase to be consistent with 'contracting parties which have just started their economic development'[101] and those which are 'undergoing a process of industrialisation'.[102]

(iii) Object and purpose

Upon a reading of Art XVIII one can see that its object and purpose is to permit countries whose economies meet both requirements of Art XVIII (1) to take otherwise GATT inconsistent measures to protect, amongst other things, their newly established industries. Thus, I find that the ordinary meaning of the phrase 'economies in the early stages of development' is consistent with this object and purpose in that newly established industries requiring the protection provided for in Art XVIII are more likely to exist in economies near the beginning of their economic growth.

(*iv) Supplementary means of interpretation*

Article 32 of the VCLT permits a treaty interpreter to have recourse to supplementary means of interpretation which includes the negotiating history of the treaty and circumstances

[99] Ad Art XVIII (2) of GATT.

[100] Lea, Bradbery & Bull et al op cit note 48 at 810.

[101] Ad Art XVIII (2) of GATT.

[102] Ad Art XVIII (2) of GATT.

surrounding its conclusion so as to confirm the meaning resulting from the application of Art 31 or to determine the meaning if the interpretation according to Art 31 either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. I find that the meaning of both phrases in Art XVIII (1) as derived from the application of Art 31 requires no further confirmation, nor is it ambiguous or obscure. Thus, recourse to the provisions of Art 32 of the VCLT is not necessary.

With the analysis of the provisions of Art XVIII (1) complete, the questions that must now be answered are when does economic growth begin? And how is it measured? Using the analysis as a basis, I find that economic growth begins when the economy establishes new industries. Moreover, and because this requires capital investment in an economy which is normally in the form of the latest equipment and machinery, such investment is likely to lead to an increase in the production of goods and services.[103] Thus, I find that economic growth is best measured in terms of Gross Domestic Product (GDP),[104] with the necessary adjustments being made for inflation.[105]

In the next subsection I examine the economies of a few Members of the WTO who identify as developing to determine if they qualify and could arguably classify as such.

(c) Application to several self – designated developing countries

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(i) China

The 2023/2024 Human Development Report (HDR) shows that China falls within the high human development category. However, a close study of its economy shows that it surpassed the US as the world's number one manufacturing country since 2010.[106] According to the United Nations Industrial Development Organization's Competitive Industrial Performance Index 2025 (UNIDO's CIPI 2025) which measures 153 countries' capacity to produce and

[103] Equipment used to run businesses usually embodies modern technology, thus providing employees with new, better, and faster ways of doing things.

[104] Tim Callen 'Gross Domestic Product: An Economy's All' available at *https://www.imf.org*, accessed on 1 December 2024.

[105] Ibid.

[106] Felix Richter 'These are the top 10 manufacturing countries in the world' available at *https://www.weforum.org*, accessed on 6 February 2025.

export manufactured goods, their technological progress and world impact on manufacturing activity, China is ranked number two.[107] Moreover, it contributed over 27.7 per cent to global manufacturing output in 2024,[108] and its manufacturing industry is diverse boasting products such as electronics (in which it is the world leader), machinery, textiles and automotive.[109] Thus, although it qualifies as an economy that can only support low standards of living, it is not in the early stages of development.

(ii) India

According to the 2023/2024 HDR India falls under the middle human development category. However, in 2024 India was listed as one of the world's top manufacturing countries,[110] with a diverse and growing manufacturing sector in areas such as automotive, electronics, textile, and pharmaceuticals.[111] It ranks number 37 in UNIDO's CIPI 2025,[112] and it contributed 2.91 per cent to global manufacturing output in 2024.[113] Moreover, and of importance is that India's manufacturing sector is ahead of its counterparts in some developed countries like the UK and Italy.[114] Thus, although India is an economy that can only support low standards of living, it is not in the early stages of development.

(iii) Brazil

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[107] United Nations Industrial Development Organization 'Competitive Industrial Performance Index 2025 available at *https://stat.unido.org*, accessed on 29 August 2025.

[108] Safeguard Global 'Top 10 Manufacturing Countries in the World in 2025' available at *https://www.safeguardglobal.com*, accessed on 29 August 2025.

[109] Spherical Insights 'World's Largest Manufacturing Countries in 2024' available at *https://www.sphericalinsights.com*, accessed on 3 June 2025.

[110] Spherical Insights op cit note 109.

[111] Spherical Insights op cit note 109. See also David Elliot '6 countries successfully growing their manufacturing - and what they are doing right' available at *https://www.weforum.org*, accessed on 2 June 2025.

[112] United Nations Industrial Development Organization op cit note 107.

[113] Safeguard Global op cit note 108.

[114] Richter op cit note 106.

The 2023/2024 HDR shows that Brazil falls under the high human development category. However, in so far as the country's production capabilities are concerned, Brazil was listed number ten on the list of the world's top manufacturing countries in both 2023 and 2024,[115] with a 1.8 per cent contribution to global manufacturing output in 2023.[116] It ranks number 42 on UNIDO's CIPI 2025.[117] Furthermore, and like China and India, its production sector spreads across areas such as steel, automotive, textiles, and food processing.[118] Brazil has also been listed as one of six countries in 2025 with a growing manufacturing sector.[119] Thus, although it meets the requirement of an economy that can only support low standards of living, it fails to meet the requirement of an economy in the early stages of development.

(iv) South Africa

South Africa is listed under the high human development category in the 2023/2024 HDR. However, UNIDO's CIPI 2025 ranks South Africa at number 53, placing it in the second of three categories of the world's most manufacturing economies.[120] It has a diverse manufacturing sector, i.e. automotive, textiles, clothing and footwear, metals, chemicals etc.,[121] and is considered the most industrialised economy on the Continent.[122] On this basis I argue that most of South Africa's industries are well established. As such, although it meets the requirement of an economy that can only support low standards of living, it fails to meet the requirement of an economy in the early stages of development.

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[115] Helen Sydney Adams 'Top 10 manufacturing countries' available at *https://manufacturingdigital.com*, accessed on 3 June 2025 & Spherical Insights op cit note 109.

[116] Felix Richter 'China is the World's Manufacturing Superpower' available at *https://www.statista.com*, accessed on 3 June 2025.

[117] United Nations Industrial Development Organization op cit note 107.

[118] Spherical Insights op cit note 109.

[119] Elliot op cit note 111.

[120] United Nations Industrial Development Organization op cit note 107.

[121] Embassy of the Republic of South Africa Lisbon, Portugal 'Manufacturing in South Africa' available at *https://www.southafrica.net*, accessed on 9 June 2025.

[122] Palesa Mnguni & Witness Simbanegavi 'South African Manufacturing: A situational analysis' available at *https://www.resbank.co.za*, accessed on 9 June 2025.

Despite this, South Africa initially classified itself a developed country in GATT 1947 and negotiated in that capacity in the Uruguay Round.[123] However, it later claimed S&DT thus reclassifying itself as developing.[124] This shows how easy it is for countries to change their development status, leading to abuse of S&DT. Moreover, it underscores the need for a meaning of developing country.

Having concluded that these four countries do not meet the formal requirements for developing status, the question that arises now is how should the WTO deal with them? Before answering this question, I address some important points for consideration regarding these four countries. First, they are the largest members of the developing country group with significant influence in international affairs.[125] Secondly, some are rich in natural resources which are necessary for the stability of global value chains.[126] Thirdly, all of them are large trading partners of both developed and developing countries.[127] Fourthly, they have formed a strong alliance with each other and other developing countries within the WTO who benefit from their collective influence.[128] Thus, their Membership within the WTO is crucial. Moreover, I find that any attempt to separate them from the developing country group is likely to be met with resistance from not only them, but from most developing countries as well thereby worsening the legitimacy crisis within the WTO.

However, the WTO is a member driven organization i.e. decisions are taken by Members and are usually influenced by their political interests. As such, political compromises are not only possible but are part of the fabric of the WTO.[129] For this reason I suggest that Members

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[123] Franziska Sucker '(Southern) African Priorities in International Economic Law' in Kholofelo Kugler & Franziska Sucker (eds) *International Economic Law (southern) African Perspectives and Priorities* (2021) at 28.

[124] Ibid.

[125]They are part of the BRICS and G20 groups.

[126] Brazil is rich in minerals such as iron ore and aluminium amongst others and South Africa is rich in gold, diamonds and coal amongst others.

[127] World Population Review 'Leading Trade Partners by Country 2025' available at *https://worldpopulationreview.com*, accessed on 27 August 2025.

[128] Fo example, they are usually at the forefront of issues affecting developing countries in the WTO. See WTO Doc WT/GC/W/765/Rev.2 op cit note 35.

[129] One example of such compromise can be seen in para 2 of Art 27 of the Subsidies and Countervailing Measures Agreement where developing country Members are treated differently for S&DT purposes i.e. the prohibition on export subsidies does not apply to developing countries listed in Annex VII of the Agreement, whilst it is only suspended for a period of eight years from the date of entry into force of the WTO Agreement for others.

negotiate a compromise that will see these four developing countries retaining their developing status, subject to restricted access to S&DT. I find this approach to be the most feasible way of balancing the interests involved in that it will not only address the real concern which is access to S&DT, but it is also likely to gain support from other less developed developing countries because it allows them to keep their allies and also receive more S&DT benefits from developed countries. In the next section I demonstrate how access to S&DT can be restricted based on each developing country's level of development.

VII TIERED S&DT MODEL

Several proposals on how access to S&DT can be restricted for non LDC developing countries have been made by different sources. For example, the US proposed that any country that is a member of the group of 20 (G20) should not have access to S&DT.[130] I disagree with this proposal in that membership of the G20 is not based on any specific criteria. The current membership is made up of economies that are large and have influence in international affairs.[131] However, that does not mean they are all at the same level of development.[132] Moreover, I find that denying S&DT to all WTO Members who are members of the G20 would discourage other developing countries from joining the G20 thus hindering agreements at multilateral level.[133]

The EU proposed a needs driven and evidenced based approach to ensure targeted S&DT.[134] I find this to be the most feasible way to restrict access to S&DT provided certain objective development criteria are used as evidence of the need for S&DT. For example, GNI/GDP per capita, human development indicators etc. Hence, I suggest that the provisions of Art XVIII (1) be used because it is possible to formulate objective criteria from them i.e. HDI (to prove a low standard of living) and infant industries (to prove early stages of

[130] WTO GC Draft General Decision: Procedures to strengthen the negotiating function of the WTO: Communication from the US (15 February 2019) WTO Doc WT/GC/W/764.

[131] See note 125 above.

[132] For example, South Africa may be the most industrialised country on the Continent but when compared to its Western counterparts it comes short in many ways i.e. GDP/GNI per capita, technological progress, manufacturing and export capabilities etc.

[133] The G20 is an informal group created to discuss matters of mutual interest to its members. These informal discussions are conducive to Agreements on related issues at multilateral level and should thus be encouraged.

[134] European Union op cit note 34 at 7.

development). For example, all countries classified under any of the bottom three categories of the HDI would be entitled to S&DT. However, their access to it would be restricted according to the HDI category the country falls under. Those falling under the low human development category would be entitled to more S&DT vis a vis those falling under the medium and high human development categories. The same rules would apply between those in the medium versus those in the high human development category.

In addition to this, developing countries with infant industries should be entitled to S&DT only if they can prove that the benefits of granting it outweigh the costs. Moreover, the margin by which the benefits outweigh the costs can be used as guidance for how much S&DT should be granted. The narrower it is, the lesser the S&DT granted should be and the wider it is, the more the S&DT granted should be. Lastly, I suggest that the level of access to S&DT go hand in hand with the number of obligations a country assumes within the WTO i.e. the lesser the access to S&DT, the more obligations a Member should have. In the next section I consider how the WTO can adopt the meaning proposed in this report.

VIII HOW TO INCORPORATE THE MEANING OF DEVELOPING COUNTRY INTO WTO LAW FOR APPLICATION BY PANELS

Article IX (2) of the WTO Agreement permits the Ministerial Conference (MC) and the GC to adopt an interpretation of provisions of all WTO agreements, provided an interpretation of any provision of the Multilateral Trade Agreements is preceded by a recommendation from the Council responsible for the functioning of that agreement. Moreover, Art IX (2) provides that a decision to adopt any such interpretation shall be taken by a three fourths majority of the Members. Thus, the meaning of developing country proposed in this report can be incorporated into WTO law thus becoming binding on all Members by a three fourths majority of either the GC or MC, following a recommendation by the Council for Trade in Goods.

Notwithstanding the feasibility of adopting this meaning, I foresee difficulty in obtaining this kind of majority given the political sensitivity of this issue.[135] However, large developing countries need to understand that for them to continue reaping the benefits of the world trading system which have thus far seen their economies grow, they must give a little more. The alternative is for aggrieved Members to walk away, which is no alternative.

[135] WTO Doc WT/GC/W/764 op cit note 130.

IX CONCLUSION

From its broken dispute settlement system to Members' issues regarding access to S&DT, the WTO is facing significant challenges. Most Members have declared themselves developing and thus entitled to S&DT, whilst a minority of developed countries carry greater obligations within the organization. This threatens the legitimacy and longevity of the WTO. Thus, for the objectives of the WTO to be realised, WTO law must clarify the meaning of developing country to determine who can access S&DT. The only way to do this is for Members, particularly the large developing countries, to negotiate in good faith and be willing to meet developed Members halfway.

However, seeing that good faith negotiations are yet to occur, this contribution seeks to clarify the meaning of this term. By exploring factors used by other intergovernmental organizations to classify countries and analysing the criteria in Art XVIII (1) of GATT, I have found that a developing country is a country with insufficient resources and one that is near the beginning of its economic growth. During my research, I discovered that most of the literature deals with the lack of a meaning of the term and the implications of this for the WTO. This suggested the absence of discourse on what the meaning is. Thus, rather than providing a conclusive answer to the question, the meaning proposed in this report is intended to stimulate a debate aimed at finding a common definition of developing country in WTO law.

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