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ARTICLE

Reimagining the Special and Differential Treatment Provisions in the WTO's Dispute Settlement Understanding

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Abstract

The developed and developing members of the World Trade Organization (WTO) are deeply divided on the concept, scope, and beneficiaries of the special and differential treatment (SDT) provisions. The division was revealed in the Committee on Trade and Development meetings, where developed members rejected the Group of 90's proposals to strengthen and operationalize SDT provisions in WTO agreements. This article focuses on the SDT provisions in the Dispute Settlement Understanding (DSU), positing that the provisions are ineffective in upholding the WTO's development objectives. It analyses the extent to which the needs and circumstances of low-income developing countries and least-developed countries have been considered by the WTO adjudicating bodies through the application and interpretation of SDT provisions in the DSU. The article seeks to reimagine SDT provisions' role in the DSU through secondary lawmaking and progressive treaty interpretation to ensure development is integrated into the WTO's Dispute Settlement Mechanism.

Keywords: Special and Differential Treatment (SDT); World Trade Organization (WTO); Dispute Settlement; Least Developed Countries (LDCs); Low-income Developing Countries (LIDCs)

Special and Differential Treatment (SDT) provisions encapsulate dialogues of convergence between the economic centre and the periphery to bridge the significant gap between the developed and developing members of the World Trade Organization (WTO). The purpose and objective of SDT provisions have evolved significantly since first being introduced, reflecting the changing role and perception of developing countries in the system. Before the introduction of SDT, developing countries participated as equals in all tariff negotiations and disputes. In 1954–5, the General Agreement on Tariff and Trade (GATT) introduced the first SDT provision by revising Article XVIII, allowing developing countries to use trade restrictions to address balance-of-payment problems and protect infant industries. Later, in 1979, the Enabling Clause gave a legal basis to the Generalized System of Preferences, under which developed countries could offer non-

reciprocal preferential treatment to products from developing countries.[1] As an outcome of the Uruguay Round of negotiations, and with the establishment of the WTO, a range of SDT provisions was introduced into the WTO agreements to promote trade between developing and developed countries and to preserve domestic policy instruments that could be used in pursuit of development policies. However, while these SDT provisions benefitted developing countries, albeit in "best-endeavour" language, some require developing countries to take on additional obligations and implement significant national reforms. Despite numerous deliberations in the WTO's Committee on Trade and Development (CTD) and academic voices emphasizing the inadequacy and ineffectiveness of these provisions, meagre action has been taken to ameliorate the grievances of developing countries and address the development objectives of the WTO in a meaningful way. A reform of SDT provisions is currently being debated in the WTO, where deep-rooted division exists between the developing and developed members of the WTO regarding the concept, scope, and beneficiaries of SDT provisions. While developing countries consider these provisions their institutional right and entitlement, developed countries believe that the advanced developing countries are taking advantage of SDT provisions and are unwilling to attach the status of "entitlement" to SDT.[2]

At this juncture, this article examines the efficacy of the SDT provisions in the WTO's Dispute Settlement Understanding (DSU)[3] to understand whether the WTO's development objectives embodied in the preamble of the WTO Agreement are reflected in these SDT provisions.[4] The first paragraph of the preamble provides for the development objectives of "raising standards of living, ensuring full employment ... with the objectives of sustainable development ... in a manner consistent with their respective needs and concerns at different levels of economic development".[5] The second paragraph of the preamble articulates the development objectives and philosophy behind the SDT provisions: "there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".[6]

If we focus on the two fundamental pillars of the WTO as an effective international organization, they are (1) the principle of special and differential treatment, captured precisely in these two paragraphs of the preamble, which holds all the members of the WTO together and (2) a rules-based, as opposed to a power-based, dispute settlement mechanism, where all countries, despite the level of their economic development, are expected to have access based on rules that are fair and equitable.[7] By contrast, a power-based system means that only members with economic and political power have access to an effective dispute settlement. A group of African countries precisely captured their expectation from the WTO Dispute Settlement Mechanism (DSM) in this way:

[1] *The Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of 28 November 1979, L/4903, GATT BISD (26th Supp) at 203.

[2] James BACCHUS and Inu MANAK, *The Development Dimension: Special and Differential Treatment in Trade* (Abingdon, Oxon; New York, NY: Routledge, 2021) at 2. Developing Members of the WTO self-declare their status as developing countries since WTO has not adopted any criteria to determine who the developing countries are. It is only for the least-developed countries that a United Nations (UN) definition based on set criteria is being used.

[3] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 to *the Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3 (entered into force on 1 January 1995) [*DSU*].

[4] *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3 (entered into force on 1 January 1995) [*WTO Agreement*].

[5] *Ibid.*

[6] *Ibid.*

[7] Antoine BOUET and Jeanne METIVIER, "Is the Dispute Settlement System, 'Jewel in the WTO's Crown', Beyond Reach of Developing Countries" (2020) 156(1) Review of World Economics 1 at 2.

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> It should be clearly affirmed, that the DS is not just about expedition or speed, it is also about real justice to all Members; and that the DS must be part of the mechanisms for attaining the development objectives of the WTO as an institution.[8]

This research examines whether SDT provisions within the DSU effectively achieve the WTO's development objectives. The article is divided into three parts. Part I critically examines the SDT provisions within the DSU and the approach taken by the WTO adjudicating bodies comprising the panel, the Appellate Body (AB), and the arbitrators in interpreting and applying these provisions in litigation and arbitration cases. The analysis in Part I sheds light on why SDT provisions in the WTO DSU should be reimagined to benefit the WTO's low-income developing countries (LIDCs) and Least Developed Countries (LDCs). Part II makes two categories of suggestions – secondary lawmaking and progressive treaty interpretation – for reimagining the SDT provisions and operationalizing them to achieve the development objectives of the WTO. Part III concludes the article.

I. SDT Provisions in the DSU

This part analyses the scope of the SDT provisions in different stages of dispute settlement, their invocation by the WTO members, and their interpretation by the panel and the AB to highlight how the gaps in the drafting resulted in uncertainty in their application. Although development arguments have been made under provisions that are not SDT provisions,[9] a discussion of all these provisions is beyond the scope of this article.

The DSU sets out the procedures and processes that govern the WTO's dispute settlement system. The Dispute Settlement Body (DSB) regulates the DSU and administers consultation, litigation, implementation, and arbitration processes. To do so, the DSB is authorized to establish panels, adopt panel and AB reports, maintain surveillance over the implementation of rulings and recommendations, and approve the suspension of concessions and other obligations.[10] A central objective of the DSU is to provide "security and predictability in the multilateral trading system".[11] To achieve this objective, the panel and the AB need to interpret the WTO agreements clearly and logically while considering the economic disparity of the WTO's respective members.

When the DSU was drafted, negotiators were concerned about the disadvantaged positions of LIDCs and LDCs when attempting to bring their legal disputes against developed countries and when complaints are brought against them.[12] To address this disparity and to take into account the development concerns of developing countries, SDT provisions were incorporated into the DSU.[13] The WTO CTD identified eleven SDT

[8] WTO Dispute Settlement Body Special Session, *Negotiations on the Dispute Settlement Understanding – Proposal by the African Group*, WTO Doc TN/DS/W/15 (15 September 2002) at 7, para. 13.

[9] Sonia E. ROLLAND, *Development at the WTO* (Oxford: Oxford University Press, 2012) at 182–9.

[10] *DSU*, *supra* note 4, arts. 2, 23.

[11] *DSU, supra* note 4, art. 3.2; *Singapore Ministerial Declaration*, WT/MIN(96)/DEC (18 December 1996) (at para. 9.

[12] Victor MOSOTI, "Does Africa Need the WTO Dispute Settlement System?" (2003) International Centre for Trade and Sustainable Development, Resource Paper No 5 at 82.

[13] *DSU*, *supra* note 4, arts. 3.12; 4.10; 8.10; 12.10; 12.11; 21.2; 21.7; 21.8; 24.2; and 27.2; World Trade Organization, *A Handbook on the WTO Dispute Settlement System* (Cambridge: Cambridge University Press, 2004) at 111 and 113; Andrea M. EWART, "Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment Through Reforms to Dispute Settlement" (2007) 35 Syracuse Journal of International Law and Commerce 27 at 42–3; Gregory SHAFFER, "How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies" (2003) International Centre for Trade and Sustainable Development, Resource Paper 5 at 25; Peter KLEEN and Sheila PAGE, "Special and Differential Treatment of Developing Countries in the World Trade Organization" (2005) Global Development Studies No. 2 at 9; Emanuel ORNELAS, "Special and Differential Treatment for Developing Countries", CESIFO Working Paper No. 5823 Category 8: Trade Policy, March 2016 at 16.

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provisions in the WTO DSU,[14] of which seven – Articles 4.10; 8.10; 12.10; 12.11; 21.2; 21.7; and 21.8 – fall under the category of provisions for safeguarding the interests of developing countries. Other relevant articles include Article 3.12, which relates to "flexibility of commitments, of action, or use of policy instruments"; Article 27.2, which concerns "technical assistance"; and Article 24.1, which is a specific provision relating to LDC members.[15] Aside from these provisions, in 1966, a special procedure was adopted under the GATT for developing countries, which provided for the automatic creation of panels on request and a fixed timeframe for each stage of the procedure. This has become a common feature of the dispute settlement mechanism, applicable to all members.

A. SDT in Consultation Process

The WTO dispute settlement process commences when a member makes a complaint to the WTO DSB seeking redress for the violation of obligations, or for the nullification or impairment of benefits under WTO-covered agreements, or for an obstruction to achieve the objectives of the agreements by another member.[16] Article 4 of the DSU sets out the rules for the consultation phase of the WTO's dispute settlement system, whereby members can settle without litigation.[17] If negotiations reach an impasse, the panel procedure can be invoked automatically by the DSB at the request of the complaining party.[18] Two SDT provisions are relevant at the consultation stage: Articles 4.10 and 12.10. The first part of Article 12.10 applies to consultation, while the second part relates to the panel process, which will be discussed under the panel process.

Article 4.10 states that "[d]uring consultations members should give special attention to the particular problems and interests of developing country members".[19] The section is broad without clarifying the developing countries' particular difficulties and interests that should be considered during the consultation phase. The vaguely worded provision is somewhat problematic; the diverse range of developing countries are at different development levels, with various concerns and interests affecting LIDCs and LDCs. To reinforce, "should" renders the provision declaratory rather than mandatory.[20] As such, the parties are not strictly bound to comply with the provision that considers the interests of developing countries. The political nature of the bargaining between the parties in the consultation stage underscores the need for clearer provisions in Article 4.10.

The difficulties ensuing from the declaratory nature of Article 4.10 of the DSU are illustrated in the *United States – Measures Affecting the Cross Border Supply of Gambling*

[14] *DSU*, *supra* note 4, arts. 3.12; 4.10; 8.10; 12.10; 12.11; 21.2; 21.7; 21.8; 24.2; and 27.2 WTO Committee on Trade and Development, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc WT/COMTD/W77 (25 October 2000) at 3, 71, 72, 73; WTO Committee on Trade and Development, *Special and Differential Treatment for Least Developed Countries – Note by the Secretariat*, WTO Doc WT/COMTD/W/135 (5 October 2004) at 2.

[15] WTO Committee on Trade and Development, *Special and Differential Treatment Provisions in the WTO Agreements and Decisions – Note by the Secretariat*, WT/COMTD/W/258 (2 March 2021) at 6, 106–110 [*Special and Differential Treatment Provisions – Note*].

[16] *DSU, supra* note 4, arts. 4.4 and 23.1.

[17] Pervaiz KHAN and Mohammad Asif KHAN, "GATT (1947) and WTO Dispute Settlement Systems: A Comparative Analysis" (2018) 49(73) Journal of Law and Society 13 at 18.

[18] *Ibid*., at 19; Pretty Elizabeth KURUVILA, "Developing Countries and the GATT/WTO Dispute Settlement Mechanism" (1997) 31(6) Journal of World Trade 171 at 177; *DSU*, *supra* note 4, art. 6.

[19] Article 4.10 does not distinguish between developing countries and LDCs.

[20] See Valentina DELICH, "Developing Countries and the WTO Dispute Settlement System", in Bernard HOEKMAN, Aaditya MATTOO and Philip ENGLISH, eds., *Development, Trade and the WTO: A Handbook* (Washington, D.C.: World Bank, 2002), 71 at 73; Shaffer, *supra* note 14 at 25.

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and Betting Services (*Antigua – United States*).[21] In this case, Antigua made a complaint against the United States, alleging that several federal and state laws prohibited the cross-border supply of gambling services.[22] Antigua contended that the US's decision to impose such a prohibition damaged Antigua's domestic gambling industry and was tantamount to violating the General Agreement on Trade in Services (GATS).[23]

Antigua stated that the US measures affected its small economy, making it difficult for Antigua to survive on trade.[24] Antigua argued that her economy survived primarily on the tourism industry but had diversified into the electronic commerce market due to the destruction of its hotels and infrastructure by hurricanes.[25] This electronic commerce attracted the internet gambling industry. It provided the Government of Antigua with revenues that could be used to provide basic facilities, including goods and services, to its people. The industry employed young people who would otherwise have turned to illicit drug trafficking.[26] Antigua argued that the US prohibition prevented operators within Antigua from lawfully offering gambling in the United States. The parties engaged in a consultation meeting on 30 April 2003 that lasted less than an hour, indicating no genuine consultation effort from the United States.[27] In its consultation, Antigua expressed its willingness to work for a mutually agreeable solution on the basis that the regulatory framework would be refined.[28] However, the United States refused Antigua's suggestion.[29]

Even though Antigua outlined its development concerns through Article 4.10 of the DSU, the United States preferred to adopt a legalistic approach with no consideration for Antigua's development concerns at the consultation, thereby violating the spirit of Article 4.10 of the DSU.[30] The use of "should" in Article 4.10 suggests that while the United States should have considered Antigua's development concerns, they had no binding obligation to do so. The lack of enforceability of Article 4.10 suggests a lack of effective procedure applicable to the consultation mechanism, which results in fruitless negotiations and practical inefficiencies that undermine the very objective of the DSU.[31]

The ineffectiveness of Article 4.10 is further illustrated in *Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States*, which resulted from the United States' refusal to comply with orders made by the WTO's Textile Monitoring Body (TMB).[32] The United States challenged transitional safeguard measures sanctioned

[21] Panel Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WT/DS285/R (10 November 2004) at para. 3.20 [Panel Report, *Antigua – United States*].

[22] Appellate Body Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005) at para. 2.

[23] *General Agreement of Trade in Services,* Annex 1B to *the Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3 (entered into force on 1 January 1995) [*GATS*]; Panel Report, *Antigua – United States, supra* note 22 at para. 3.134.

[24] WTO Dispute Settlement Body, Minutes of Meeting, Held in the Centre William Rappard on 24 June 2003, Chairman: Mr Shotaro Oshima (Japan), WT/DSB/M/151 (12 August 2003), para. 44.

[25] *Ibid*., para. 42.

[26] *Ibid* para 43.

[27] Ewart, *supra* note 14 at 46.

[28] Panel Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) at para. 3.14.

[29] *Ibid.*

[30] Ewart, *supra* note 14 at 49.

[31] In Antigua's case, an additional six months were lost due to the adherence to the consultation process.

[32] Appellate Body Report, *United States – Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan,* WTO Doc WT/DS192/AB/R (8 October 2001).

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under the *Agreement of Textiles and Clothing* (ATC).[33] It informed the TMB of its intention to impose quota restraints on imports from Pakistan for three years.[34] The TMB decided in favour of Pakistan and requested the United States to lift the quota restraints. However, the United States refused.[35]

Pakistan complained to the DSB and consulted with the United States under Article 4.10. Consultation failed because the United States was unwilling to offer a mutually agreeable solution.[36] During the consultation, the United States disregarded Pakistan's status as a developing country and the fact that the textile industry was Pakistan's largest manufacturing sector, with an 8.5 per cent share of GDP at that time.[37]

As these cases illustrate, by not mandating the procedure for dealing with developing countries' development concerns or providing any guidance on the development concerns that should be considered,[38] Article 4.10 is not adequately designed to assist developing countries in the consultation phase and results in practical inefficiencies. The consultation stage is regarded as a political exercise of bargaining power and leverage between the disputing parties, where external matters to the dispute could also have an influence.[39] Therefore, members possessing greater economic and political power may be able to link external considerations, such as foreign aid and diplomatic efforts, to the dispute. Hence, members cannot come to an amicable solution or block consultation.[40] In both *Antigua – United States* and *Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States*, the United States used the consultations as a delaying tactic.[41]

Another SDT provision relevant to the consultation stage is the first part of Article 12.10 of the DSU, which states:

> In consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide,

[33] *Agreement on Textile and Clothing,* Annex 1A to *the Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3 (entered into force on 1 January 1995), art. 6 [*Agreement on Textiles and Clothing*].

[34] Turab HUSSAIN, "Victory in Principle: Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States" in Peter GALLAGHER, Patrick LOW and Andrew L. STOLER, eds., *Managing the Challenges of WTO Participation: 45 Case Studies* (Cambridge: Cambridge University Press, 2005), 459; Panel Report, *United States – Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan*, WTO Doc WT/DS192/R (31 May 2001) at para. 2.2.

[35] The United States appealed the decision but was unsuccessful.

[36] S.M. Turab HUSSAIN, "Combed Cotton Yarn Exports of Pakistan to the United States: A Dispute Settlement Case", Centre for Management and Economic Research, Working Paper No. 05–36, 2005 at 8.

[37] Following the phase-out of the Multi-Fibre Agreement (MFA) – which provided quota restraints on textile and clothing exports from developing countries – Pakistan became the second-largest exporter of cotton yarn behind the United States at that time: *ibid.*; Panel Report, *United States – Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan*, WTO Doc WT/DS192/R (31 May 2001); Ewart, *supra* note 14 at 60.

[38] See Fazil ISMAIL, "How Can Least-developed Countries and Other Small, Weak and Vulnerable Economies also Gain from the Doha Development Agenda on the Road to Hong Kong?" (2006) 40(1) Journal of World Trade 37 at 38.

[39] Amin ALAVI, "On the (Non-)Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process" (2007) 41(2) Journal of World Trade 319 at 321; Asif H. QURESHI, "Participation of Developing Countries in the WTO Dispute Settlement System" (2003) 47(2) Journal of African Law 174 at 182.

[40] According to Ewart, *supra* note 14 at 44 and 59, in both the *Antigua – United States* case and *Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States*, the United States used the consultations as a delaying tactic.

[41] *Ibid.*

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> after consultation with the parties, whether to extend the relevant period and, if so, for how long.[42]

The language of the first section seeks to ensure that an extended timeframe is allocated during consultations when a complaint is brought against a developing country. This provision does not create an obligation for the developed country or the DSB to extend the time period for consultation in favour of a developing country since such an extension needs to be agreed upon by both parties. In *Pakistan – Patent Protection*, when the United States requested to establish a panel, Pakistan invoked this provision in resisting the United States' request. Pakistan questioned whether a developed country could unilaterally decide that the consultation had been concluded within the context of Article 12.10.[43]

B. SDT in Panel Process

If the parties to a dispute cannot reach an agreement through consultation, the complaining party may request the DSB to establish a panel to adjudicate the dispute.[44] Article 12 of the DSU deals with panel procedures for litigation, of which Articles 12.10 and 12.11 contain SDT provisions.

1. Flexible Time for Preparing Submissions

The second part of Article 12.10 states:

> [I]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.[45]

Article 12.10 recognizes the need to give developing countries sufficient time to prepare written submissions and obtain necessary documents and evidence for panel proceedings. Compared to developed countries, the panel process is often particularly demanding and time-consuming for most developing countries due to the dearth of human, financial, and institutional resources.[46] Use of the word "shall" in Article 12.10 indicates the mandatory nature of the panel's obligation. This interpretation is supported by the common tendency of panels to consider the second part of Article 12.10, even where neither party has invoked Article 12.10.[47] For instance, in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products,*[48] the panel referred to the second part of Article 12.10 as justification for its decision to grant additional time to India. However, India did not invoke this provision requesting extra time.[49]

[42] *DSU*, *supra* note 4, art. 12.10.

[43] Notification of a Mutually-Agreed Solution, *Pakistan – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS36 (7 March 1997); *Minutes of the Meeting of the DSB, 15 and 16 July 1996,* WT/DSB/M/21 (5 August 1996); Sharmin TANIA, "Least Developed Countries in the WTO Dispute Settlement System" (2013) 60(3) Netherlands International Law Review 375 at 398.

[44] *DSU, supra* note 4, art 6.

[45] *Ibid.*, art 12.10.

[46] Andrew GUZMAN and Beth A. SIMMONS, "Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes" (2005) 34(2) Journal of Legal Studies 557 at 559; Constantine MICHALOPOULOS, "The developing countries in the WTO" (1999) 22(1) World Economy 117.

[47] See, for example, Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc WT/DS90/R (6 April 1999) [*India – Quantitative Restrictions*].

[48] *Ibid.*, at para. 5.10.

[49] *Ibid.*, at paras. 5.8–5.10, the panel noted that India had the opportunity to raise its concerns regarding the country's administration reorganization needs during the organization meeting on 27 February 1998.

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Several factors question the efficacy of this provision. First, Article 12.10 is of little practical value since, under Article 12.4, the panel must provide sufficient time to both parties to the dispute, including both developed and developing members. Second, Article 12.10 grants panels the discretion to determine what constitutes a sufficient time frame. Third, there needs to be more guidance on what factors the panel should consider in granting sufficient time. Fourth, the wording of this part of Article 12.10 reconfirms the position that this provision is invoked where a developing country is a respondent rather than a complainant or a third party. In *European Communities – Bananas*, the ACP third parties[50] contended that they were given insufficient time to prepare and present their submissions, which was inconsistent with Article 12.10. The panel did not even consider this argument because of the clear provision in Article 12.10, which stated that this is applicable only when a complaint is made against a developing country member.[51] The discretionary nature of Article 12.10 and the lack of guiding principles means the provision lacks certainty for developing countries that rely on the provision.

2. The SDT Provision that Connects with all SDT Provisions in the WTO Agreements

Article 12.11 of the DSU is the most progressive SDT provision, providing a direct linkage to invoke other SDT provisions in the covered agreements. In theory, this provision should shift the focus to developing countries by imposing a positive obligation on the panel to report on how it considers the development condition of a developing country member. Article 12.11 states:[52]

> Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

Despite the provision's great potential to enforce other SDT provisions in the WTO agreement, the text of this provision and its interpretation and application by the panel raises at least six uncertainties that go to the heart of its real benefit to LIDCs and LDCs.

First, scholars such as Qureshi question whether this provision creates a procedural or a substantive obligation.[53] The authors argue that Article 12.11 is both procedural and substantive. The procedural aspect arises from the fact that when developing countries invoke an SDT provision, it is mandatory for panels to expressly set out how the panel has taken the SDT provision into account. The terms "relevant provisions on differential and more favourable treatment … that form part of the covered agreements" clearly show that the article has contemplated the substantive rules of the covered agreements and granted broad powers to the panel to deal with SDT provisions relevant to a dispute at hand.

Second, it is unclear whether using the words "raised by the developing Member" means to "allude to or raise".[54] It is also unclear whether a developing country needs to raise SDT provisions in the covered agreement or only raise the breach of the covered

[50] The ACP third parties are Belize, Cameron, Cote d'Ivoire, Dominica, the Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Senegal, and Suriname: Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* WTO Doc WT/DS 27/AB/R (9 September 1997) at 4 [*European Communities – Bananas III*].

[51] Tania, *supra* note 44 at 399.

[52] *DSU*, *supra* note 4, art. 12.11.

[53] Qureshi, *supra* note 40 at 185; *supra* note 38.

[54] *Ibid.*

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agreement with the panel considering the relevant SDT provisions in that agreement.[55] In *Mexico – Taxes on Soft Drinks*, Mexico made development arguments supporting its claim. While the panel acknowledged the importance of special and differential treatments for developing countries, the panel considered that Mexico had not raised any specific SDT provision requiring "additional consideration".[56] The LDC group, in a 2002 proposal to the DSB, argued that if a developing country needs to raise the SDT provision specifically, it places an unnecessary legal burden and contradicts the well-established legal principle *jura novit curia* (that the judge or the court is supposed to know the law).[57] The LDC group proposed the removal of the phrase "which have been raised by the developing country Member" so as to require the panel to apply all applicable legal principles.

The third issue of uncertainty arises when the SDT provision needs to be raised, whether it needs to be included in the terms of references or whether it can be raised at any time "in the course of the dispute settlement procedures". In *United States – Continued Dumping and Subsidy Offset*,[58] India and Indonesia invoked Article 15 of the Anti–Dumping Agreement[59] because they were developing countries. Article 15 of the Anti-Dumping Agreement was not included in the panel's terms of reference during the panel stage. Nonetheless, the panel addressed the SDT provision of Article 15 of the Anti-Dumping Agreement because it was invoked during the proceedings, and Article 12.11 required the panel to address the SDT provision.[60] In this case, the panel held that the invoked provision was irrelevant to the case and that India and Indonesia had not "substantiated" their arguments.[61] This article argues that a developing country can allude to the SDT provision at any stage of the dispute settlement procedure: all decision-makers, including the panel, the AB, and the arbitrators, need to consider this SDT provision.

Fourth, ambiguity arises as to what extent the panel needs to take account of the SDT provision – whether the panel may meet its obligation by providing lip service to the SDT provision or whether it must give more weight to SDT provisions in their reports. Article 12.11 requires the panel to "explicitly indicate the form in which account has been taken" of the relevant SDT provision. However, there is a concerning trend where the panel does not apply this provision substantively: instead, only mentioning in one paragraph that the parties have not raised any SDT provision or that the panel has considered the relevant SDT provision. In most cases, the panel does not provide further details on how the panel has taken SDT provisions into account.[62] For instance, in the case of *Mexico – Measures Affecting Telecommunications Services*,[63] the panel stated that "pursuant to Article 12.11 of the DSU, it has taken into account in its findings GATT provisions on differential and more-favourable treatment for developing country members", but did not elaborate further.[64] According to the wording of Article 12.11 of the DSU, panels are not bound to

[55] Rolland, *supra* note 10 at 173.

[56] Panel Report, *Mexico – Taxes Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/R (7 October 2005) at 162.

[57] WTO Dispute Settlement Body Special Session, *Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group*, WTO Doc TN/DS/W/17 (9 October 2002) at paras 7–8; Tania, *supra* note 44 at 400.

[58] Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc WT/DS217/R (16 September 2002) [*United States – Continued Dumping*].

[59] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,* Annex 1A to *the Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3 (which entered into force on 1 January 1995) [*Anti-Dumping Agreement*].

[60] *United States – Continued Dumping, supra* note 59 at para. 7.87; Rolland, *supra* note 10 at 172.

[61] *United States – Continued Dumping, supra* note 59 at paras. 7.87–7.89; Alavi**,** *supra* note 40 at 324.

[62] Rolland, *supra* note 10 at 173; *infra* note 99.

[63] Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WTO Doc WT/DS204/R (2 April 2004) at para. 8.3.

[64] *Ibid*.

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decide the matter according to the SDT provisions so invoked.[65] The lack of further detail on how the panels should consider those provisions effectively means there is no requirement for the provisions in the WTO agreement or covered agreements to be applied. Roessler observes that Article 12.11 of the DSU "is nothing but a specific application of the general obligation of panels to present in their reports an objective assessment of the matter before them".[66]

Fifth, a related issue to the above is whether the panel can use the doctrine of judicial economy to bypass its obligation to give a detailed consideration of the SDT provision.[67] Brazil submitted to the AB that the panel had improperly exercised judicial economy by refusing to address Brazil's claim that the United States violated Articles 1.1 and 3.1(a) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) concerning export credit guarantees.[68] In the case of *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*,[69] the panel concluded that the United States had acted inconsistently with the provisions of the Agreement on Safeguards and the GATT 1994.[70] However, the panel used its policy of judicial economy to avoid considering an additional claim made under the SDT provision of Article 9.1 of the Agreement on Safeguard.[71]

Sixth, the phrase "where one or more of the parties is a developing country" is not clear as to whether a developing country, in whose favour the panel considers the SDT provision, must be a party to the dispute or whether a third-party developing country can also point to the SDT provision in a covered agreement.

In addition to the issues of ambiguity surrounding the interpretation of Article 12.11, in several cases where both Articles 12.10 and 12.11 are relevant, the panel seems to discharge its obligation only by stating that it has established a flexible timetable for submissions and adjudication. This type of interpretation makes Article 12.11 redundant.[72]

C. SDT Provisions Regarding the Implementation of Recommendations and Rulings

Once the WTO DSB adopts the panel or AB reports, the proceeding enters the implementation stage, and the losing member is obliged to comply with and implement the ruling of the DSB. Article 21.3 of the DSU requires members to inform the DSB of its intention to implement the DSB's recommendations and rulings within thirty days. If the losing member fails to implement the ruling within thirty days or within "a reasonable period of time", the winning member can resort to arbitration.[73] Article 21.3(c) provides a guideline for the arbitrator; fifteen months should be the maximum period of time, starting from the adoption of the panel or AB reports. The relevant SDT provision, enshrined in Article

[65] Alavi, *supra* note 40 at 324.

[66] F. ROESSLER, "Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System" in Federico ORTINO and Ernst-Ulrich PETERSMAN, eds., *The WTO Dispute Settlement System 1995–2003 (Studies in Transnational Economic Law, Vol 18)* (The Hague: Kluwer Law International, 2004), 87 at 88.

[67] Judicial economy is a concept under which panels may decline to address certain claims and issues raised by a member to a dispute when the resolution of such claims is not needed to resolve the matter at issue. Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products,* WTO Doc WT/DS/248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R and WT/DS259/R (11 July 2003) at para. 10.714 [*United States – Steel Products*].

[68] Appellate Body Report, *United States – Subsidies on Upland Cotton,* WTO Doc WT/DS267/AB/R (3 March 2005) [*United States – Upland Cotton*] at paras. 130, 160, 161.

[69] *United States – Steel Products*, *supra* note 68.

[70] *Ibid*., at para. 11.4.

[71] *Ibid.,* at para. 10.714.

[72] Rolland, *supra* note 10 at 172.

[73] *DSU*, *supra* note 4, arts. 21.3(a); 21.3(b); and 21.3(c).

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21.2, states: "Particular attention should be paid to matters affecting the interests of developing country members with respect to measures which have been subject to dispute settlement".[74]

Although the provision is open-ended, the placement of the provision in Article 21 indicates its relevance in the context of arbitration. The provision was raised in fourteen cases, from which thirteen cases were invoked for a determination by the arbitrator, asking for a reasonable period of time to implement the panel or the AB rulings and recommendations. From the outset, using the word "should" indicates that Article 21.2 grants discretionary powers to arbitrators to determine a reasonable period of time for implementation.[75] We will examine whether developing countries can invoke Article 21.2 as a complainant, a respondent, or in both capacities and what development arguments they make to support their request under Article 21.2. We will also analyse the arbitration cases to identify the arbitrator's approach in interpreting and applying this Article regarding these two issues.

1. Who can invoke Article 21.2?

Reliance on Article 21.2 by the implementing developing country is straightforward, as is apparent from the arbitration cases where arbitrators consider whether a developing country has proved its case that its development consideration should be considered in determining the reasonable period of time. However, whether a developing country can invoke this Article as a complaining member was initially unsettled. In the *United States – Gambling Services (Article 21.3(c))*, when Antigua invoked Article 21.2 as a complaining developing country, the United States argued the provision is relevant only when the developing country is an implementer.[76] The arbitrator did not give a clear answer to this argument.[77]

In later cases, such as in *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (Article 21.3(c)),* the arbitrator agreed with Brazil that "Article 21.2, on its face, makes no distinction in cases where developing country members are complaining rather than implementing members in a particular dispute".[78]

In all the arbitrations where a developing country was the complainant, the arbitrator determined the "reasonable period of time" to be the shortest period possible to implement the decision within the legal framework of the implementing developed country.[79] In deciding the shortest period, the arbitrators usually conclude that the status of a developing country as a complainant is irrelevant in the absence of more specific evidence on how a developing country is disadvantaged by such determination.[80] For instance, in

[74] *DSU*, *supra* note 4, art. 21.2.

[75] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India,* WTO Doc WT/DS141/RW (29 November 2002) at para. 6.264–6.267, where the panel noted that because Article 21.2 does not require any specific action and because it contains the hortatory word "should", it is unlikely that the drafters intended the provision to be mandatory.

[76] Award of the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/13 (19 August 2005) at para. 17.

[77] Ewart, *supra* note 14 at 54.

[78] Award of the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes,* WTO Doc WT/DS269/13, WT/DS269/15 (20 February 2006) at paras. 82 and 84 [*European Communities – Chicken Cuts*].

[79] Rolland, *supra* note 10 at 176. *Ibid*., at para. 82; Award by the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes,* WTO Doc WT/DS268/12 (7 June 2005) at para. 52.

[80] Rolland, *supra* note 10 at 176.

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European Communities – Customs Classification of Frozen Boneless Chicken Cuts (Article 21.3(c)),[81] the EC requested that the arbitrator determine a reasonable period of time to be twenty-six months for implementation of the DSB's recommendation after Brazil was successful in their case against the EC.[82] The EC requested this timeframe to repeal and update the measure at issue and other relevant measures. Brazil argued that EC should be allowed five months and ten days.[83] The arbitrator held that a reasonable period of time for the EC was nine months from the date of adoption of the panel and the AB reports.[84] The arbitrator concluded that a "reasonable period of time for implementation is not additionally affected by the fact that Brazil, as a complaining member in this dispute, is a developing country".[85] Similarly, in *United States – Cool (Article 21.3(c))*, in allowing the United States ten months as a reasonable period of time for implementation, the arbitrator justified this timeframe as the "shortest possible period" within the United States legal system.[86] The arbitrator stated that Mexico's status as a developing country had no bearing on the final determination of the timeframe. The arbitrator was not persuaded by Mexico's argument that its cattle producers were being "economically harmed" by the United States' delay in implementation.[87]

These cases clearly show that the arbitrators prioritized the situation of developed countries in making necessary changes to their statutes and administrative orders. In doing so, the arbitrators deprioritized the plight of developing countries arising from the delay in implementation.[88]

Whether the development considerations of the third-party developing countries are relevant or not arose in two arbitration cases where, interestingly, it was the developed member, the EC, that raised the hardship of third-party developing countries for the arbitrator's determination of a reasonable period of time. In *European Communities – Sugar Subsidies (Article 21.3(c))*, the EC argued that Article 21.2 applies to non-party developing countries and that a shorter implementation period would adversely affect sugar-importing developing countries and ACP countries.[89] While interpreting Article 21.3, the arbitrator observed that the drafters did not limit the application of Article 21.2 to any particular type of developing country.[90] However, the arbitrator found that EC failed to provide sufficient evidence on how implementing the rulings and recommendations would affect ACP countries or sugar-importing or exporting developing countries.[91] Therefore, the arbitrator found that, in this case, it was unnecessary to decide whether Article 21.3 applies to third-party developing countries.[92] In *European Communities – Tariff Preferences (Article 21.3(c))*, the EC made a similar argument of an adverse effect on third-party developing countries – beneficiaries of the EC preferential scheme – to justify its request for a longer implementation timeframe. The arbitrator also took a similar

[81] *European Communities – Chicken Cuts*, *supra* note 79.

[82] *Ibid*.

[83] *Ibid*., at paras. 19, 21, 33–5. The EC did not need all the measures proposed for implementation.

[84] *Ibid*., at paras. 81–2.

[85] *Ibid*., at para. 82.

[86] Award of the Arbitrator, *United States – Certain Country of Origin Labelling (Cool) Requirements – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS384/24, WT/DS386/23 (4 December 2012) at paras. 99–100.

[87] *Ibid*.

[88] Rolland, *supra* note 10 at 177.

[89] Award of the Arbitrator, *European Union Communities – Export Subsidies on Sugar – Arbitration under Article 21.3 (c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS265/33, WT/DS266/33, WT/DS283/14 (28 October 2005) at para. 98.

[90] *Ibid*., at para. 99.

[91] *Ibid*., at paras. 102–3.

[92] *Ibid*., at para. 104.

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approach in not deciding the question of applicability of Article 21.2 to non-party developing countries on the ground that neither party could provide sufficient evidence or an explanation of how developing countries' interests would be affected by the EC's implementation.[93]

In several arbitrations, both complaining and implementing developing countries invoked Article 21.2.[94] In these cases, the arbitrator found that both parties' status as developing countries would offset each other unless one party could prove that its economy was more susceptible to impact, depending on whether a shorter or longer period of time was granted.[95] For instance, in *Peru – Agricultural Products (Article 21.3(c))*, the arbitrator found that Guatemala as a complainant and Peru as an implementer were both developing countries, rendering this status "of little relevance" unless one of them could prove that it was more severely affected because of its status as a developing country.[96] The arbitrator decided that neither Peru nor Guatemala could prove how their status as developing countries should have a bearing on determining a "reasonable period of time".[97] Similarly, in *Columbia – Measures Relating to the Implementation of Textiles, Apparel and Footwear (Article 21.3(c))*, where both the complaining party (Panama) and implementing party (Colombia) were developing countries, the arbitrator reiterated:

> [I]n a situation where both the implementing and complaining Member are developing countries, the requirement provided in Article 21.2 is of little relevance, except if one party succeeds in demonstrating that it is more severely affected by problems related to its developing country status than the other party with respect to measures that have been subject to dispute settlement.[98]

2. Development Consideration under Article 21.2

In *Indonesia – Certain Measures Affecting the Automobile Industry (Article 21.3(c))*,[99] Indonesia requested the arbitrator for fifteen months as a reasonable time period to implement the panel's rulings. By invoking Article 21.2, Indonesia claimed that its domestic economic condition was severe, "near collapse", and the financial and economic crisis affected the automobile industry the most.[100] Therefore, the Indonesian government needed additional time to stabilize the economy to prevent further unemployment and avert a deepening economic crisis.[101] Indonesia tied its development arguments with the preamble of

[93] Award of the Arbitrator, *European Communities – Conditions for the Granting of Tariff Preference to Developing Countries – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes,* WTO Doc WT/DS246/14 (20 September 2004) at paras. 57–9.

[94] Award of the Arbitrator, *Colombia – Indicative Prices and Restrictions on Ports of Entry – Arbitration under Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes,* WTO Doc WT/DS366/13 (2 October 2009); Award of the Arbitrator, *Peru – Additional Duty on Imports of Certain Agricultural Products – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes,* WTO Doc WT/DS457/15 (16 December 2015) [*Peru – Agricultural Products*].

[95] Rolland, *supra* note 10 at 178.

[96] *Peru – Agricultural Products*, *supra* note 95 at para. 3.43.

[97] *Ibid*.

[98] Award of the Arbitrator, *Columbia – Measures Relating to the Implementation of Textiles, Apparel and Footwear – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Dispute,* WTO Doc WT/DS461/13 (15 November 2016) at para. 3.60.

[99] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WTO Doc WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS/64/R (2 July 1998); Award of the Arbitrator, *Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes,* WTO Doc WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS/64/12 (7 December 1998) at para. 1 [*Indonesia – Automobile Industry*].

[100] *Indonesia – Automobile Industry, supra* note 100 at para. 8.

[101] *Ibid.,* at paras. 8 and 9.

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the WTO Agreement, which, as we saw above, enshrines the importance of ensuring full employment in trade and economic development.[102]

In determining a reasonable period of time, the arbitrator commented on the difficulties in considering the argument submitted by Indonesia due to the ambiguity of Article 21.2 of the DSU, stating that "the language of [Article 21.2 of the DSU] is rather general and does not provide a great deal of guidance".[103] However, the arbitrator agreed with Indonesia to fully consider Indonesia's developing country status, stating that Indonesia "is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is 'near collapse.'"[104] The arbitrator granted Indonesia an additional six months above the usual six months required for implementation within the Indonesian legal system.[105]

In the case of *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Article 21.3(c))*,[106] after losing its case against the EC, Argentina requested approximately forty-six months as a reasonable period of time for implementation, because its fiscal position had seriously deteriorated due to the economic recession that occurred in 1997 and 1998.[107] The arbitrator found that "Argentina has not been very specific about how its interests as a developing country Member actually bear upon the duration of a reasonable period of time" for compliance.[108] Referring to *Indonesia – Certain Measures Affecting the Automobile Industry (Article 21.3(c)),* the arbitrator doubted whether Argentina's economy was "near collapse", as was Indonesia's.[109] However, the arbitrator agreed with the arbitration decision on *Indonesia – Auto* that developing countries confronted by "severe economic and financial problems" required particular attention from the arbitrator[110] and, on that ground, provided Argentina with special treatment by granting twelve months and twelve days for implementation, despite the lack of specific evidence by Argentina.[111]

In contrast, the arbitrator in the *United States – Gambling Services (Article 21.3(c))*, found that Antigua had failed to provide specific data in support of its claim that its interests were adversely affected by a delayed implementation and that Antigua failed to show a clear relationship between the decline of its industry and the measures at issue.[112] In *Chile – Taxes on Alcoholic Beverages (Article 21.3(c)),* Chile submitted that the arbitrator should pay attention to the particular interests of developing countries and stressed the fact that it had to consider the political sensitivity when implementing the recommendations of the DSB.[113] Chile further submitted that "[legal change for implementation of the DSB award] will affect fiscal revenues, public health and the social and economic situation

[102] *Ibid*., at para. 11.
[103] *Ibid*., at para. 24.
[104] *Ibid.*
[105] *Ibid.*
[106] Award by the Arbitrator, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes,* WTO Doc WT/DS155/10 (31 August 2001).
[107] *Ibid.,* at para. 8: this being the Argentinean currency problem at that time due to the "Asian Crisis".
[108] *Ibid*., at para. 51.
[109] *Ibid*.
[110] *Ibid*.
[111] *Ibid*., at para. 52.
[112] Award of the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS285/13 (19 August 2005) at paras. 62–3.
[113] Award of the Arbitrator, Chile – Taxes on Alcoholic Beverages – *Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS87/15 (23 May 2000) at paras. 20–1.

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of pisco producers".[114] The arbitrator noted that he was "mindful of the great difficulties that a developing country member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB".[115] Nevertheless, the arbitrator was not convinced by Chile's submissions. According to the arbitrator, Chile did not specifically demonstrate how its interests as a developing country would affect Chile's ability to change its laws to comply with the DSB's recommendations.

The case analysis shows that, in recent times, arbitrators have required more concrete assertions of how a developing country's status should have a bearing on the determination of a reasonable period of time. Although in all cases where a developing country is involved, the arbitrators expressly mention that they have taken into account the interests of the developing countries; however, the extent to which those interests impact the arbitrator's determination of a reasonable time for implementation remains a key concern. The cases also show a disparity in the arbitrators' approach, requiring more concrete evidence of developing countries' specific interests as opposed to the general condition of developing countries. More worrying is the trend of the arbitrator to conclude that the developing country status of the complaining and implementing members offset each other. This article proposes that where LIDCs or LDCs are involved in a dispute where the other party is a middle- to high-income developing country, the development considerations of LIDCs and LDCs require greater attention.

Two other SDT provisions relevant at the implementation stage are Articles 21.7 and 21.8 of the DSU, which empower the DSB to consider developing countries' interests. Article 21.7 of the DSU states: "If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances."[116]

Article 21.8 states that when a developing country member brings a case, and the DSB needs to take appropriate action, the DSB shall consider "trade coverage of the measures complained of" and "their impact on the economy of developing country members concerned".[117] These provisions do not clearly indicate when the DSB can act or whether developing countries need to specifically raise these provisions so that the DSB can apply them.[118] It seems to be that these provisions could be used at the implementation stage when an implementing developed country does not comply with the recommendations and rulings of the panel and AB.

The only case where Article 21.8 was considered was *European Communities – Bananas III (Ecuador) (Article 22.6)*.[119] Ecuador requested the DSB's authorization to suspend concessions or other obligations against the EC in the amount of $450 million (US). The EC requested arbitration under Article 22.6 of the DSU, claiming that the suspension of the concession proposed by Ecuador was excessive compared to the nullification or impairment suffered due to the EC measure.[120] Ecuador requested the suspension of concessions and other obligations under the GATS and TRIPS agreements because such a suspension in the goods sector was not practicable.[121] Referring to Article 21.8, Ecuador claimed the arbitrators should consider the total economic impact of the EC Banana

[114] *Ibid*.
[115] *Ibid*., at para. 45.
[116] *DSU*, *supra* note 4, art 21.7.
[117] *Ibid*., art 21.8.
[118] Ewart, *supra* note 14 at 56.
[119] Decision of the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article* 22.6 *of the DSU*, WT/DS27/ARB/ECU (24 March 2000)
[120] *Ibid*., at paras. 1, 7, and 8.
[121] *Ibid*., at para. 2.

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regime in calculating the level of nullification and impairment suffered by Ecuador.[122] Ecuador highlighted the importance of bananas as "the lifeblood of its economy", being "the largest source of employment and the largest source of foreign earnings".[123] It further claimed that "the banana industry is of greater importance to its economy than the whole agricultural sector in most developed countries".[124] The arbitrators found Ecuador's argument more reasonable in establishing that the nullification and impairment caused by the WTO-inconsistent aspects of the EC banana import regime aggravated the economic problems of Ecuador, while the EC would hardly face any consequence from Ecuador's suspension of concessions.[125] The arbitrators decided that Ecuador complied with the principles and procedures of Article 22.3 in requesting the DSB authorization to suspend some of their obligations under the TRIPS Agreement.[126] The arbitrators noted that their interpretation and application of Article 22.3(d) was corroborated by Article 21.8, which required them to consider the impact of the complained measures on the economy of the developing country members.[127]

D. SDT Provision Exclusively for the Least Developed Countries

Article 24 of the DSU deals exclusively with least-developed countries, even though other SDT provisions of the DSU equally apply to LDCs. The first sentence of Article 24.1 states: "At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country members."[128]

Through the use of the word "shall", Article 24.1 mandatorily requires particular consideration of the situation of least-developed country members. The crux of the problem is that Article 24.1 does not specify who should give "particular consideration" to the special situation of LDCs and whether LDCs can invoke this provision as a third party.

Bangladesh, being a least-developed country, brought the first case under this Article to the DSU against India, challenging India's imposition of anti-dumping measures against the import of batteries from Bangladesh.[129] This case was settled at the consultation stage;[130] therefore, it is too early to analyse how this article would operate and how a panel would interpret it.[131]

In the case of *United States – Subsidies on Upland Cotton*,[132] Benin and Chad invoked Article 24.1 as third parties in their intervention at the appeal stage of a dispute between the United States and Brazil. Brazil alleged that the United States had violated the SCM Agreement and Article III:4 of the GATT 1994. Benin and Chad argued before the AB that the United States' upland cotton subsidies eventually increased the United States' world market share, which caused serious prejudice to the economies of the West

[122] *Ibid.*, at para. 23.
[123] *Ibid.*, at para. 129.
[124] *Ibid.*
[125] *Ibid.*, at paras. 133–4.
[126] *Ibid.*, at para. 138.
[127] *Ibid.*, at para. 136.
[128] *DSU*, *supra* note 4, art. 24.1.
[129] Request for Consultations by Bangladesh, *India – Anti-dumping Measures on Batteries from Bangladesh*, WTO Doc WT/DS306/1 (2 February 2002) [*India – Batteries*].
[130] *Ibid.*
[131] Asif H. QURESHI, "Participation of Developing Countries in the WTO Dispute Settlement System" in Federico ORTINO and Ernst-Ulrich PETERSMAN (eds), *Studies in Transnational Economic Law: The WTO Dispute Settlement System 1995–2003, Vol. 18* (The Hague: Kluwer Law International, 2004), 475 at 484.
[132] *United States – Upland Cotton*, *supra* note 69.

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African countries by reducing theirs.[133] Benin and Chad sought to persuade the AB to support the removal of United States subsidies and their adverse effects, not only in relation to Brazil but also in respect of Benin and Chad.[134] The AB stated that "[it] fully recognize [s] the importance of [Article 24.1 of the DSU]".[135] Ultimately, however, the AB found that it was unable to consider Benin and Chad's request as a third party since the AB found it was not necessary to rule on Brazil's appeal regarding the interpretation of the phrase "world market share" in Article 6.3(d) of the SCM Agreement. The AB found that the condition to adhere to the request of Benin and Chad was not met.[136]

The second sentence of Article 24.1 states that "members shall exercise due restraint in raising matters under these procedures involving a least-developed country member".[137] However, it is unclear whether Article 24.1 refers to developed or developing countries or both developed and developing countries that will exercise due restraint. The third sentence of Article 24.1 states:

> If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.[138]

This third sentence is interesting because it is designed to exempt an LDC from an action for suspension of concessions against an LDC, indicating the preoccupation of the drafters to frame SDT provisions as exemption provisions. This shows that the drafters should have realized that LDCs require more assistance as a complaining party due to their lack of legal, technical, and logistic resources.

E. Technical Assistance and SDT provision

Article 27.2 of the DSU is the only provision concerning technical assistance to developing countries where the onus is imposed on the WTO Secretariat to provide assistance in the form of "additional legal advice and assistance in respect of dispute settlement" when requested by a developing country. Article 27.2 provides that "the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests".[139] In coordination with the Institute for Training and Technical Cooperation, which coordinates WTO's technical assistance and training programmes,[140] the secretariat arranges for the services of two consultants to provide legal assistance to developing countries.[141] However, the flow of legal advice and assistance could be problematic when both parties are developing countries, given that, as per Article 27.2, the Secretariat needs to maintain its impartiality while providing legal assistance to developing countries. The Advisory Centre on WTO Law (ACWL), established in 2001 as an organization independent of the WTO, provides legal assistance in WTO law to LDCs and thirty-nine developing countries that are

[133] *Ibid*., at para. 214.
[134] *Ibid*., at paras. 212–4.
[135] *Ibid*., at para. 512.
[136] *Ibid*.
[137] *DSU*, *supra* note 4, art 24.1.
[138] *Ibid*.
[139] *Ibid*., art 27.2.
[140] WTO, "Institute for Training and Technical Cooperation (ITTC)", online: WTO. https://www.wto.org/english/tratop_e/devel_e/teccop_e/ittc_e.htm.
[141] *Special and Differential Treatment Provisions – Note, supra* note 16 at 109.

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currently members of the ACWL.[142] Its assistance to developing countries in all stages of dispute settlement and all capacities as complainants, respondents, and third parties is commendably bridging the gaps in technical assistance provided by the WTO.[143] However, the legal services provided by ACWL are not enough to overcome the shortcomings of the SDT provisions in the DSU. Hence, in Part IV, the article suggests a way forward for effective SDT provisions to reinforce the trade's development aspect, particularly concerning LIDCs and LDCs.

II. Why Reimagine the SDT Provisions in the DSU and the Way Forward

Part II underscored that SDT provisions in the DSU require adaptation to meet the needs of the WTO's LIDCs and LDCs. In recent years, China's rising economic and geopolitical power has become a concern for most developed countries, particularly the United States. To strip the advanced developing countries of their SDT, the Trump administration circulated a communication to all WTO members in February 2019, calling for reform of the SDT in the WTO to reflect the differences between developing countries at different stages of development.[144] The United States' proposal on differentiation among developing countries found vehement opposition from ten such countries – China, India, South Africa, Venezuela, Laos, Bolivia, Kenya, Cuba, Pakistan, and the Central African Republic – each of which maintained their stance on the persisting gap between developed and developing countries, despite some developing countries' impressive achievements.[145] Other developed members, such as the European Union,[146] Norway,[147] and Canada,[148] took a middle course and proposed a reimagination and reform of SDT beyond the binary terms of developed and developing countries.

The debate over the concept, scope, parameters, and beneficiaries of SDT has proved to be a bottleneck in WTO negotiations, evidenced by a note of frustration from Ambassador Kadra Ahmed Hassan (Djibouti), chairperson of the CTD, on the lack of proactive engagement from all WTO members.[149] The group of 90 countries (G90): the African, Caribbean, and Pacific (ACP) group; the African group; and the LDC group – submitted agreement-specific proposals focusing on ten specific issues out of 155 total SDT provisions in the covered agreements and WTO instruments.[150] Interestingly, the group of 90 did not

[142] Advisory Centre on WTO Law, "Members", online: https://www.acwl.ch/members-introduction/.

[143] *Ibid*.

[144] *An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance – Communication from the United States*, WT/GC/W/757/Rev.1 (14 February 2019).

[145] *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, the Plurinational State of Bolivia, Kenya, Cuba, Central African Republic and Pakistan*, WT/GC/W/765/Rev.2 (4 March 2019) at paras 1.1–1.2.

[146] European Commission for Trade, "WTO Modernisation: Introduction to Future European Union Proposals", Concept Paper, 2018.

[147] *Pursuing the Development Dimension in WTO Rule-Making Efforts – Communication from Norway; Canada; Hong Kong, China; Iceland; Mexico; New Zealand; Singapore; and Switzerland*, WT/GC/W/770/Rev.3 (26 April 2019).

[148] *Strengthening and Modernizing the WTO: Discussion Paper – Communication from Canada*, JOB/GC/201 (24 September 2018).

[149] *Note on the Meeting of 24 September 2021*, *supra* note 2.

[150] These ten proposals concern (i) Agreement on Trade-Related Investment Measures; (ii) Art XVIII of the General Agreement on Tariff and Trade (GATT) 1994; (iii) Art XVIII of the GATT 1994 balance of payment provision; (iv) Agreement on the Application of Sanitary and Phytosanitary Measures; (v) Agreement on Technical Barriers to Trade; (vi) Agreement on Subsidies and Countervailing Measures; (vii) Agreement on Customs Valuation; (viii) 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause); (ix) transfer of technology; and (x) LDC accession.

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include the DSU in these proposals, indicating their disappointment with the SDT provisions in the DSU to uphold the WTO's development objectives, instead focusing on operationalizing ambiguous SDT provisions in other agreements. The major developed members of the WTO – the United States, the European Union, the United Kingdom, Australia, Japan, and the Republic of Korea – regarded these proposals as archaic, rejecting the need for further negotiations.[151] Underlying this divide is the deep-rooted discordance with the concept of SDT.

SDT has been considered by developing countries and LDCs as "an institutional right for developing members",[152] "a non-negotiable right of all developing countries",[153] "a treaty-embedded right",[154] and an "integral part of the multilateral trading system".[155] Some developed members are ready to consider SDT as a "fundamental pillar of the WTO"[156] and a "fundamental tenet and principle of the WTO"[157] and have recognized the needs of SDT for LDCs and other developing countries that can demonstrate their special needs.[158] Nevertheless, these views do not necessarily accord with recognizing SDT as "an entitlement and right of developing countries".

Turning to the DSM of the WTO, in many ways, the transition from the GATT system to the current WTO system has been central to enabling the panel and the AB to interpret the covered agreements in a development-friendly manner, upholding the preamble of the WTO Agreement. Previously, the dispute settlement procedure under the GATT 1994 lacked a set of central principles and was premised on a power-orientated, diplomatic system whereby disputes were resolved by one party exerting dominance or influence over the other. This approach led to the embedded inequality in the GATT system since large, influential nations had a distinct advantage in the dispute settlement process. Developing countries preferred to have a rule-based system in the GATT.[159] However, due to the dissatisfaction of the EC and the United States with the GATT system, rather than the need to overcome these inequalities, the rules on mandatory and impartial dispute settlement between parties were incorporated into the DSU.[160] Therefore, the DSU has largely transformed the dispute settlement system from a diplomatic, power-oriented system to a legalized, rules-based system as set out in the relevant negotiated agreements.[161] However, diplomacy is still part of the system.[162]

[151] *Note on the Meeting of 24 September 2021, supra* note 2.

[152] *Ibid*., China at para. 14.

[153] *Ibid*., India at para. 15.

[154] *Ibid*., Bangladesh at para. 17.

[155] *Ibid*., South Africa at para. 7.

[156] *Ibid*., United Kingdom at para. 20.

[157] *Ibid*., Australia at para. 21,

[158] *Ibid*., European Union at para. 19, the United Kingdom at para. 20, Australia at para. 21, Japan at para. 23 and the Republic of Korea at para. 24.

[159] T. N. SRINIVASAN, "The Dispute Settlement Mechanism of the WTO: A Brief History and an Evaluation from Economic, Contractarian and Legal Perspectives" (2007) 30(7) The World Economy 1033 at 1037.

[160] *Ibid*., at 1036.

[161] See J. G. CASTEL, "The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures" (1989) 38(4) International and Comparative Law Quarterly 834 at 849; Kim VAN DER BORGHT, "The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate" (1999) 14(4) the American University of International Law Review 1223 at 1224; Joost PAUWELYN, "The Limits of Litigation: 'Americanization' and Negotiation in the Settlement of WTO Disputes" (2003) 19(1) Ohio State Journal on Dispute Resolution 121 at 125; Guzman and Simmons, *supra* note 47 at 558; Surya P. SUBEDI, "The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level is the 'Level Playing Field'?" (2006) 53(2) Netherlands International Law Review 273 at 282; Bouet and Metivier, *supra* note 8 at 2.

[162] Srinivasan, *supra* note 160 at 1035.

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The DSM, labelled as the "jewel in the [WTO's] crown" and the "most powerful and most significant international" adjudicatory system,[163] is ironically beyond the reach of LIDCs and LDCs. According to a list compiled by the WorldTradeLaw.net database, since the establishment of the WTO in 1995 until 2010, low-income countries have been complainants in twenty-six disputes. Between 1995 and 2008, they were respondents in twenty-four disputes out of 607 under the DSU.[164] They have been absent from the DSM since 2011. Among the members that participated as low-income countries, there was the predominant presence of India, a complainant in fourteen disputes and a respondent in thirteen disputes,[165] followed

[163] John JACKSON, "The World Trade Organization After Ten Years: The Role of the WTO in a Globalized World" (2006) 59(1) Current Legal Problems 427 at 434.

[164] The WorldTradeLaw.net used the World Bank's income classification of countries, based on gross national income (GNI) into "high income" (USD 12,056 and higher), "upper middle income (USD 3,896–12,055), "lower middle income" (USD 996–3,895) and "low income" (USD 995 and lower) – WorldTradeLaw.net, "WTO Complaints Grouped by Income Classification", online: https://worldtradelaw-net.eu1.proxy.openathens.net/databases/classificationcount.php.

[165] Request for Consultations by India, *European Union and a Member State – Seizure of Generic Drugs in Transit,* WTO Doc WT/DS408/1 (19 May 2010) (India complainant); Request for Consultations by India, *European Communities – Expiry Reviews of Anti-dumping and Countervailing Duties Imposed on Imports of PET from India*, WTO Doc WT/DS385/1 (10 December 2008) (India complainant); Request for Consultations by the European Communities, *India – Certain Taxes and Other Measures on Imported Wines and Spirits*, WTO Doc WT/DS380/1 (25 September 2008) (India respondent); Request for Consultations by the United States, *India – Additional and Extra-Additional Duties on Imports from the United States,* WTO Doc WT/DS360/1 (12 March 2007) (India respondent); Request for Consultations by the European Communities, *India – Measures Affecting the importation and Sale of Wines and Spirits from the European Communities,* WTO Doc WT/DS352/1 (23 November 2006) (India respondent); Request for Consultations by India, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WTO Doc WT/DS345/1 (12 June 2006) (India complainant); Request for Consultations by the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, *India – Anti-Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu*, WTO Doc WT/DS318/1 (1 November 2004) (India respondent); Request for Consultations by India, *European Communities – Anti-Dumping Duties on Certain Flat Rolled Iron or Non-Alloy Steel Products from India*, WTO Doc WT/DS313/1 (8 July 2004) (India complainant); *India – Batteries*, *supra* note 130; Request for Consultations by the European Communities, *India – Anti-Dumping Measures on Imports of Certain Products from the European Communities and/or Member States*, WTO Doc WT/DS304/1 (11 December 2003) (India respondent); Request for Consultations by the European Communities, *India – Import Restriction Maintained Under the Export and Import Policy 2002–2007*, WTO Doc WT/DS279/1 (9 January 2003) (India respondent); Request for Consultations by India, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/1 (12 March 2002) (India complainant); Request for Consultations by the United States, *United States – Rules of Origin for Textiles and Apparel Products*, WTO Doc WT/DS243/1 (22 January 2002) (India complainant); Request for Consultations by India, *Argentina – Measures Affecting the Import of Pharmaceutical Products*, WTO Doc WT/DS233/1 (30 May 2001) (India complainant); Request for Consultations by India, *Brazil – Anti-Dumping Duties on Jute Bags from India*, WTO Doc WT/DS229/1 (17 April 2001) (India complainant); Request for Consultations by India, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WTO Doc WT/DS206/1 (9 October 2000) (India complainant); Request for Consultations by the United States, *India – Measures Affecting Trade and Investment in the Motor Vehicle Sector*, WTO Doc WT/DS175/1 (7 June 1999) (India respondent); Request for Consultations by the European Communities, *India – Measures Affecting Customs Duties,* WTO Doc WT/DS150/1 (3 November 1998) (India respondent); Request for Consultations by the European Communities, *India – Import Restrictions,* WTO Doc WT/DS149/1 (12 November 1998) (India respondent); Request for Consultations by the European Communities, *India – Measures Affecting the Automotive Sector*, WTO Doc WT/DS146/1 (12 October 1998) (India respondent); Request for Consultations by India, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India,* WTO Doc WT/DS141/1 (7 August 1998) (India complainant); Request for Consultations by India, *European Communities – Anti-Dumping Investigations Regarding Unbleached Cotton Fabrics from India,* WTO Doc WT/DS140/1 (7 August 1998) (India complainant); Request for Consultations by India, *European Communities – Restrictions on Certain Import Duties on Rice*, WTO Doc WT/DS134/1 (8 June 1998) (India complainant); Request for Consultations by the European Communities, *India – Measures Affecting Export of Certain Commodities*, WTO Doc WT/DS120/1 (23 March 1998) (India respondent); Request for Consultations by the European Communities, *India – Quantitative Restrictions on Imports of Agricultural, Textile*

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by Pakistan,[166] Nicaragua,[167] and Guatemala,[168] with their limited experience with the DSM. The database now shows that these countries are no longer in the low-income category. Only Bangladesh, as an LDC, filed a WTO complaint against India, which was settled at the consultation stage in a mutually agreeable manner.[169]

Between 1995 and this article's submission date, high-income members were complainants in 362 disputes and respondents in 345; upper-middle-income members were complainants in 147 disputes and respondents in 155; and lower-middle-income members were complainants in 88 disputes and respondents in 83.[170] The database shows increasing participation in dispute settlement by upper-middle-income members, such as Argentina, Brazil, China, Colombia, Dominican Republic, Mexico, Russia, Turkey, and Malaysia, and lower-middle-income members, such as India, Indonesia, Tunisia, Ukraine, Morocco, and Vietnam.

The near absence of many LIDCs and LDCs from the dispute settlement system does not imply that the trade measures of other WTO members did not aggrieve them. Instead, it indicates that LDCs are unable to have recourse to the system.[171] Some might attribute this lack of participation to the meagre share of LDCs in international trade: 0.2 per cent of total WTO exports[172] and 0.3 per cent of WTO imports.[173] However, the value of this trade is undoubtedly significant to these countries since they house a large number of the world's population.

The reasons behind the lack of participation of LIDCs and LDCs in dispute settlements are well-documented in the literature[174] and can be broadly classified into four categories. First, the lack of human and economic capital, including legal expertise, coupled with the enormous cost of litigation. Second, is the lack of vigilant private sectors to leverage disputes through their respective governments and public-private partnerships. Third, more

and Industrial Products, WTO Doc WT/DS96/1 (24 July 1997) (India respondent); (another five similar cases where complainants were Switzerland, New Zealand, Canada, Australia, and the United States against India); Request for Consultations by the European Communities, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc WT/DS79/1 (6 May 1997) (India respondent); Request for Consultations by India, *Turkey – Restrictions on Imports of Textile and Clothing Products,* WTO Doc WT/DS34/1 (25 March 1996) (India complainant); Request for Consultations by India, *United States – Measures Affecting Imports of Women Wool Shirts and Blouses*, WTO Doc WT/DS33/1 (15 March 1996) (India complainant); Request for the Establishment of a Panel by India, *United States – Measures Affecting Imports of Women's and Girls' Wool Coats*, WTO Doc WT/DS32/1 (15 March 1996) (India complainant); Request for Consultations by India, *Poland – Import Regime for Automobiles*, WTO Doc WT/DS19/1 (18 October 1995).

[166] Request for Consultations by Pakistan, *Egypt – Anti-Dumping Duties on Matches from Pakistan*, WTO Doc WT/DS327/1 (24 February 2005) (Pakistan complainant); Request for Consultations by the United States, *Pakistan – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc WT/DS36/1 (6 May 1996) (Pakistan respondent); Request for Consultations by the European Communities, *Pakistan – Export Measures Affecting Hides and Skins*, WTO Doc WT/DS107/1 (20 November 1997).

[167] Request for Consultations by Nicaragua, *Mexico – Certain Measures Preventing the Importation of Black Beans from Nicaragua*, WTO Doc WT/DS284/1 (20 March 2003) (Nicaragua complainant); Request for Consultations by Colombia, *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, WTO Doc WT/DS188/1 (20 January 2000).

[168] Request for Consultations by Guatemala, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/1 (12 February 1996) (Guatemala complainant).

[169] *India – Batteries*, *supra* note 130; Amrita BAHRI and Toufiq ALI, "Using Dispute Settlement Partnerships for Capacity Building: Bangladesh's Triumphant Experience at WTO DSU" (2019) 18(1) Journal of International Trade Law and Policy 19 at 27.

[170] WorldTradeLaw.net, *supra* note 165.

[171] Bahri and Ali, supra note 170 at 20; Tania, *supra* note 44 at 379–85; Bouet and Metivier, *supra* note 8.

[172] Bouet and Metivier, *supra* note 8 at 12.

[173] *Ibid*., at 13.

[174] Bahri and Ali, supra note 170; Tania, *supra* note 44 at 379–85; Bouet and Metivier, *supra* note 8.

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political will is needed to bring a case against an economically more powerful country. Fourth, the lack of effective and equitable remedies, particularly the lack of retaliatory capacity required to enforce a decision of the panel and the AB.[175] In essence, WTO remedies are grossly inadequate for LIDCs and LDCs since compensation is voluntary and does not retrospectively cover the loss flowing from the delay in implementing a decision.[176] Proposals for retrospective monetary compensation by the African countries and LDCs fell on deaf ears. Shaffer, Busch, and Reinhardt rightly phrased this as constraints of "law, money and politics".[177]

This article does not examine the reasons for lower participation by LIDCs and LDCs. Instead, it focuses its attention on the SDT provisions in the DSU. The participation statistics, coupled with the structural constraints for the utilization of the DSM, reinforce the argument that SDT provisions were incorporated into the DSU to facilitate the participation of developing countries. This article seeks to reimagine the SDT provisions within the DSU to achieve the development objectives of the WTO's preamble. The article suggests two sets of recommendations: first, secondary lawmaking and second, progressive interpretation by the WTO adjudicative bodies. Both processes are complementary. This article seeks to borrow ideas from three seminal works by Mavroidis on WTO lawmaking and legal interpretation,[178] Rolland on progressive interpretations of the SDT provision,[179] and Crawford and Keen's work on treaty interpretation techniques.[180]

A. Secondary Lawmaking

We will look at the avenues of secondary lawmaking and then possible reform of the SDT articles in the DSU. A detailed discussion of the decision-making process in the WTO is beyond the scope of this article.[181] In the WTO, the authority to make decisions on all matters is bestowed on the Ministerial Conference.[182] Article IX:2 of the WTO Agreement provides for the Ministerial Conference and the General Council, the highest organs of the WTO, which can adopt interpretations of the WTO Agreements, including the DSU, by a three-quarter majority of its members. Mavroidis regarded them as legally binding secondary laws in a hierarchy of WTO law where the primary laws are the covered agreements.[183]

Apart from the highest WTO organs, the lower-ranked committees, such as the CTD, acting within their parameters, can arguably make secondary laws by adopting decisions

[175] Article 3.7 of the DSU provides for WTO remedies in the form of cessation or withdrawal, voluntary compensation, the suspension of concession or other obligations – also known as retaliation. Retaliation as a remedy would harm the low-income Countries and LDCs more than the Member which implemented a WTO-inconsistent measure: Kym ANDERSON, "Peculiarities of Retaliation in WTO Dispute Settlement" (2002) 1(2) World Trade Review 123 at 129.

[176] See the first sentence in *supra* note 176.

[177] G. C. SHAFFER, M. BUSCH and E. REINHARDT, "Does Legal Capacity Matter? A Survey of WTO Members" (2009) 8(4) World Trade Review 559.

[178] Petros C. MAVROIDIS, "No Outsourcing of Law? WTO Law as Practiced by WTO Courts" (2008) 102(3) The American Journal of International Law 421 at 425.

[179] Rolland, *supra* note 10 at 117–38.

[180] James CRAWFORD and Amelia KEENE, "Interpretation of the Human Rights Treaties by the International Court of Justice" (2020) 24(7) The International Journal of Human Rights 935 at 939.

[181] See Thomas COTTIER, "A Two-Tier Approach to WTO Decision-Making" in Debra P. STEGER, ed., *Redesigning the World Trade Organization for the Twenty-first Century* (Waterloo: Wilfrid Laurier University Press, 2010), 43; Mary E FOOTER, "The Role of Consensus in GATT/WTO Decision-making" (1996–7) 17(1) Northwestern Journal of International Law & Business 653.

[182] *WTO Agreement*, *supra* note 3, art. IV:1.

[183] Mavroidis, *supra* note 179 at 429–30.

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and recommendations by the SDT, which are normative in character, to regulate transactions and establish regulatory standards between parties.[184] The General Council established the CTD on 31 January 1995 to work as a "focal point for consideration and coordination of work on development in the [WTO] and its relationship to development-related activities in other multilateral agencies".[185] The secondary lawmaking power of the CTD can be deduced from the mandate under Article IV:7 of the WTO Agreement and paragraph 44 of the Doha Ministerial Conference to review the SDT provisions in the WTO agreements periodically and to report to the General Council to strengthen them and make them more precise, effective, and operational.[186] It can also consider any issues regarding the "application or use" of the SDT provisions in the WTO agreements in favour of developing countries and, in particular, for LDCs.[187]

The Bali Ministerial Conference of December 2013 established a monitoring mechanism to operate in dedicated sessions of the CTD "to analyse and review the implementation" of SDT provisions.[188] The mechanism can make "recommendations" to the relevant WTO bodies proposing "actions to improve the implementation" of SDT provisions and initiate negotiations on the improvement of SDT provisions under review.[189] Its recommendations form part of the annual report of the CTD to the General Council.[190] In making recommendations, the mechanism cannot alter or affect the rights or obligations of WTO members under the covered agreements.[191]

The authority of the CTD and the mechanism to review the SDT provisions and to submit an annual report to the General Council includes an objective assessment of the effectiveness of the SDT provisions and making recommendations to the General Council for their effectiveness. The legal value of such recommendations is still being determined. While we do not have any case where the WTO adjudicatory bodies have had the opportunity to consider any recommendations from the CTD, on some occasions, the panel favourably considered the decision and recommendation of WTO committees, such as the Committee on Balance of Payments and the Antidumping Committee.[192] Mavroidis considered these decisions to be secondary law due to the absence of a quorum requirement for such committees and subsidiary bodies, unlike the General Council, which complies with the quorum requirement in making decisions.[193]

Moving to the reform of the SDT provisions in the DSU, this article proposes that the CTD could engage in secondary lawmaking through its reviews and reports to the General

[184] *Ibid*., at 430. It is interesting to note that the WTO Agreement does not specify when the WTO Committees can make decisions and when they can make recommendations. The difference between decisions and recommendations is also not clear.

[185] *WTO Committee on Trade and Development – Decision by the General Council on 31 January 1995*, WTO Doc WT/L/46 (23 February 1995) at 1 [*WTO Committee on Trade and Development*].

[186] *Ibid.*, at para. 2; *Doha Ministerial Declaration*, WTO Doc WT/MIN/1 (20 November 2001) (adopted on 14 November 2001) at para. 44.

[187] *WTO Committee on Trade and Development*, *supra* note 186 at para. 3.

[188] *Monitoring Mechanism on Special and Differential Treatment – Ministerial Decision of 7 December 2013*, WTO Doc WT/MIN(13)/45, WT/L/920 (11 December 2013), at paras. 3–5. The Monitoring Mechanism on SDT will be based on written inputs or submissions made by WTO Members and other WTO bodies: at para. 10.

[189] *Ibid*., at paras. 3–6.

[190] *Ibid*., at paras. 8–9.

[191] *Ibid*., at para. 5.

[192] In *India- Quantitative Restrictions* and *European Communities – Pipe Fittings*, the WTO panels considered the decisions of the Committee on Balance of Payments and the Antidumping Committee, respectively, as sources of law: Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc WT/DS90/R (6 April 1999) at paras. 5.93–5.94; Panel Report, *European Communities – Anti-dumping Duties on Malleable Cast Iron Tube on Pipe Fittings from Brazil,* WTO Doc WT/DS219/R (7 March 2003) at para. 7.321.

[193] Mavroidis, *supra* note 179 at 433–4.

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Council in the areas identified below to make the SDT provisions fulfil the development objectives of the WTO.

First, Article 4.10 could be fleshed out by including illustrations of the problems and interests of developing countries. This will give more guidance to WTO members when they enter into consultations with an LIDC and LDC. To overcome the unenforceability of Article 4.10, in 2003, India submitted a proposal to make Article 4.10 mandatory by replacing the word "should" with "shall", thereby mandating members to give special attention to the particular problems and interests of developing country members in the consultation process.[194] Though such a reform would indeed mandate consideration of the interests of developing countries, India's proposal does not illustrate the particular interests of developing countries that require consideration. Without clarifying the interests and concerns to be considered, WTO members and decision-makers will remain relatively unguided in applying Article 4.10.[195] Members should also be required to explain how they have considered the interests of developing countries in the consultation stage.

Second, Articles 12.10 and 12.11 should apply in proceedings before the panel and the AB. This should be mandatory for the panel and the AB to allow extended time for LIDCs as complainants, respondents, and third parties. This will incentivise these countries to be involved in the dispute settlement as third parties and gain experience and expertise from that place.

Third, Article 12.11 can be a gateway to invoke relevant SDT provisions in the covered agreements. When an LIDC or LDC is a party to a dispute or participates as a third party, the panel and the AB must mandatorily consider relevant SDT provisions. The panel and the AB must not bypass consideration of the provisions on the grounds of judicial economy. Article 12.11 should not require an LIDC or LDC to raise an SDT provision in the covered agreement specifically; such countries do not have the legal expertise to identify a specific SDT provision. Whenever an LIDC or an LDC is a party to the dispute or is a third party, the panel and the AB must consider a relevant SDT provision and record how they have considered the SDT provisions in their decision-making. It is important to consider these provisions when the other party to the dispute is a developed country or a high- or mid-income developing country. If an LIDC or an LDC raises this provision, they should not be restricted to including these provisions in their terms of reference; they should be able to raise this at any stage of the proceedings.

Fourth, Article 24 should include LIDCs within its ambit to offer more special treatment at all stages of dispute settlement. This provision should be available to LIDCs not only as a party to the dispute but also as third parties. This is highly important for accommodating the interests of developing countries as third parties since this will eventually enable them to gain expertise and confidence in dispute settlements. LIDCs and LDCs could utilize their expertise as third parties to identify and pursue a dispute as a complainant.

Fifth, Article 27.2 can be amended to provide priority treatment to LIDCs and LDC when they request legal assistance in dispute settlement, particularly against developed and middle-income developing countries.

B. Progressive Treaty Interpretations

In this section, we will look at the scope of treaty interpretation by the WTO adjudicating bodies, critically examine the current approach to treaty interpretation, and support

[194] WTO Dispute Settlement Special Session, *Dispute Settlement Understanding Proposals: Legal Text – Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia*, WTO Doc TN/DS/W/47 (11 February 2003).

[195] William J. DAVEY, "Reforming WTO Dispute Settlement" in Mitsuo MATSUSHITA and Dukgeun AHN, eds., *WTO and East Asia: New Perspectives* (2004), 91 at 106.

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progressive or dynamic treaty interpretation by applying purposive and evolutive interpretative approaches flowing from the principle of effectiveness. Devoid of any lawmaking power,[196] the WTO adjudicating bodies can interpret SDT provisions in the DSU and the covered agreement according to Article 3.2 of the DSU, which states:

> The Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.[197]

Article 3.2 of the DSU inscribes limitations on the interpretative power of the WTO adjudicatory bodies with the words "[r]ecommendation and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[198]

The reference to "customary rules of interpretation of public international law" undoubtedly refers to the principles contained in the 1969 Vienna Convention on the Law of the Treaties (VCLT)[199] since most of these provisions have evolved as customary international law.[200] Articles 31 and 32 of the VCLT embody the rules of treaty interpretation. Article 31(1) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[201]

Article 32 of the VCLT provides supplementary means of treaty interpretation when applying Article 31 leads to an ambiguous and unreasonable interpretation. The VCLT provides general interpretative rules, which could be elaborated in the context of international trade law, human rights, or environmental law.[202] This opportunity was seized upon by the AB in *United States – Shrimp* by crafting a hierarchical means of treaty interpretation:

> A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[203]

WTO Adjudicating bodies have developed a "compartmentalized approach"[204] focusing on the textual interpretation of treaties, heavily relying on the ordinary meaning of the terms.[205] In this approach, the panel and the AB rarely apply the context, object, and

[196] Mavroidis, *supra* note 179 at 429.
[197] *DSU*, *supra* note 4, art 3.2.
[198] *Ibid*.
[199] *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 U.N.T.S. 331 (entered into force on 27 January 1980) [*VCLT*].
[200] Mavroidis, *supra* note 179 at 425, 444, 469.
[201] *VCLT*, *supra* note 201, art. 31(1).
[202] Richard GARDINER, *Treaty Interpretation*, 1st ed. (Oxford: Oxford University Press, 2015) at 504; Crawford and Keene, *supra* note 181 at 939.
[203] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) at para. 114.
[204] Mavroidis, *supra* note 179 at 447.
[205] *Ibid*., at 446.

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purpose of the WTO Agreement and supplementary means of interpretation.[206] Such textual interpretation and the reluctance to apply purposive interpretation explains why development has been relegated as a side issue of the WTO.[207]

This article argues that WTO adjudicating bodies should interpret SDT provisions by construing the ordinary meaning of terms in the context of the overall WTO Agreement.[208] The context of the treaty, as per the VCLT Article 31(2), includes its preamble. Similarly, the object and purpose of the treaty can also be identified in the preamble of the WTO Agreement as well as the covered agreements. The VCLT Article 31 (3) expands the means of treaty interpretation, by stating that, along with the context, the adjudicating bodies "shall take into account" (a) any subsequent agreement between the parties and (b) any subsequent practice in the application and interpretation of treaty provisions. The VCLT Article 31(3) also includes "any relevant rules of international law applicable in relations between the parties" as an interpretative element. The WTO adjudicating bodies classified preambles in various covered agreements as "object and purpose of the treaty" under Article 31(1) of the VCLT, and common WTO practice after 1995 as "subsequent practice" under Article 31(3) of the VCLT.[209]

Article 32 of the VCLT encapsulates the supplementary means of treaty interpretation:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.[210]

The interpretative elements envisaged in this Article are not limited to travaux preparatoires of a treaty, as evidenced by the word "including". Therefore, in the WTO context, this provision, which has attained the status of a rule of customary international law,[211] accommodates an extensive variety of interpretative elements for the adjudicating bodies.[212] Mavroidis established that the WTO adjudicating bodies had classified acts by WTO organs, informal agreements between WTO members, decisions by international courts, and decisions by domestic courts as "supplementary means of implementation", falling under Article 33 of the VCLT.[213]

Article 3.2 of the DSU and the VCLT Articles 31 and 32, construed together, show an inevitable link to the wider public international law for the interpretation of SDT provisions. Pauwelyn argued for construing WTO law as part of the wider public international law.[214] Howse convincingly argued that if WTO provisions are interpreted and applied in clinical isolation from the rest of the public international law, they will be repugnant for

[206] *Ibid*., at 470.
[207] Rolland, *supra* note 10 at 137.
[208] Mavroidis, *supra* note 179 at 446–7; Eduardo JIMENEZ DE ARECHAGA, "International law in the Past Third of a Century" (Leiden: Sijthoff et Noordhoff, 1978) at 159.
[209] Mavroidis, *supra* note 179 at 454.
[210] *VCLT*, *supra* note 201, art. 32.
[211] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) at 9.
[212] Mavroidis, *supra* note 179 at 454.
[213] *Ibid*., at 450.
[214] Joost PAUWELYN, "Conflicts of Norms in Public International Law" (Cambridge: Cambridge University Press, 2003).

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application to the present concerns of WTO members.[215] As we look at the domain of public international law, we observe three approaches of treaty interpretation that the WTO adjudicating bodies should apply to interpret SDT provisions.

First, the International Court of Justice adopted the approach of purposive interpretation of treaties by inquiring about the object and purpose of the treaties beyond the ordinary meaning of the text.[216] In the context of interpretations of the SDT provisions, the WTO adjudicating bodies need to ask this significant question: why were these SDT provisions incorporated in the DSU and other covered agreements and how are they linked with the WTO preamble?

Second, both the European Court of Human Rights (ECHR) and the International Court of Justice (ICJ) applied evolutive interpretation of treaties in light of present-day conditions and, on some occasions, in preference to a textual approach.[217] WTO adjudicating bodies can similarly ask this question: should the SDT provisions be interpreted in light of the current situation and level of participation of the WTO's LIDCs and LDCs?

Third, the ICJ adopted the principle of effectiveness in treaty interpretation, which is intertwined with the purposive and evolutive approaches.[218] This principle implies that treaties should be interpreted to give practical and effective meaning to the treaty's purpose. Lauterpacht observed that the principle had been applied in both national and international jurisprudence in the sense of "liberal interpretation" as opposed to "restrictive interpretation" and, in respect of national jurisprudence, gave examples from the English and United States courts.[219] WTO adjudicating bodies should also interpret SDT provisions to make them effective in achieving the development objectives of the WTO.

As discussed earlier, Article 12.11 of the DSU can pave the way for the WTO adjudicating bodies to consider, interpret, and apply SDT provisions in the covered agreements and decisions, such as the Enabling Clause. While examining the SDT provisions in the DSU in Part IV, we observed that Articles 4.10 and 21.2 used the word "should", which characterizes them as "best effort" or "best endeavour" provisions. The hortatory provisions have been considered as not creating a binding legal obligation.[220] Article 4.10 of the DSU states that members "should" give special consideration to the particular concerns of developing countries. Similarly, Article 21.2 uses the word "should" when the arbitrator needs to pay attention to the particular challenges of developing countries. Again, the words "particular attention" used in these two provisions and the words "particular considerations" used in Article 27.2 are also vague. There are many examples of this type of

[215] Robert HOWSE, "The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environmental Debate" (2002) 27 Columbian Journal of Environmental Law 489 at 516.

[216] Crawford and Keene, *supra* note 181 at 942. ICJ applied the purposive approaches in the *LaGrand Case (Germany v United States of America),* Judgment of 27 June 2001, [2001] I.C.J. Rep. 466 at para. 99 and in *Maritime Delimitation in the Indian Ocean (Somalia v Kenya),* Preliminary Objections, Judgment of 2 February 2017, [2017] I.C.J. Rep. 3 at para. 64.

[217] *Tyrer v The United Kingdom,* Merits, App No 5856/72, A/26, [1978] ECHR 2, (1980) 2 EHRR 1 at 15, para. 31; *Aegean Sea Continental Shelf (Greece v Turkey),* Judgment of 19 December 1978, [1978] I.C.J. Rep. 3 at 32, para. 77; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment of 13 July 2009, [2009] I.C.J. Rep. 213 at 242–4, para. 64. Crawford and Keene, *supra* note 181 at 942.

[218] *Territorial Dispute (Libyan Arab Jamahiriya v Chad),* Judgment of 3 February 1994, [1994] I.C.J. Rep. 6 at 25–6, paras. 51–2.

[219] Hersch LAUTERPACHT, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties" (1949) 26 British Yearbook of International Law 48 at 67–8.

[220] J. E. S. FAWCETT, "The Legal Character of International Agreements" (1953) 30(1) British Yearbook of International Law 381 at 390.

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best endeavour provisions in the WTO Agreements.[221] For instance, Article 12.6 of the Agreement on Technical Barriers to Trade states:

> Members *shall* take such reasonable measures *as may be available to them* to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of and, if practicable, prepare international standards concerning products of special interest to developing country Members.[222] (*Emphasis added.*)

Phrases such as "as may be available to them" reduce the obligatory force of the word "shall". To some extent, the "best endeavour" language dissuades developing countries from raising these provisions in dispute settlement, which raises questions about the purpose of these provisions' very existence.

The WTO adjudicatory bodies can go beyond the textual interpretation of these provisions and interpret them contextually according to the object and purpose of these provisions. In this context, the adjudicatory bodies can draw parallels from environmental law, where most provisions are on a "best endeavour" basis, albeit interpreted as creating legal obligations. Inspirations can be drawn even from national precedence. For instance, as Rolland observed, in *Commonwealth of Australia v State of Tasmania*,[223] the majority of the judges of the High Court of Australia interpreted the language of Articles 4 and 5 of the World Heritage Convention as "[i]t will do all it can to this end" and "each state party shall endeavour, in so far as possible, and as appropriate for each country" – creating a binding legal obligation for the state parties for the protection and conservation of the cultural and natural heritage.[224] Mason J clarified that state parties may have discretion to decide what measures are necessary and appropriate to carry out the obligation. Still, they do not have discretion as to the obligation itself, which makes performance a legal obligation, or at least akin, for the state parties.[225] This analogy could be applied to interpreting SDT provisions as creating legal obligations to consider the problems and interests of developing countries. These best endeavour provisions create a duty of due diligence for the WTO adjudicating bodies and WTO members.[226] However, in the current dilemma with the AB, when the United States has been effectively blocking the appointments of AB members as of December 2019 on the grounds of, inter alia, following precedents, taking a legalistic approach, and overreaching its authority by non-textual interpretation of the WTO agreements,[227] the possibility of a progressive interpretation of the SDT provisions remains bleak. Hence, in the current vacuum, more potential lies with secondary lawmaking.

III. Conclusion

The wider membership of the WTO gives the organization legitimacy for regulating trade and social and economic relations among countries at different stages in their economic

[221] Rolland, *supra* note 10 at 119; see also *Special and Differential Treatment Provisions – Note, supra* note 16.

[222] *Agreement on Technical Barriers to Trade,* Annex 1A to *the Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 U.N.T.S. 3 (entered into force on 1 January 1995), art 12.6.

[223] (1983) 158 CLR 1.

[224] *Ibid.*, Mason J at 132–5, Murphy J at 177–8.

[225] *Ibid.*, at 132.

[226] Rolland, *supra* note 10 at 122.

[227] Office of the United States Trade Representative, "Report on the Appellate Body of the World Trade Organization" (February 2020), online: https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf; Isabelle Van DAMME, "25 Years of Law and Practice at the WTO: Did the Appellate Body Dig its Own Grave?" (2023) 26(1) Journal of International Economic Law 124.

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development. However, the fundamental pillar of the WTO – its SDT provisions – is at the centre of the negotiating deadlock between developed and developing members of the WTO. The 12th Ministerial Conference of the WTO in 2022 could not adopt any decision on SDT provisions apart from repeating the rhetoric in paragraph 2 of the MC12 Outcome Document: "[w]e reaffirm the provisions of special and differential treatment for developing country members and LDCs as an integral part of the WTO and its agreements".[228]

In the 12th Ministerial Conference, the WTO members agreed with the central theme of this article that "[s]pecial and differential treatment in WTO agreements should be precise, effective and operational".[229] This article addresses the challenges facing LIDCs and LDCs in the WTO dispute settlement process due to these provisions' uncertain, ineffective, and non-operational nature. One might argue, why bother? These countries hardly participate in the dispute settlement system. This article counter-argues that the ineffectiveness of these provisions contributes to the lack of utilization of the WTO laws' strongest aspect – their enforceability.

Despite being clearly aimed at assisting developing countries in the dispute settlement system, the DSU's SDT provisions suffer from ambiguity and practical inefficacy, which undermines the ability of developing countries to effectively invoke SDT provisions at all stages of the WTO dispute settlement process.[230] This article analyses WTO cases where developing countries made "development arguments", invoking SDT provisions in the DSU at the consultation, litigation, and arbitration phases. But consideration of these provisions by the WTO panel, the AB, and the arbitrators is not always satisfactory. This article identifies the reasons behind the scant consideration of SDT provisions in their ambiguous texts with the predominant adoption of the word "should". Some SDT provisions, such as Article 12.11, have the potential to make all SDT provisions in other WTO agreements enforceable. This article highlights the ambiguous nature of Article 12.11 by examining the panel reports. Similar ambiguities were found regarding the interpretation and application of Article 21.2, where arbitrators were not convinced by the submissions of developing countries and required more concrete evidence of developing countries' specific interests.

From its detailed examination of the SDT provisions in the DSU, this article argues that these provisions need more clear direction on how development concerns should be prioritized, which are ineffective in assisting LIDCs and LDCs in dispute settlements. A critical evaluation of the adjudicating body's approaches in interpreting and applying these provisions highlights a significant gap in realizing the development objectives of the WTO.

To address this challenge, this article proposes two sets of recommendations: first, secondary lawmaking by the CTD through its review and reports to the General Council and second, a progressive interpretation of the SDT provisions by the WTO adjudicating bodies to give them more strength, purpose, and meaning. In this context, the article suggests that the WTO adjudicating bodies need to go beyond the textual interpretation and apply a purposive and evolutive interpretation along with the principle of effectiveness. The Outcome Document of the 12th Ministerial Conference of the WTO included a rhetorical pledge to revive "a fully and well-functioning dispute settlement system accessible to all members by 2024".[231] Strikingly, even this rhetorical commitment omitted the

[228] *MC12 Outcome Document*, WTO Doc WT/MIN(22)/24, WT/L/1135 (22 June 2022), at para. 2 [*MC12 Outcome Document*].

[229] *Ibid*.

[230] Tania, *supra* note 44. The United States criticized SDT provisions for reflecting an outdated dichotomy between developed and developing countries, such that the need for countries to "self-declare" their developing country status amplifies the problem: WTO, Communication from the United States, An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance, WTO Doc WT/GC/W/765/Rev/1 (14 February 2019).

[231] *MC12 Outcome Document, supra* note 230 at para. 4.

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reference to the AB, indicating a less hopeful future for the progressive interpretation of SDT provisions. Until a solution is reached on the appellate mechanism in the WTO, secondary lawmaking remains the only option to move forward with the SDT provisions in the DSU. This article reignites the debate on the SDT provisions of the WTO and provides some concrete ideas for reimagination. Finally, the authors echo Rolland in arguing that WTO law should not be used merely for balancing the economic interests of WTO members.[232] The law should be interpreted to uphold the development objectives of the organization enshrined in its preamble because these objectives constitute major terms based on which members joined the social and economic contracts of the WTO.

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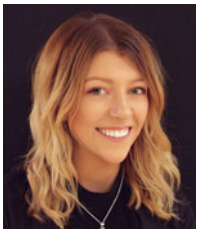

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[232] Rolland, *supra* note 10 at 137.

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